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CODE OF FEDERAL REGULATIONS

Title 43

Public Lands: Interior

Parts 1 to 999

Revised as of October 1, 2014

Containing a codification of documents
of general applicability and future effect

As of October 1, 2014

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Table of Contents

	Page
Explanation	v
Title 43:	
SUBTITLE A—Office of the Secretary of the Interior	3
SUBTITLE B—Regulations Relating to Public Lands	589
Chapter I—Bureau of Reclamation, Department of the Interior	591
Finding Aids:	
Table of CFR Titles and Chapters	727
Alphabetical List of Agencies Appearing in the CFR	747
List of CFR Sections Affected	757

Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 43 CFR 1.1 *refers to title 43, part 1, section 1.*

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Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

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An index to the text of ''Title 3—The President'' is carried within that volume.

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CHARLES A. BARTH,
Director,
Office of the Federal Register.
October 1, 2014.

THIS TITLE

Title 43—PUBLIC LANDS: INTERIOR is composed of two volumes. Volume one (parts 1–999) contains all current regulations issued under subtitle A—Office of the Secretary of the Interior and chapter I—Bureau of Reclamation, Department of the Interior. Volume two (part 1000 to end) includes all regulations issued under chapter II—Bureau of Land Management, Department of the Interior, and Chapter III—Utah Reclamation Mitigation and Conservation Commission. The contents of these volumes represent all current regulations codified under this title of the CFR as of October 1, 2014.

In the second volume, containing chapter II—Bureau of Land Management, Department of the Interior, the OMB control numbers appear in a ''Note'' immediately below the ''Group'' headings throughout the chapter, if applicable. An index to chapter II appears in the Finding Aids section of the second volume.

For this volume, Bonnie Fritts was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Jim Hemphill.

Title 43—Public Lands: Interior

(This book contains parts 1 to 999)

Part

SUBTITLE A—OFFICE OF THE SECRETARY OF THE INTERIOR .. 1

SUBTITLE B—REGULATIONS RELATING TO PUBLIC LANDS

CHAPTER I—Bureau of Reclamation, Department of the Interior 402

Subtitle A—Office of the Secretary of the Interior

Part		*Page*
1	Practices before the Department of the Interior	5
2	Freedom of Information Act; records and testimony	6
3	Preservation of American antiquities	47
4	Department hearings and appeals procedures	49
5	Commercial filming and similar projects and still photography on certain areas under department jurisdiction	154
6	Patent regulations	158
7	Protection of archaeological resources	167
8	Joint policies of the Departments of the Interior and of the Army relative to reservoir project lands	184
9	Intergovernmental review of Department of the Interior programs and activities	185
10	Native American graves protection and repatriation regulations	188
11	Natural resource damage assessments	216
12	Administrative and audit requirements and cost principles for assistance programs	277
13	Vending facilities operated by blind persons	338
14	Petitions for rulemaking	340
15	Key Largo Coral Reef Preserve	341
16	Conservation of helium	342
17	Nondiscrimination in federally assisted programs of the Department of the Interior	343
18	New restrictions on lobbying	382
19	Wilderness preservation	393
20	Employee responsibilities and conduct	396
21	Occupancy of cabin sites on public conservation and recreation areas	407

Part		Page
22	Administrative claims under the Federal Tort Claims Act and indemnification of Department of the Interior employees	411
23	Surface exploration, mining and reclamation of lands	413
24	Department of the Interior fish and wildlife policy: State-Federal relationships	421
26	Grants to States for establishing Youth Conservation Corps programs	426
27	Nondiscrimination in activities conducted under permits, rights-of-way, public land orders, and other Federal authorizations granted or issued under Title II of Public Law 93–153	431
28	Fire protection emergency assistance	443
29	Trans-Alaska Pipeline Liability Fund	443
30	Indian probate hearings procedures	450
32	Grants to States for establishing Young Adult Conservation Corps (YACC) program	480
33	Allocation of duty-free watches from the Virgin Islands, Guam, and American Samoa [Note]	490
34	Requirements for equal opportunity during construction and operation of the Alaska Natural Gas Transportation System	490
35	Administrative remedies for fraudulent claims and statements	501
36	Transportation and utility systems in and across, and access into, conservation system units in Alaska	516
37	Cave management	526
38	Pay of U.S. Park Police—interim geographic adjustments	529
39	Collection of debts by administrative wage garnishment	530
41	Nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance	531
44	Financial assistance, local governments	547
45	Conditions and prescriptions in FERC hydropower licenses	553
46	Implementation of the National Environmental Policy Act of 1969	573
47–199	[Reserved]	

PART 1—PRACTICES BEFORE THE DEPARTMENT OF THE INTERIOR

Sec.
1.1 Purpose.
1.2 Definitions.
1.3 Who may practice.
1.4 Disqualifications.
1.5 Signature to constitute certificate.
1.6 Disciplinary proceedings.

AUTHORITY: Sec. 5, 23 Stat. 101; 43 U.S.C. 1464.

SOURCE: 29 FR 143, Jan. 7, 1964, unless otherwise noted.

§ 1.1 Purpose.

This part governs the participation of individuals in proceedings, both formal and informal, in which rights are asserted before, or privileges sought from, the Department of the Interior.

§ 1.2 Definitions.

As used in this part the term:

(a) *Department* includes any bureau, office, or other unit of the Department of the Interior, whether in Washington, DC, or in the field, and any officer or employee thereof;

(b) *Solicitor* means the Solicitor of the Department of the Interior or his authorized representative;

(c) *Practice* includes any action taken to support or oppose the assertion of a right before the Department or to support or oppose a request that the Department grant a privilege; and the term ''practice'' includes any such action whether it relates to the substance of, or to the procedural aspects of handling, a particular matter. The term ''practice'' does not include the preparation or filing of an application, the filing without comment of documents prepared by one other than the individual making the filing, obtaining from the Department information that is available to the public generally, or the making of inquiries respecting the status of a matter pending before the Department. Also, the term ''practice'' does not include the representation of an employee who is the subject of disciplinary, loyalty, or other personnel administrative proceedings.

§ 1.3 Who may practice.

(a) Only those individuals who are eligible under the provisions of this section may practice before the Department, but this provision shall not be deemed to restrict the dealings of Indian tribes or members of Indian tribes with the Department.

(b) Unless disqualified under the provisions of § 1.4 or by disciplinary action taken pursuant to § 1.6:

(1) Any individual who has been formally admitted to practice before the Department under any prior regulations and who is in good standing on December 31, 1963, shall be permitted to practice before the Department.

(2) Attorneys at law who are admitted to practice before the courts of any State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Trust Territory of the Pacific Islands, or the District Court of the Virgin Islands will be permitted to practice without filing an application for such privilege.

(3) An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of

(i) A member of his family;

(ii) A partnership of which he is a member;

(iii) A corporation, business trust, or an association, if such individual is an officer or full-time employee;

(iv) A receivership, decedent's estate, or a trust or estate of which he is the receiver, administrator, or other similar fiduciary;

(v) The lessee of a mineral lease that is subject to an operating agreement or sublease which has been approved by the Department and which grants to such individual a power of attorney;

(vi) A Federal, State, county, district, territorial, or local government or agency thereof, or a government corporation, or a district or advisory board established pursuant to statute; or

(vii) An association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter.

§ 1.4 Disqualifications.

No individual may practice before the Department if such practice would violate the provisions of 18 U.S.C. 203, 205, or 207.

§ 1.5 Signature to constitute certificate.

When an individual who appears in a representative capacity signs a paper in practice before the Department, his signature shall constitute his certificate:

(a) That under the provisions of this part and the law, he is authorized and qualified to represent the particular party in the matter;

(b) That, if he is the partner of a present or former officer or employee, including a special Government employee, the matter in respect of which he intends to practice is not a matter in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise and that the matter is not the subject of such partner's official Government responsibility;

(c) That, if he is a former officer or employee, including a special Government employee, the matter in respect of which he intends to practice is not a matter in which he participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed and, if a period of one year has not passed since the termination of his employment with the Government, that the matter was not under his official responsibility as an officer or employee of the Government; and

(d) That he has read the paper; that to the best of his knowledge, information, and belief there is good ground to support its contents; that it contains no scandalous or indecent matter; and that it is not interposed for delay.

§ 1.6 Disciplinary proceedings.

(a) Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Department on grounds that he is incompetent, unethical, or unprofessional, or that he is practicing without authority under the provisions of this part, or that he has violated any provisions of the laws and regulations governing practice before the Department, or that he has been disbarred or suspended by any court or administrative agency. Individuals practicing before the Department should observe the Canons of Professional Ethics of the American Bar Association and those of the Federal Bar Association, by which the Department will be guided in disciplinary matters.

(b) Whenever in the discretion of the Solicitor the circumstances warrant consideration of the question whether disciplinary action should be taken against an individual who is practicing or has practiced before the Department, the Solicitor shall appoint a hearing officer to consider and dispose of the case. The hearing officer shall give the individual adequate notice of, and an opportunity for a hearing on, the specific charges against him. The hearing shall afford the individual an opportunity to present evidence and cross-examine witnesses. The hearing officer shall render a decision either (1) dismissing the charges, or (2) reprimanding the individual or suspending or excluding him from practice before the Department.

(c) Within 30 days after receipt of the decision of the hearing officer reprimanding, suspending, or excluding an individual from practice before the Department, an appeal may be filed with the Solicitor, whose decision shall be final.

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

Subpart A—Introduction

Sec.
2.1 What should you know up front?
2.2 What kinds of records are not covered by the regulations in subparts A through I of this part?

Subpart B—How to Make a Request

2.3 Where should you send a FOIA request?
2.4 Does where you send your request affect its processing?
2.5 How should you describe the records you seek?
2.6 How will fee information affect the processing of your request?

2.7 What information should you include about your fee category?
2.8 Can you ask for records to be disclosed in a particular form or format?
2.9 What if your request seeks records about another person?
2.10 May you ask for the processing of your request to be expedited?
2.11 What contact information should your request include?

Subpart C—Processing Requests

2.12 What should you know about how bureaus process requests?
2.13 How do consultations and referrals work?

Subpart D—Timing of Responses to Requests

2.14 In what order are responses usually made?
2.15 What is multitrack processing and how does it affect your request?
2.16 What is the basic time limit for responding to a request?
2.17 When does the basic time limit begin for misdirected FOIA requests?
2.18 When can the bureau suspend the basic time limit?
2.19 When may the bureau extend the basic time limit?
2.20 When will expedited processing be provided and how will it affect your request?

Subpart E—Responses to Requests

2.21 How will the bureau respond to requests?
2.22 How will the bureau grant requests?
2.23 When will the bureau deny a request or procedural benefits?
2.24 How will the bureau deny requests?
2.25 What if the requested records contain both exempt and nonexempt material?

Subpart F—Handling Confidential Information

2.26 How will the bureau interact with the submitter of possibly confidential information?
2.27 When will the bureau notify a submitter of a request for their possibly confidential information?
2.28 What information will the bureau include when it notifies a submitter of a request for their possibly confidential information?
2.29 When will the bureau not notify a submitter of a request for their possibly confidential information?
2.30 How and when may a submitter object to disclosure of confidential information?
2.31 What must a submitter include in a detailed Exemption 4 objection statement?
2.32 How will the bureau consider the submitter's objections?
2.33 What if the bureau determines it will disclose information over the submitter's objections?
2.34 Will a submitter be notified of a FOIA lawsuit?
2.35 Will you receive notification of activities involving the submitter?
2.36 Can a bureau release information protected by Exemption 4?

Subpart G—Fees

2.37 What general principles govern fees?
2.38 What are the requester fee categories?
2.39 How does your requester category affect the fees you are charged?
2.40 How will fee amounts be determined?
2.41 What search fees will you have to pay?
2.42 What duplication fees will you have to pay?
2.43 What review fees will you have to pay?
2.44 What fees for other services will you have to pay?
2.45 When will the bureau waive fees?
2.46 When may you ask the bureau for a fee waiver?
2.47 How will the bureau notify you if it denies your fee waiver request?
2.48 How will the bureau evaluate your fee waiver request?
2.49 When will you be notified of anticipated fees?
2.50 When will the bureau require advance payment?
2.51 What if the bureau needs clarification about fee issues?
2.52 How will you be billed?
2.53 How will the bureau collect fees owed?
2.54 When will the bureau combine or aggregate requests?
2.55 What if other statutes require the bureau to charge fees?
2.56 May the bureau waive or reduce your fees at its discretion?

Subpart H—Administrative Appeals

2.57 When may you file an appeal?
2.58 How long do you have to file an appeal?
2.59 How do you file an appeal?
2.60 Who makes decisions on appeals?
2.61 How are decisions on appeals issued?
2.62 When can you expect a decision on your appeal?
2.63 Can you receive expedited processing of appeals?
2.64 Must you submit an appeal before seeking judicial review?

Subpart I—General Information

2.65 Where are records made available?
2.66 What are public liaisons?
2.67 When will the Department make records available without a FOIA request?

2.68 How will FOIA materials be preserved?
2.69 How will a bureau handle a request for federally-funded research data?
2.70 What definitions apply to subparts A through I of this part?

Subpart J—Declassification of Classified Documents

2.200 Declassification of classified documents.

Subpart K—Privacy Act

2.220 Purpose and scope.
2.221 Definitions.
2.222 Records subject to Privacy Act.
2.223 Standards for maintenance of records subject to the Act.
2.224 [Reserved]
2.225 Federal Register notices describing systems of records.
2.226 Assuring integrity of records.
2.227 Conduct of employees.
2.228 Government contracts.
2.229–2.230 [Reserved]
2.2316 Disclosure of records.
2.232 Accounting for disclosures.
2.233–2.234 [Reserved]
2.235 Request for notification of existence of records: Submission.
2.236 Requests for notification of existence of records: Action on.
2.237 Requests for access to records.
2.238 Requests for access to records: Submission.
2.239 Requests for access to records: Initial decision.
2.240 Requests for notification of existence of records and for access to records: Appeals.
2.241 Requests for access to records: Special situations.
2.242–2.244 [Reserved]
2.245 Amendment of records.
2.246 Petitions for amendment: Submission and form.
2.247 Petitions for amendment: Processing and initial decision.
2.248 Petitions for amendments: Time limits for processing.
2.249 Petitions for amendment: Appeals.
2.250 Petitions for amendment: Action on appeals.
2.251 [Reserved]
2.252 Statements of disagreement.
2.253 [Reserved]
2.254 Exemptions.

Subpart L—Legal Process: Testimony by Employees and Production of Records

GENERAL INFORMATION

2.280 What does this subpart cover?
2.281 What is the Department's policy on granting requests for employee testimony or Department records?

RESPONSIBILITIES OF REQUESTERS

2.282 How can I obtain employee testimony or Department records?
2.283 If I serve a subpoena *duces tecum*, must I also submit a *Touhy* Request?
2.284 What information must I put in my *Touhy* Request?
2.285 How much will I be charged?
2.286 Can I get an authenticated copy of a Department record?

RESPONSIBILITIES OF THE DEPARTMENT

2.287 How will the Department process my *Touhy* Request?
2.288 What criteria will the Department consider in responding to my *Touhy* Request?

RESPONSIBILITIES OF EMPLOYEES

2.289 What must I, as an employee, do upon receiving a request?
2.290 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

APPENDIX A TO PART 2—FEE SCHEDULE
APPENDIX B TO PART 2—MINERAL LEASING ACT AND MINERAL LEASING ACT FOR ACQUIRED LANDS—SPECIAL RULES

AUTHORITY: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

SOURCE: 40 FR 7305, Feb. 19, 1975, unless otherwise noted.

Subpart A—Introduction

SOURCE: 77 FR 76902, Dec. 31, 2012, unless otherwise noted.

§ 2.1 What should you know up front?

(a) Subparts A through I of this part contain the rules that the Department follows in processing records under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

(b) Definitions of terms used in Subparts A through I of this part are found at § 2.70.

(c) Subparts A through I of this part should be read in conjunction with the text of the FOIA and the OMB Fee Guidelines.

(d) The Department's FOIA Handbook and its attachments contain detailed information about Department procedures for making FOIA requests and descriptions of the types of records maintained by different Department bureaus or offices. This resource is available at *http://www.doi.gov/foia/guidance.cfm*.

(e) Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under subparts A through I and subpart K of this part.

(f) Part 2 does not entitle any person to any service or to the disclosure of any record that is not required under the FOIA.

(g) Before you file a FOIA request, you are encouraged to review the Department's electronic FOIA libraries at *http://www.doi.gov/foia/libraries.cfm*. The material you seek may be immediately available electronically at no cost.

§2.2 What kinds of records are not covered by the regulations in subparts A through I of this part?

Subparts A through I of this part do not apply to records that fall under the law enforcement exclusions in 5 U.S.C. 552(c)(1)–(3). These exclusions may be used only in the limited circumstances delineated by the statute and require both prior approval from the Office of the Solicitor and the recording of their use and approval process.

Subpart B—How To Make a Request

SOURCE: 77 FR 76902, Dec. 31, 2012, unless otherwise noted.

§2.3 Where should you send a FOIA request?

(a) The Department does not have a central location for submitting FOIA requests and it does not maintain a central index or database of records in its possession. Instead, the Department's records are decentralized and maintained by various bureaus and offices throughout the country.

(b) To make a request for Department records, you must write directly to the bureau that you believe maintains those records.

(c) Address requests to the appropriate FOIA contact in the bureau that maintains the requested records. The Department's FOIA Web site, *http://www.doi.gov/foia/index.cfm*, lists the physical and email addresses of each bureau's FOIA Officer, along with other appropriate FOIA contacts at *http://www.doi.gov/foia/contacts.cfm*.

(d) Questions about where to send a FOIA request should be directed to the bureau that manages the underlying program or to the appropriate FOIA Public Liaison, as discussed in §2.66 of this part.

§2.4 Does where you send your request affect its processing?

(a) A request to a particular bureau component (for example, a request addressed to a regional or field office) will be presumed to seek only records from that particular component.

(b) If you seek records from an entire bureau, submit your request to the bureau FOIA Officer. The bureau FOIA Officer will forward it to the bureau component(s) that he or she believes has or are likely to have responsive records.

(c) If a request to a bureau states that it seeks records located at another specific component of the same bureau, the appropriate FOIA contact will forward the request to the other component.

(d) If a request to a bureau states that it seeks records from other unspecified components within the same bureau, the appropriate FOIA contact will send the request to the Bureau FOIA Officer. He or she will forward it to the components that the bureau FOIA Officer believes have or are likely to have responsive records.

(e) If a request to a bureau states that it seeks records of another specified bureau, the bureau will route the misdirected request to the specified bureau for response.

(f) If a request to a bureau states that it seeks records from other unspecified bureaus, the bureau's FOIA Officer may forward the request to those bureaus which he or she believes have or are likely to have responsive records. If the bureau FOIA Officer forwards the request, they will notify you in writing and provide the name of a contact in the other bureau(s). If it does not forward the request, the bureau will return it to you, advise you to submit the request directly to the other bureaus, notify you that it cannot comply with the request, and close the request.

§ 2.5 How should you describe the records you seek?

(a) You must reasonably describe the records sought. A reasonable description contains sufficient detail to enable bureau personnel familiar with the subject matter of the request to locate the records with a reasonable amount of effort.

(b) You should include as much detail as possible about the specific records or types of records that you are seeking. This will assist the bureau in identifying the requested records (for example, time frames involved or specific personnel who may have the requested records). For example, whenever possible, identify:

(1) The date, title or name, author, recipient, and subject of any particular records you seek;

(2) The office that created the records you seek;

(3) The timeframe for which you are seeking records; and

(4) Any other information that will assist the bureau in locating the records.

(c) The bureau's FOIA Public Liaison can assist you in formulating or reformulating a request in an effort to better identify the records you seek.

(d) If the request does not reasonably describe the records sought, the bureau will inform you what additional information is needed. It will also notify you that it will not be able to comply with your FOIA request unless you provide the additional information requested within 20 workdays. If you receive this sort of response, you may wish to discuss it with the bureau's designated FOIA contact or its FOIA Public Liaison (see § 2.66 of this part). If the bureau does not receive a written response within 20 workdays after asking for additional information, it will presume that you are no longer interested in the records and will close the file on the request.

[77 FR 76902, Dec. 31, 2012; 78 FR 6216, Jan. 30, 2013]

§ 2.6 How will fee information affect the processing of your request?

(a) Your request must explicitly state that you will pay all fees associated with processing the request, that you will pay fees up to a specified amount, and/or that you are seeking a fee waiver.

(b) If the bureau anticipates that the fees for processing the request will exceed the amount you have agreed to pay, or if you did not agree in writing to pay processing fees and the bureau anticipates the processing costs will exceed your entitlements, the bureau will notify you:

(1) Of the estimated processing fees;

(2) Of its need for either an advance payment (see § 2.50 of this part) or your written assurance that you will pay the anticipated fees (or fees up to a specified amount); and

(3) That it will not be able to fully comply with your FOIA request unless you provide the written assurance or advance payment requested.

(c) If the bureau does not receive a written response from you within 20 workdays after requesting the information in paragraph (b) of this section, it will presume that you are no longer interested in the records and will close the file on the request.

(d) If you are seeking a fee waiver, your request must include sufficient justification (see the criteria in §§ 2.45, 2.48, and 2.56 of this part). Failure to provide sufficient justification will result in a denial of the fee waiver request. If you are seeking a fee waiver, you may also indicate the amount you are willing to pay if the fee waiver is denied. This allows the bureau to process the request for records while it considers your fee waiver request.

(e) The bureau will begin processing the request only after the fee issues are resolved.

(f) If you are required to pay a fee and it is later determined on appeal that you were entitled to a full or partial fee waiver, you will receive an appropriate refund.

§ 2.7 What information should you include about your fee category?

(a) A request should indicate your fee category (that is, whether you are a commercial-use requester, news media, educational or noncommercial scientific institution, or other requester as described in §§ 2.38 and 2.39 of this part).

(b) If you submit a FOIA request on behalf of another person or organization (for example, if you are an attorney submitting a request on behalf of a client), the bureau will determine the fee category by considering the underlying requester's identity and intended use of the information.

(c) If your fee category is unclear, the bureau may ask you for additional information (see §2.51 of this part).

§2.8 Can you ask for records to be disclosed in a particular form or format?

(a) Generally, you may choose the form or format of disclosure for records requested. The bureau must provide the records in the requested form or format if the bureau can readily reproduce the record in that form or format.

(b) The bureau may charge you the direct costs involved in converting records to the requested format if the bureau does not normally maintain the records in that format (see §2.44 of this part).

§2.9 What if your request seeks records about another person?

(a) When a request seeks records about another person, you may receive greater access by submitting proof that the person either:

(1) Consents to the release of the records to you (for example, a notarized authorization signed by that person); or

(2) Is deceased (for example, a copy of a death certificate or an obituary).

(b) At its discretion, the bureau can require you to supply additional information if necessary to verify that a particular person has consented to disclosure or is deceased.

§2.10 May you ask for the processing of your request to be expedited?

You may ask for the processing of your request to be expedited. The bureau will determine whether to expedite the processing of your request using the criteria outlined in §2.20.

§2.11 What contact information should your request include?

A request should include your name, mailing address, daytime telephone number (or the name and telephone number of an appropriate contact), email address, and fax number (if available) in case the bureau needs additional information or clarification of your request.

Subpart C—Processing Requests

SOURCE: 77 FR 76902, Dec. 31, 2012, unless otherwise noted.

§2.12 What should you know about how bureaus process requests?

(a) Except as described in §§2.4 and 2.13 of this part, the bureau to which the request is addressed is responsible for responding to the request and for making a reasonable effort to search for responsive records.

(b) In determining which records are responsive to a request, the bureau will include only records in its possession and control on the date that it begins its search.

(c) The bureau will make reasonable efforts to search for the requested records in electronic form or format, except when these efforts would significantly interfere with the operation of the bureau's automated information system.

(d) If a bureau receives a request for records in its possession that it did not create or that another bureau or a Federal agency is substantially concerned with, it may undertake consultations and/or referrals as described in §2.13.

§2.13 How do consultations and referrals work?

(a) Consultations and referrals can occur within the Department or outside the Department.

(1) Paragraphs (b) and (c) of this section addresses consultations and referrals that occur within the Department when the bureau has responsive records.

(2) Paragraphs (d) through (g) of this section address consultations and referrals that occur outside the Department when the bureau has responsive records.

(3) Paragraph (h) of this section addresses what happens when the bureau has no responsive records but believes responsive records may be in the possession of a Federal agency outside the Department.

(b) If a bureau (other than the Office of Inspector General) receives a request for records in its possession that another bureau created or is substantially concerned with, it will either:

(1) Consult with the other bureau before deciding whether to release or withhold the records; or

(2) Refer the request, along with the records, to that other bureau for direct response.

(c) The bureau that originally received the request will notify you of the referral in writing. When the bureau notifies you of the referral, it will tell you whether the referral was for part or all of your request and provide the name and contact information for the other bureau.

(d) If, while responding to a request, the bureau locates records that originated with another Federal agency, it usually will refer the request and any responsive records to that other agency for a release determination and direct response.

(e) If the bureau refers records to another agency, it will document the referral and maintain a copy of the records that it refers and notify you of the referral in writing, unless the notification will itself disclose a sensitive, exempt fact. When the bureau notifies you of the referral, it will tell you whether the referral was for part or all of your request and provide the name and contact information for the other agency. You may treat such a response as a denial of records and file an appeal, in accordance with the procedures in § 2.59 of this part.

(f) If the bureau locates records that originated with another Federal agency while responding to a request, the bureau will make the release determination itself (after consulting with the originating agency) when:

(1) The record is of primary interest to the Department (for example, a record may be of primary interest to the Department if it was developed or prepared according to the Department's regulations or directives, or in response to a Departmental request);

(2) The Department is in a better position than the originating agency to assess whether the record is exempt from disclosure;

(3) The originating agency is not subject to the FOIA; or

(4) It is more efficient or practical depending on the circumstances.

(g) If the bureau receives a request for records that another Federal agency has classified under any applicable executive order concerning record classification, it must refer the request to that agency for response.

(h) If the bureau receives a request for records not in its possession, but that the bureau believes may be in the possession of a Federal agency outside the Department, the bureau will return the request to you, may advise you to submit it directly to the agency, will notify you that the bureau cannot comply with the request, and will close the request. If you believe this response was in error, you may file an appeal in accordance with the procedures in § 2.59.

[77 FR 76902, Dec. 31, 2012; 78 FR 6216, Jan. 30, 2013]

Subpart D—Timing of Responses to Requests

SOURCE: 77 FR 76902, Dec. 31, 2012, unless otherwise noted.

§ 2.14 In what order are responses usually made?

The bureau ordinarily will respond to requests according to their order of receipt within their processing track.

§ 2.15 What is multitrack processing and how does it affect your request?

(a) Bureaus use processing tracks to distinguish simple requests from more complex ones on the basis of the estimated number of workdays needed to process the request.

(b) In determining the number of workdays needed to process the request, the bureau considers factors such as the number of pages involved in processing the request or the need for consultations.

(c) The basic processing tracks are designated as follows:

(1) Simple: requests in this track will take between one to five workdays to process;

(2) Normal: requests in this track will take between six to twenty workdays to process;

(3) Complex: requests in this track will take between twenty-one workdays and sixty workdays to process; or

(4) Exceptional/Voluminous: requests in this track involve very complex processing challenges, which may include a large number of potentially responsive records, and will take over sixty workdays to process.

(d) Bureaus also have a specific processing track for requests that are granted expedited processing under the standards in §2.20 of this part. These requests will be processed as soon as practicable.

(e) Bureaus must advise you of the track into which your request falls and, when appropriate, will offer you an opportunity to narrow your request so that it can be placed in a different processing track.

(f) The use of multitrack processing does not alter the statutory deadline for a bureau to determine whether to comply with your FOIA request (see §2.16 of this part).

§2.16 What is the basic time limit for responding to a request?

(a) Ordinarily, the bureau has 20 workdays after the date of receipt to determine whether to comply with (for example, grant, partially grant, or deny) a FOIA request, but unusual circumstances may allow the bureau to take longer than 20 workdays (see §2.19).

(b) A consultation or referral under §2.13 of this part does not restart the statutory time limit for responding to a request.

§2.17 When does the basic time limit begin for misdirected FOIA requests?

The basic time limit for a misdirected FOIA request (see §2.4(e) of this part) begins no later than ten workdays after the request is first received by any component of the Department that is designated to receive FOIA requests.

§2.18 When can the bureau suspend the basic time limit?

(a) The basic time limit in §2.16 of this part may be temporarily suspended for the time it takes you to respond to one written communication from the bureau reasonably asking for clarifying information.

(b) The basic time limit in §2.16 may also repeatedly be temporarily suspended for the time it takes you to respond to written communications from the bureau that are necessary to clarify issues regarding fee assessment (see §2.51 of this part).

§2.19 When may the bureau extend the basic time limit?

(a) The bureau may extend the basic time limit if unusual circumstances exist. Before the expiration of the basic 20 workday time limit to respond, the bureau will notify you in writing of:

(1) The unusual circumstances involved; and

(2) The date by which it expects to complete processing the request.

(b) If the processing time will extend beyond a total of 30 workdays, the bureau will:

(1) Give you an opportunity to limit the scope of the request or agree to an alternative time period for processing; and

(2) Make available its FOIA Public Liaison (see §2.66 of this part) to assist in resolving any disputes between you and the bureau.

(c) If the bureau extends the time limit under this section and you do not receive a response in accordance with §2.16(a) in that time period, you may consider the request denied and file an appeal in accordance with the procedures in §2.59.

(d) Your refusal to reasonably modify the scope of a request or arrange an alternative time frame for processing a request after being given the opportunity to do so may be considered for litigation purposes as a factor when determining whether exceptional circumstances exist.

§ 2.20 When will expedited processing be provided and how will it affect your request?

(a) The bureau will provide expedited processing upon request if you demonstrate to the satisfaction of the bureau that there is a compelling need for the records. The following circumstances demonstrate a compelling need:

(1) Where failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) Where there is an urgency to inform the public about an actual or alleged Federal Government activity and the request is made by a person primarily engaged in disseminating information.

(i) In most situations, a person primarily engaged in disseminating information will be a representative of the news media.

(ii) If you are not a full time member of the news media, to qualify for expedited processing here, you must establish that your main professional activity or occupation is information dissemination, although it need not be your sole occupation.

(iii) The requested information must be the type of information which has particular value that will be lost if not disseminated quickly; this ordinarily refers to a breaking news story of general public interest.

(iv) Information of historical interest only or information sought for litigation or commercial activities would not qualify, nor would a news media deadline unrelated to breaking news.

(b) If you seek expedited processing, you must submit a statement that:

(1) Explains in detail how your request meets one or both of the criteria in paragraph (a) of this section; and

(2) Certifies that your explanation is true and correct to the best of your knowledge and belief.

(c) You may ask for expedited processing at any time by writing to the appropriate FOIA contact in the bureau that maintains the records requested. When making a request for expedited processing of an administrative appeal, submit the request to the FOIA Appeals Officer.

(d) The bureau must notify you of its decision to grant or deny expedited processing within 10 calendar days of receiving an expedited processing request.

(e) If expedited processing is granted, the request will be given priority, placed in the processing track for expedited requests, and be processed as soon as practicable.

(f) If expedited processing is denied, the bureau will notify you of the right to appeal the decision on expedited processing in accordance with the procedures in subpart H of this part.

(g) If you appeal the decision on expedited processing, your appeal (if it is properly formatted under § 2.59 of this part) will be processed ahead of other appeals.

(h) If the bureau has not responded to the request for expedited processing within 10 calendar days, you may file an appeal (for nonresponse in accordance with § 2.57(a)(8) of this part).

Subpart E—Responses to Requests

SOURCE: 77 FR 76902, Dec. 31, 2012, unless otherwise noted.

§ 2.21 How will the bureau respond to requests?

(a) When the bureau informs you of its decision to comply with a request by granting, partially granting, or denying the request, it will do so in writing and in accordance with the deadlines in subpart D of this part. The bureau's written response will include a statement about the services offered by the Office of Government Information Services (OGIS), using standard language that can be found at: *http://www.doi.gov/foia/news/guidance/index.cfm.*

(b) If the bureau determines that your request will take longer than 10 workdays to process, the bureau immediately will send you a written acknowledgment that includes the request's individualized tracking number and processing track (see § 2.15(e)). The acknowledgement may also include a brief description of the subject of your request.

§ 2.22 How will the bureau grant requests?

(a) Once the bureau makes a determination to grant a request in full or in part, it must notify you in writing.

(b) The notification will inform you of any fees charged under subpart G of this part.

(c) The bureau will release records (or portions of records) to you promptly upon payment of any applicable fees (or before then, in accordance with § 2.37(c) of this part).

(d) If the records (or portions of records) are not included with the bureau's notification, the bureau will advise you how, when, and where the records will be made available.

§ 2.23 When will the bureau deny a request or procedural benefits?

(a) A bureau denies a request when it makes a decision that:

(1) A requested record is exempt, in full or in part;

(2) The request does not reasonably describe the records sought;

(3) A requested record does not exist, cannot be located, or is not in the bureau's possession; or

(4) A requested record is not readily reproducible in the form or format you seek.

(b) A bureau denies a procedural benefit only, and not access to the underlying records, when it makes a decision that:

(1) A fee waiver, or another fee-related issue, will not be granted; or

(2) Expedited processing will not be provided.

(c) The bureau must consult with the Office of the Solicitor before it denies a fee waiver request or withholds all or part of a requested record.

§ 2.24 How will the bureau deny requests?

(a)The bureau must notify you in writing of any denial of your request.

(b) The denial notification must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including a reference to any FOIA exemption(s) applied by the bureau to withhold records in full or in part;

(3) An estimate of the volume of any records or information withheld, for example, by providing the number of pages or some other reasonable form of estimation, unless such an estimate would harm an interest protected by the exemption(s) used to withhold the records or information;

(4) The name and title of the Office of the Solicitor attorney consulted (if the bureau is denying a fee waiver request or withholding all or part of a requested record); and

(5) A statement that the denial may be appealed under subpart H of this part and a description of the requirements set forth therein.

§ 2.25 What if the requested records contain both exempt and nonexempt material?

If responsive records contain both exempt and nonexempt material, the bureau will consult with the Office of the Solicitor, as discussed in § 2.23(c). After consultation, the bureau will partially grant and partially deny the request by:

(a) Segregating and releasing the nonexempt information, unless the nonexempt material is so intertwined with the exempt material that disclosure of it would leave only meaningless words and phrases;

(b) Indicating on the released portion of the record the amount of information deleted and the FOIA exemption under which the deletion was made, unless doing so would harm an interest protected by the FOIA exemption used to withhold the information; and

(c) If technically feasible, placing the information required by paragraph (b) of this section at the place in the record where the deletion was made.

Subpart F—Handling Confidential Information

SOURCE: 77 FR 76906, Dec. 31, 2012, unless otherwise noted.

§ 2.26 How will the bureau interact with the submitter of possibly confidential information?

(a) The Department encourages, but does not require, submitters to designate confidential information in good faith at the time of submission. Such

designations assist the bureau in determining whether information obtained from the submitter is confidential information, but will not always be determinative.

(b) If, in the course of responding to a FOIA request, a bureau cannot readily determine whether information is confidential information, the bureau will:

(1) Consult with the submitter under §§ 2.27 and 2.28; and

(2) Provide the submitter an opportunity to object to a decision to disclose the information under §§ 2.30 and 2.31 of this subpart.

§ 2.27 When will the bureau notify a submitter of a request for their possibly confidential information?

(a) Except as outlined in § 2.29 of this subpart, a bureau must promptly notify a submitter in writing when it receives a FOIA request if either:

(1) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4 of the FOIA, found at 5 U.S.C. 552(b)(4); or

(2) The bureau believes that requested information may be protected from disclosure under Exemption 4.

(b) If a large number of submitters are involved, the bureau may publish a notice in a manner reasonably calculated to reach the attention of the submitters (for example, in newspapers or newsletters, the bureau's Web site, or the FEDERAL REGISTER) instead of providing a written notice to each submitter.

§ 2.28 What information will the bureau include when it notifies a submitter of a request for their possibly confidential information?

A notice to a submitter must include:

(a) Either a copy of the FOIA request or the exact language of the request;

(b) Either a description of the possibly confidential information located in response to the request or a copy of the responsive records, or portions of records, containing the information;

(c) A description of the procedures for objecting to the release of the possibly confidential information under §§ 2.30 and 2.31 of this subpart;

(d) A time limit for responding to the bureau—no less than 10 workdays from receipt or publication of the notice (as set forth in § 2.27(b) of this subpart)—to object to the release and to explain the basis for the objection;

(e) Notice that information contained in the submitter's objections may itself be subject to disclosure under the FOIA;

(f) Notice that the bureau, not the submitter, is responsible for deciding whether the information will be released or withheld;

(g) A request for the submitter's views on whether they still consider the information to be confidential if the submitter designated the material as confidential commercial or financial information 10 or more years before the request; and

(h) Notice that failing to respond within the time frame specified under § 2.28(d) of this subpart will create a presumption that the submitter has no objection to the disclosure of the information in question.

§ 2.29 When will the bureau not notify a submitter of a request for their possibly confidential information?

The notice requirements of § 2.28 of this subpart will not apply if:

(a) The information has been lawfully published or officially made available to the public; or

(b) Disclosure of the information is required by a statute other than the FOIA or by a regulation (other than this part) issued in accordance with the requirements of Executive Order 12600.

§ 2.30 How and when may a submitter object to the disclosure of confidential information?

(a) If a submitter has any objections to the disclosure of confidential information, the submitter should provide a detailed written statement to the bureau that specifies all grounds for withholding the particular information under any FOIA exemption (see § 2.31 of this subpart for further discussion of Exemption 4 objection statements).

(b) A submitter who does not respond within the time period specified under § 2.28(d) of this subpart will be considered to have no objection to disclosure of the information. Responses received

by the bureau after this time period will not be considered by the bureau unless the appropriate bureau FOIA contact determines, in his or her sole discretion, that good cause exists to accept the late response.

§ 2.31 What must a submitter include in a detailed Exemption 4 objection statement?

(a) To rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information is confidential information. To do this, the submitter must give the bureau a detailed written statement. This statement must include a specific and detailed discussion of why the information is a trade secret or, if the information is not a trade secret, the following three categories must be addressed (unless the bureau informs the submitter that a response to one of the first two categories will not be necessary):

(1) Whether the Government required the information to be submitted, and if so, how substantial competitive or other business harm would likely result from release;

(2) Whether the submitter provided the information voluntarily and, if so, how the information fits into a category of information that the submitter does not customarily release to the public; and

(3) A certification that the information is confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.

(b) If not already provided, the submitter must include a daytime telephone number, an email and mailing address, and a fax number (if available).

§ 2.32 How will the bureau consider the submitter's objections?

(a) The bureau must carefully consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(b) The bureau, not the submitter, is responsible for deciding whether the information will be released or withheld.

§ 2.33 What if the bureau determines it will disclose information over the submitter's objections?

If the bureau decides to disclose information over the objection of a submitter, the bureau must notify the submitter by certified mail or other traceable mail, return receipt requested. The notification must be sent to the submitter's last known address and must include:

(a) The specific reasons why the bureau determined that the submitter's disclosure objections do not support withholding the information;

(b) Copies of the records or information the bureau intends to release; and

(c) Notice that the bureau intends to release the records or information no less than 10 workdays after receipt of the notice by the submitter.

§ 2.34 Will a submitter be notified of a FOIA lawsuit?

If you file a lawsuit seeking to compel the disclosure of confidential information, the bureau must promptly notify the submitter.

§ 2.35 Will you receive notification of activities involving the submitter?

If any of the following occur, the bureau will notify you:

(a) The bureau provides the submitter with notice and an opportunity to object to disclosure;

(b) The bureau notifies the submitter of its intent to disclose the requested information; or

(c) A submitter files a lawsuit to prevent the disclosure of the information.

§ 2.36 Can a bureau release information protected by Exemption 4?

If a bureau determines that the requested information is protected from release by Exemption 4 of the FOIA, the bureau has no discretion to release the information. Release of information protected from release by Exemption 4 is prohibited by the Trade Secrets Act, a criminal provision found at 18 U.S.C. 1905.

Subpart G—Fees

SOURCE: 77 FR 76906, Dec. 31, 2012, unless otherwise noted.

§ 2.37 What general principles govern fees?

(a) The bureau will charge for processing requests under the FOIA in accordance with this subpart and with the OMB Fee Guidelines.

(b) The bureau may contact you for additional information to resolve fee issues.

(c) The bureau ordinarily will collect all applicable fees before sending copies of records to you.

(d) You may usually pay fees by check, certified check, or money order made payable to the ''Department of the Interior'' or the bureau.

(1) Where appropriate, the bureau may require that your payment be made in the form of a certified check.

(2) You may also be able to pay your fees by credit card. You may contact the bureau to determine what forms of payment it accepts.

(e) The bureau should ensure that it conducts searches, review, and duplication in the most efficient and the least expensive manner so as to minimize costs for both you and the bureau.

(f) If the Department does not comply with any of the FOIA's statutory time limits:

(1) The bureau cannot assess search fees for your FOIA request, unless unusual or exceptional circumstances apply; and

(2) Depending on your fee category, the bureau may not be able to assess duplication fees for your FOIA request, as discussed in § 2.39(b) of this subpart.

§ 2.38 What are the requester fee categories?

(a) There are four categories of requesters for the purposes of determining fees—commercial-use, educational and noncommercial scientific institutions, representatives of news media, and all others.

(b) The bureau's decision to place you in a particular fee category will be made on a case-by-case basis based on your intended use of the information and, in most cases, your identity. If you do not submit sufficient information in your FOIA request for the bureau to determine your proper fee category, the bureau may ask you to provide additional information (see § 2.51 of this subpart).

(c) See § 2.70 of this part for the definitions of each of these fee categories.

§ 2.39 How does your requester category affect the fees you are charged?

(a) You will be charged as shown in the following table:

Requester Category	Search fees	Review fees	Duplication fees
Commercial use requester	Yes	Yes	Yes.
Educational and non-commercial scientific institutions	No	No	Yes (first 100 pages, or equivalent volume, free).
Representative of news media requester	No	No	Yes (first 100 pages, or equivalent volume, free).
All other requesters	Yes (first 2 hours free)	No	Yes (first 100 pages, or equivalent volume, free).

(b) If you are in the fee category of a representative of the news media or an educational and noncommercial scientific institution and the Department does not comply with any of the FOIA's statutory time limits, the Department cannot assess duplication fees for the FOIA request in question, unless unusual or exceptional circumstances apply to the processing of the request.

§ 2.40 How will fee amounts be determined?

(a) The bureau will charge the types of fees discussed below unless a waiver of fees is required under § 2.39 of this subpart or has been granted under § 2.45 or § 2.56.

(b) Because the types of fees discussed below already account for the overhead costs associated with a given fee type, the bureau should not add any additional costs to those charges.

§ 2.41 What search fees will you have to pay?

(a) The bureau will charge search fees for all requests, subject to the restrictions of §§ 2.37(f), 2.39, and 2.40(a) of this subpart. The bureau may charge you for time spent searching even if it does not locate any responsive records or if it determines that the records are entirely exempt from disclosure.

(b) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be the average hourly General Schedule (GS) base salary, plus the District of Columbia locality payment, plus 16 percent for benefits, of employees in the following three categories, as applicable:

(1) Clerical—Based on GS–6, Step 5, pay (all employees at GS–7 and below are classified as clerical for this purpose);

(2) Professional—Based on GS–11, Step 7, pay (all employees at GS–8 through GS–12 are classified as professional for this purpose); and

(3) Managerial—Based on GS–14, Step 2, pay (all employees at GS–13 and above are classified as managerial for this purpose).

(c) You can review the current fee schedule for the categories discussed above in paragraph (b) of this section at *http://www.doi.gov/foia/fees-waivers.cfm*.

(d) Some requests may require retrieval of records stored at a Federal records center operated by the National Archives and Records Administration. For these requests, bureaus will charge additional costs in accordance with the Transactional Billing Rate Schedule established by the National Archives and Records Administration.

§ 2.42 What duplication fees will you have to pay?

(a) The bureau will charge duplication fees, subject to the restrictions of §§ 2.37(f), 2.39, and 2.40(a) of this subpart.

(b) If photocopies or scans are supplied, the bureau will provide one copy per request at the cost determined by the table in appendix A to this part.

(c) For other forms of duplication, the bureau will charge the actual costs of producing the copy, including the time spent by personnel duplicating the requested records. For each quarter hour spent by personnel duplicating the requested records, the fees will be the same as those charged for a search under § 2.41(b) of this subpart.

(d) If the bureau must scan paper records to accommodate your preference to receive records in an electronic format, you will pay both the per page amount noted in Appendix A to this part and the time spent by personnel scanning the requested records. For each quarter hour spent by personnel scanning the requested records, the fees will be the same as those charged for a search under § 2.41(b) of this subpart.

§ 2.43 What review fees will you have to pay?

(a) The bureau will charge review fees if you make a commercial-use request, subject to the restrictions of §§ 2.37(f), 2.39, and 2.40(a) of this subpart.

(b) The bureau will assess review fees in connection with the initial review of the record (the review conducted by the bureau to determine whether an exemption applies to a particular record or portion of a record).

(c) The Department will not charge for reviews at the administrative appeal stage of exemptions applied at the initial review stage. However, if the appellate authority determines that an exemption no longer applies, any costs associated with the bureau's re-review of the records to consider the use of other exemptions may be assessed as review fees.

(d) The bureau will charge review fees at the same rates as those charged for a search under § 2.41(b) of this subpart.

(e) The bureau can charge review fees even if the record(s) reviewed ultimately is not disclosed.

§ 2.44 What fees for other services will you have to pay?

(a) Although not required to provide special services, if the bureau chooses to do so as a matter of administrative

discretion, it will charge you the direct costs of providing the service.

(b) Examples of these services include certifying that records are true copies under subpart L of this part, providing multiple copies of the same record, converting records to a requested format, obtaining research data under § 2.69 of this part, or sending records by means other than first class mail.

(c) The bureau will notify you of these fees before they accrue and will obtain your written assurance of payment or an advance payment before proceeding. See §§ 2.49 and 2.50 of this subpart.

§ 2.45 When will the bureau waive fees?

(a) The bureau will release records responsive to a request without charge (in other words, it will give you a full fee waiver) or at a reduced charge (in other words, it will give you a partial fee waiver, as discussed further in paragraph (b) of this section) if the bureau determines, based on all available information, that you have demonstrated (under the factors listed in § 2.48 of this subpart) that disclosing the information is:

(1) In the public interest because it is likely to contribute significantly to public understanding of government operations or activities, and

(2) Not primarily in your commercial interest.

(b) A partial fee waiver may be appropriate if some but not all of the requested records are likely to contribute significantly to public understanding of the operations and activities of the government.

(c) When deciding whether to waive or reduce fees, the bureau will rely on the fee waiver justification submitted in your request letter. If the letter does not include sufficient justification, the bureau will deny the fee waiver request. The bureau may, at its discretion, request additional information from you (see § 2.51 of this subpart).

(d) The burden is on you to justify entitlement to a fee waiver. Requests for fee waivers are decided on a case-by-case basis under the criteria discussed above in paragraph (a) of this section and § 2.48 of this subpart. If you have received a fee waiver in the past, that does not mean you are automatically entitled to a fee waiver for every request submitted.

(e) Discretionary fee waivers are addressed in § 2.56 of this subpart.

(f) The bureau must not make value judgments about whether the information at issue is ''important'' enough to be made public; it is not the bureau's role to attempt to determine the level of public interest in requested information.

§ 2.46 When may you ask the bureau for a fee waiver?

(a) You should request a fee waiver when your request is first submitted to the bureau (see § 2.6 of this part).

(b) You may submit a fee waiver request at a later time if the underlying record request is still either pending or on administrative appeal.

§ 2.47 How will the bureau notify you if it denies your fee waiver request?

If the bureau denies your request for a fee waiver, it will notify you, in writing, of the following:

(a) The basis for the denial, including a full explanation of why the fee waiver request does not meet the Department's fee waiver criteria in § 2.48 of this subpart.

(b) The name and title or position of each person responsible for the denial;

(c) The name and title of the Office of the Solicitor attorney consulted; and

(d) Your right to appeal the denial to the FOIA Appeals Officer, under the procedures in § 2.57 of this part, within 30 workdays after the date of the fee waiver denial letter.

§ 2.48 How will the bureau evaluate your fee waiver request?

(a) In deciding whether your fee waiver request meets the requirements of § 2.45(a)(1) of this subpart, the bureau will consider the criteria listed in paragraphs one through four below. You must address each of these criteria.

(1) How the records concern the operations or activities of the Federal government.

(2) How disclosure is likely to contribute to public understanding of those operations or activities, including:

(i) How the contents of the records are meaningfully informative;

(ii) The logical connection between the content of the records and the operations or activities;

(iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding;

(iv) Your identity, vocation, qualifications, and expertise regarding the requested information and information that explains how you plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding

(v) Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom do you intend to disseminate the information).

(3) How disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding, including:

(i) Whether the information being requested is new;

(ii) Whether the information would confirm or clarify data that has been released previously;

(iii) How disclosure will increase the level of public understanding of the operations or activities of the Department or a bureau that existed prior to disclosure; and

(iv) Whether the information is already publicly available. If the Government previously has published the information you are seeking or it is routinely available to the public in a library, reading room, through the Internet, or as part of the administrative record for a particular issue, it is less likely that there will be a significant contribution from release.

(4) How the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure.

(b) In deciding whether the fee waiver meets the requirements in § 2.45(a)(2) of this subpart, the bureau will consider any commercial interest of yours that would be furthered by the requested disclosure.

(1) You are encouraged to provide explanatory information regarding this consideration.

(2) The bureau will not find that disclosing the requested information will be primarily in your commercial interest where the public interest is greater than any identified commercial interest in disclosure.

(3) If you do have a commercial interest that would be furthered by disclosure, explain how the public interest in disclosure would be greater than any commercial interest you or your organization may have in the documents.

(i) Your identity, vocation, and intended use of the requested records are all factors to be considered in determining whether disclosure would be primarily in your commercial interest.

(ii) If you are a representative of a news media organization seeking information as part of the news gathering process, we will presume that the public interest outweighs your commercial interest.

(iii) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.

§ 2.49 When will you be notified of anticipated fees?

(a) The bureau will notify you under this section unless:

(1) The anticipated fee is less than $50 (you will not be charged if the fee for processing your request is less than $50, unless multiple requests are aggregated under § 2.54 of this subpart).

(2) You have been granted a full fee waiver; or

(3) You have previously agreed to pay all the fees associated with the request.

(b) If none of the above exceptions apply, the bureau will:

(1) Promptly notify you of the estimated costs for search, review, and/or duplication;

(2) Ask you to provide written assurance within 20 workdays that you will pay all fees or fees up to a designated amount;

(3) Notify you that it will not be able to comply with your FOIA request unless you provide the written assurance requested; and

(4) Give you an opportunity to reduce the fee by modifying the request.

(c) If the bureau does not receive your written assurance of payment under paragraph (b)(2) of this section within 20 workdays, the request will be closed.

(d) After the bureau begins processing a request, if it finds that the actual cost will exceed the amount you previously agreed to pay, the bureau will:

(1) Stop processing the request;

(2) Promptly notify you of the higher amount and ask you to provide written assurance of payment; and

(3) Notify you that it will not be able to fully comply with your FOIA request unless you provide the written assurance requested; and

(4) Give you an opportunity to reduce the fee by modifying the request.

(e) If you wish to modify your request in an effort to reduce fees, the bureau's FOIA Public Liaison can assist you.

§ 2.50 When will the bureau require advance payment?

(a) The bureau will require advance payment before starting further work when it finds the estimated fee is over $250 and:

(1) You have never made a FOIA request to the Department requiring the payment of fees; or

(2) You did not pay a previous FOIA fee within 30 calendar days of the date of billing.

(b) If the bureau believes that you did not pay a previous FOIA fee within 30 calendar days of the date of billing, the bureau will require you to either:

(1) Demonstrate you paid prior fee within 30 calendar days of the date of billing; or

(2) Pay any unpaid amount of the previous fee, plus any applicable interest penalties (see § 2.53 of this subpart), and pay in advance the estimated fee for the new request.

(c) When the bureau notifies you that an advance payment is due, it will give you an opportunity to reduce the fee by modifying the request.

(d) The bureau may require payment before records are sent to you; such a payment is not considered an ''advance payment'' under § 2.50(a) of this subpart.

(e) If the bureau requires advance payment, it will start further work only after receiving the advance payment. It will also notify you that it will not be able to comply with your FOIA request unless you provide the advance payment. Unless you pay the advance payment within 20 workdays after the date of the bureau's fee letter, the bureau will presume that you are no longer interested and will close the file on the request.

§ 2.51 What if the bureau needs clarification about fee issues?

(a) If your FOIA request does not contain sufficient information for the bureau to determine your proper fee category or leaves another fee issue unclear, the bureau may ask you to provide additional clarification. If it does so, the bureau will notify you that it will not be able to comply with your FOIA request unless you provide the clarification requested.

(b) If the bureau asks you to provide clarification, the 20-workday statutory time limit for the bureau to respond to the request is temporarily suspended.

(1) If the bureau receives a written response within 20 workdays, the 20-workday statutory time limit for processing the request will resume (see § 2.16 of this part).

(2) If you still have not provided sufficient information to resolve the fee issue, the bureau may ask you again to provide additional clarification and notify you that it will not be able to comply with your FOIA request unless you provide the additional information requested within 20 workdays.

(3) If the bureau asks you again for additional clarification, the statutory time limit for response will be temporarily suspended again and will resume again if the bureau hears from you within 20 workdays.

(c) If the bureau asks for clarification about a fee issue and does not receive a written response from you within 20 workdays, it will presume

that you are no longer interested and will close the file on the request.

[77 FR 76906, Dec. 31, 2012; 78 FR 6216, Jan. 30, 2013]

§ 2.52 How will you be billed?

If you are required to pay a fee associated with a FOIA request, the bureau processing the request will send a bill for collection.

§ 2.53 How will the bureau collect fees owed?

(a) The bureau may charge interest on any unpaid bill starting on the 31st day following the billing date.

(b) The bureau will assess interest charges at the rate provided in 31 U.S.C. 3717 and implementing regulations and interest will accrue from the billing date until the bureau receives payment.

(c) The bureau will follow the provisions of the Debt Collection Act of 1982 (Public Law 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset to collect overdue amounts and interest.

(d) This section does not apply if you are a state, local, or tribal government.

§ 2.54 When will the bureau combine or aggregate requests?

(a) The bureau may aggregate requests and charge accordingly when it reasonably believes that you, or a group of requesters acting in concert with you, are attempting to avoid fees by dividing a single request into a series of requests on a single subject or related subjects.

(1) The bureau may presume that multiple requests of this type made within a 30-day period have been made to avoid fees.

(2) The bureau may aggregate requests separated by a longer period only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved.

(b) The bureau will not aggregate multiple requests involving unrelated matters.

§ 2.55 What if other statutes require the bureau to charge fees?

(a) The fee schedule in appendix A to this part does not apply to fees charged under any statute that specifically requires the bureau to set and collect fees for particular types of records.

(b) If records otherwise responsive to a request are subject to a statutorily-based fee schedule, the bureau will inform you whom to contact to obtain the records.

§ 2.56 May the bureau waive or reduce your fees at its discretion?

(a) The bureau may waive or reduce fees at its discretion if a request involves furnishing:

(1) A copy of a record that the bureau has reproduced for free distribution;

(2) One copy of a personal document (for example, a birth certificate) to a person who has been required to furnish it for retention by the Department;

(3) One copy of the transcript of a hearing before a hearing officer in a grievance or similar proceeding to the employee for whom the hearing was held;

(4) Records to donors with respect to their gifts;

(5) Records to individuals or private nonprofit organizations having an official, voluntary, or cooperative relationship with the Department if it will assist their work with the Department;

(6) A reasonable number of records to members of the U.S. Congress; state, local, and foreign governments; public international organizations; or Indian tribes, when to do so is an appropriate courtesy, or when the recipient is carrying on a function related to a Departmental function and the waiver will help accomplish the Department's work;

(7) Records in conformance with generally established business custom (for example, furnishing personal reference data to prospective employers of current or former Department employees); or

(8) One copy of a single record to assist you in obtaining financial benefits to which you may be entitled (for example, veterans or their dependents, employees with Government employee compensation claims).

(b) You cannot appeal the denial of a discretionary fee waiver or reduction.

Subpart H—Administrative Appeals

SOURCE: 77 FR 76906, Dec. 31, 2012, unless otherwise noted.

§ 2.57 When may you file an appeal?

(a) You may file an appeal when:

(1) The bureau withholds records, or parts of records;

(2) The bureau informs you that your request has not adequately described the records sought;

(3) The bureau informs you that it does not possess or cannot locate responsive records and you have reason to believe this is incorrect or that the search was inadequate;

(4) The bureau did not address all aspects of the request for records;

(5) You believe there is a procedural deficiency (for example, fees are improperly calculated);

(6) The bureau denied a fee waiver;

(7) The bureau did not make a decision within the time limits in § 2.16 or, if applicable, § 2.18; or

(8) The bureau denied, or was late in responding to, a request for expedited processing filed under the procedures in § 2.20 of this part.

(b) An appeal under paragraph (a)(8) of this section relates only to the request for expedited processing and does not constitute an appeal of the underlying request for records. Special procedures apply to requests for expedited processing of an appeal (see § 2.63 of this subpart).

(c) Before filing an appeal, you may wish to communicate with the contact person listed in the FOIA response, the bureau's FOIA Officer, and/or the FOIA Public Liaison to see if the issue can be resolved informally. However, appeals must be received by the FOIA Appeals Officer within the time limits in § 2.58 of this subpart or they will not be processed.

§ 2.58 How long do you have to file an appeal?

(a) Appeals covered by § 2.57(a)(1) through (5) of this subpart must be received by the FOIA Appeals Officer no later than 30 workdays from the date of the final response.

(b) Appeals covered by § 2.57(a)(6) of this subpart must be received by the FOIA Appeals Officer no later than 30 workdays from the date of the letter denying the fee waiver.

(c) Appeals covered by § 2.57(a)(7) of this subpart may be filed any time after the time limit for responding to the request has passed.

(d) Appeals covered by § 2.57(a)(8) of this subpart should be filed as soon as possible.

(e) Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

§ 2.59 How do you file an appeal?

(a) You must submit the appeal in writing by mail, fax or email to the FOIA Appeals Officer (using the address available at *http://www.doi.gov/foia/appeals.cfm)*. Your failure to send an appeal directly to the FOIA Appeals Officer may delay processing.

(b) The appeal must include:

(1) Copies of all correspondence between you and the bureau concerning the FOIA request, including the request and the bureau's response (if there is one); and

(2) An explanation of why you believe the bureau's response was in error.

(c) The appeal should include your name, mailing address, daytime telephone number (or the name and telephone number of an appropriate contact), email address, and fax number (if available) in case the Department needs additional information or clarification.

(d) An appeal concerning a denial of expedited processing or a fee waiver denial should also demonstrate fully how the criteria in § 2.20 or §§ 2.45 and 2.48 of this part are met.

(e) All communications concerning an appeal should be clearly marked with the words: ''FREEDOM OF INFORMATION APPEAL.''

(f) The Department will reject an appeal that does not attach all correspondence required by paragraph (b)(1) of this section, unless the FOIA Appeals Officer determines, in his or her sole discretion, that good cause exists to accept the defective appeal. The

time limits for responding to an appeal will not begin to run until the correspondence is received.

§ 2.60 Who makes decisions on appeals?

(a) The FOIA Appeals Officer is the deciding official for FOIA appeals.

(b) When necessary, the FOIA Appeals Officer will consult other appropriate offices, including the Office of the Solicitor for denials of records and fee waivers.

(c) The FOIA Appeals Officer normally will not make a decision on an appeal if the request becomes a matter of FOIA litigation.

§ 2.61 How are decisions on appeals issued?

(a) A decision on an appeal must be made in writing.

(b) A decision that upholds the bureau's determination will notify you of the decision and your statutory right to file a lawsuit.

(c) A decision that overturns, remands, or modifies the bureau's determination will notify you of the decision. The bureau then must further process the request in accordance with the appeal determination.

§ 2.62 When can you expect a decision on your appeal?

(a) The basic time limit for responding to an appeal is 20 workdays after receipt of an appeal meeting the requirements of § 2.59 of this subpart.

(b) The FOIA Appeals Officer may extend the basic time limit, if unusual circumstances exist. Before the expiration of the basic 20-workday time limit to respond, the FOIA Appeals Officer will notify you in writing of the unusual circumstances involved and of the date by which he or she expects to complete processing of the appeal.

(c) If the Department is unable to reach a decision on your appeal within the given time limit for response, the FOIA Appeals Officer will notify you of:

(1) The reason for the delay; and

(2) Your statutory right to seek review in a United States District Court.

§ 2.63 Can you receive expedited processing of appeals?

(a) To receive expedited processing of an appeal, you must demonstrate to the Department's satisfaction that the appeal meets one of the criteria under § 2.20 of this part and include a statement that the need for expedited processing is true and correct to the best of your knowledge and belief.

(b) The FOIA Appeals Officer will advise you whether the Department will grant expedited processing within 10 calendar days of receiving the appeal.

(c) If the FOIA Appeals Officer decides to grant expedited processing, he or she will give the appeal priority over other pending appeals and process it as soon as practicable.

§ 2.64 Must you submit an appeal before seeking judicial review?

Before seeking review by a court of the bureau's adverse determination, you generally must first submit a timely administrative appeal.

Subpart I—General Information

SOURCE: 77 FR 76906, Dec. 31, 2012, unless otherwise noted.

§ 2.65 Where are records made available?

Records that are required by the FOIA to be made proactively available for public inspection and copying are accessible on the Department's Web site, *http://www.doi.gov/foia/libraries.cfm*. They may also be available at bureau office locations.

§ 2.66 What are public liaisons?

(a) Each bureau has a FOIA Public Liaison that can assist individuals in locating bureau records.

(b) FOIA Public Liaisons report to the Department's Chief FOIA Officer and you can raise concerns to them about the service you have received.

(c) FOIA Public Liaisons are responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in resolving disputes.

(d) A list of the Department's FOIA Public Liaisons is available at *http://doi.gov/foia/servicecenters.cfm*.

§ 2.67 When will the Department make records available without a FOIA request?

(a) Each bureau must:

(1) Determine which of its records must be made publicly available under the FOIA (for example, certain frequently requested records);

(2) Identify additional records of interest to the public that are appropriate for public disclosure; and

(3) Post those records in FOIA libraries.

(b) Because of these proactive disclosures, you are encouraged to review the Department's FOIA libraries before filing a FOIA request. The material you seek may be immediately available electronically at no cost.

§ 2.68 How will FOIA materials be preserved?

(a) Each bureau must preserve all correspondence pertaining to the requests that it receives under subpart B of this part, as well as copies of all requested records, until disposition or destruction is authorized by the General Records Schedule 14 of the National Archives and Records Administration (NARA) or another NARA-approved records schedule.

(b) Materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or lawsuit is pending. This is true even if they would otherwise be authorized for disposition or destruction under the General Records Schedule 14 of NARA or another NARA-approved records schedule.

§ 2.69 How will a bureau handle a request for federally-funded research data?

(a) If you request research data that were used by the Federal Government in developing certain kinds of agency actions, and the research data relate to published research findings produced under an award, in accordance with OMB Circular A–110:

(1) If the bureau was the awarding agency, it will request the research data from the recipient;

(2) The recipient must provide the research data within a reasonable time; and

(3) The bureau will review the research data to see if it can be released under the FOIA.

(b) If the bureau obtains the research data solely in response to your FOIA request, the bureau may charge you a reasonable fee equaling the full incremental cost of obtaining the research data.

(1) This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients.

(2) This fee is in addition to any fees the agency may assess under the FOIA.

(c) The bureau will forward a copy of the request to the recipient, who is responsible for searching for and reviewing the requested information in accordance with these FOIA regulations. The recipient will forward a copy of any responsive records that are located, along with any recommendations concerning the releasability of the data, and the total cost incurred in searching for, reviewing, and providing the data.

(d) The bureau will review and consider the recommendations of the recipient regarding the releasability of the requested research data. However, the bureau, not the recipient, is responsible for deciding whether the research data will be released or withheld.

§ 2.70 What definitions apply to subparts A through I of this part?

For the purposes of subparts A through I of this part, the following definitions apply:

Bureau means any major component of the Department administering its own FOIA program. A list of these components is available at: *http://www.doi.gov/foia/contacts.cfm.*

Commercial interest means a commercial, trade, or profit interest as these terms are commonly understood. Your status as profitmaking or non-profitmaking is not the deciding factor in determining whether you have a commercial interest.

Commercial use means a use that furthers your commercial, trade or profit interests or that of the person on whose behalf the request is made.

Confidential information means trade secrets or commercial or financial information (that is privileged or confidential and obtained by the Department from a person) that may be protected from disclosure under Exemption 4 of the FOIA.

Department means the Department of the Interior.

Direct costs means those resources that the bureau expends in searching for and duplicating (and, in the case of commercial-use requests, reviewing) records to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space and of heating or lighting a facility.

Duplication means reproducing a copy of a record or of the information contained in it necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Educational institution means any school that operates a program of scholarly research. In order to fall within this category, you must show that the request is authorized by and made under the auspices of, a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research.

Exceptional circumstances means a delay that does not result from a predictable workload of requests (unless the bureau demonstrates reasonable progress in reducing its backlog of pending requests).

Exempt means the record in question, or a portion thereof, is not subject to disclosure due to one or more of the FOIA's nine statutory exemptions, found at 5 U.S.C. 552(b)(1)–(9).

Exemption means one or more of the FOIA's nine statutory exemptions, found at 5 U.S.C. 552(b)(1)–(9).

Expedited processing means giving a FOIA request priority and processing it ahead of other requests pending in the bureau because you have shown a compelling need for the records.

Fee category means one of the four categories, discussed in §§ 2.38 and 2.39, that agencies place you in for the purpose of determining whether you will be charged fees for search, review, and duplication.

FOIA means the Freedom of Information Act, 5 U.S.C. 552, as amended.

FOIA libraries means a physical or electronic compilation of records required to be made available to the public for inspection and copying under 5 U.S.C. 552(a)(2). It also includes a physical or electronic compilation of records that the bureau, at its discretion, makes available to the public for inspection and copying.

Frequently requested records means records that have been released to any person in response to a FOIA request and that have been requested, or that the bureau anticipates will be requested, at least two more times under the FOIA.

Multitrack processing means placing simple requests, requiring relatively minimal review, in one processing track and more voluminous and complex requests in one or more other tracks. Requests in each track are processed on a first-in/first-out basis.

Noncommercial scientific institution means an institution that is not operated for commerce, trade or profit, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, you must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

OMB Fee Guidelines means the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget at 52 FR 10012 (Mar. 27, 1987).

Published means, for the purposes of § 2.69 of this subpart only, when:

(1) Research findings are published in a peer-reviewed scientific or technical journal; or

(2) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

Recipient means, for the purposes of § 2.69 of this subpart only, an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Federal awarding agency. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Record means an agency record that is either created or obtained by an agency and is under agency possession and control at the time of the FOIA request, or is maintained by an entity under Government contract for the purposes of records management.

Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* as used in this definition means information that is about current events or that would be of current interest to the public. Examples of news media entities are newspapers, television, Web sites, or radio stations broadcasting to the public at large, and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all inclusive. As methods of news delivery evolve, alternative representatives of news media may come into being. A freelance journalist will qualify as a news-media entity if he or she can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by that entity (for example, a publication contract would present a solid basis for such an expectation).

Research data means, for the purposes of § 2.69 of this subpart only, the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. The term *recorded* as used in this definition excludes physical objects (e.g., laboratory samples). Research data also do not include:

(1) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(2) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

Review means the examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential information submitter under subpart G of this part, but it excludes time spent resolving general legal or policy issues regarding the application of FOIA exemptions.

Search means the process of looking for and retrieving records responsive to a request. Search time includes page-by-page or line-by-line identification of information within records; and the reasonable efforts expended to locate and retrieve electronic records.

Submitter means any person or entity outside the Federal Government from

whom the Department obtains confidential information, directly or indirectly. The term includes, but is not limited to individuals, corporations, and state, local, tribal, and foreign governments.

Unusual circumstances means the need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request; the need to search for, collect, and examine a voluminous amount of separate and distinct records which are demanded in a single request; or the need for consultation, which shall be conducted with all practicable speed, with another agency, or among two or more components of the Department, having a substantial interest in the determination of the request.

Workday means a regular Federal workday. It excludes Saturdays, Sundays, or Federal legal public holidays. Items arriving or delivered after 5 p.m. Eastern Time will be deemed received on the next workday.

You means a person requesting records, or filing an appeal, under the FOIA.

Subpart J—Declassification of Classified Documents

SOURCE: 40 FR 7305, Feb. 19, 1975, unless otherwise noted. Redesignated at 67 FR 64530, Oct. 21, 2002. Redesignated at 77 FR 76902, Dec. 31, 2012; 78 FR 6216, Jan. 30, 2013.

§ 2.200 Declassification of classified documents.

(a) *Request for classification review.* (1) Requests for a classification review of a document of the Department of the Interior pursuant to section 5(c) of Executive Order 11652 (37 FR 5209, March 10, 1972) and section III B of the National Security Council Directive Governing Classification, Downgrading, Declassification and Safeguarding of National Security Information (37 FR 10053, May 1972) shall be made in accordance with the procedures established by this section.

(2) Any person desiring a classification review of a document of the Department of the Interior containing information classified as National Security Information by reason of the provisions of Executive Order 12065 (or any predecessor executive order) and which is more than 10 years old, should address such request to the Chief, Division of Enforcement and Security Management, Office of Administrative Services, U.S. Department of the Interior, Washington, DC 20240.

(3) Requests need not be made on any special form, but shall, as specified in the executive order, describe the document with sufficient particularity to enable identification of the document requested with expenditure of no more than a reasonable amount of effort.

(4) Charges for locating and reproducing copies of records will be made when deemed applicable in accordance with appendix A to this part and the requester will be notified.

(b) *Action on requests for classification review.* (1) The Chief, Division of Enforcement and Security Management, shall, unless the request is for a document over 30 years old, assign the request to the bureau having custody of the requested records for action. In the case of requests for declassification of records in the custody of the Office of the Secretary and less than 30 years old, the request shall be processed by the Chief, Division of Enforcement and Security Management. Requests for declassification of documents over 30 years shall be referred directly to the Archivist of the United States. The bureau which has been assigned the request, or the Chief, Division of Enforcement and Security Management, in the case of requests assigned to him, shall immediately acknowledge the request in writing. Every effort will be made to complete action on each request within thirty (30) days of its receipt. If action cannot be completed within thirty (30) days, the requester shall be so advised.

(2) If the requester does not receive a decision on his request within sixty (60) days from the date of receipt of his request, or from the date of his most recent response to a request for more particulars, he may apply to the Department of the Interior Oversight Committee for Security, U.S. Department of the Interior, Washington, DC 20240, for a decision on his request. The Committee must render a decision within thirty (30) days.

(c) *Form of decision and appeal to Oversight Committee for Security*. In the event that the bureau to which a request is assigned or the Chief, Division of Enforcement and Security Management, in the case of a request assigned to him, determines that the requested information must remain classified by reason of the provisions of Executive Order 11652, the requester shall be given prompt notification of that decision and, whenever possible, shall be provided with a brief statement as to why the information or material cannot be declassified. He shall also be advised that if he desires he may appeal the determination to the Chairman, Department of the Interior Oversight Committee for Security, U.S. Department of the Interior, Washington, DC 20240. An appeal shall include a brief statement as to why the requester disagrees with the decision which he is appealing. The Department Oversight Committee for Security shall render its decision within thirty (30) days of receipt of an appeal. The Departmental Committee shall be authorized to overrule previous determinations in whole or in part when, in its judgement, continued protection is no longer required.

(d) *Appeal to Interagency Classification Review Committee*. Whenever the Department of the Interior Oversight Committee for Security confirms a determination for continued classification, it shall so notify the requester and advise him that he is entitled to appeal the decision to the Interagency Classification Review Committee established under section 8(A) of the Executive Order 11652. Such appeals shall be addressed to the Interagency Classification Review Committee, the Executive Office Building, Washington, DC 20500.

(e) *Suggestions and complaints*. Any person may also direct suggestions or complaints with respect to the administration of the other provisions of Executive Order 11652 and the NSC Directive by the Department of the Interior to the Department of the Interior Oversight Committee for Security, U.S. Department of the Interior, Washington, DC 20240.

[40 FR 7305, Feb. 19, 1975, as amended at 47 FR 38327, Aug. 31, 1982]

Subpart K—Privacy Act

SOURCE: 40 FR 44505, Sept. 26, 1975, unless otherwise noted. Redesignated at 67 FR 64530, Oct. 21, 2002. Redesignated at 77 FR 76902, Dec. 31, 2012; 78 FR 6216, Jan. 30, 2013.

§ 2.220 Purpose and scope.

This subpart contains the regulations of the Department of the Interior implementing section 3 of the Privacy Act. Sections 2.47 through 2.57 describe the procedures and policies of the Department concerning maintenance of records which are subject to the Act. Sections 2.60 through 2.66 describe the procedure under which individuals may determine whether systems of records subject to the Act contain records relating to them and the procedure under which they may seek access to existing records. Sections 2.70 through 2.77 describe the procedure under which individuals may petition for amendment of records subject to the Act relating to them. Section 2.79 lists records systems that have been exempted from certain requirements of the Act.

[48 FR 56583, Dec. 22, 1983]

§ 2.221 Definitions.

(a) *Act*. As used in this subpart, ''Act'' means section 3 of the Privacy Act, 5 U.S.C. 552a.

(b) *Bureau*. For purposes of this subpart, a ''bureau'' is any constituent bureau or office of the Department, including the Office of the Secretary and any other Departmental office.

(c) *Individual*. As used in this subpart, ''individual'' means a citizen of the United States or an alien lawfully admitted for permanent residence.

(d) *Maintain*. As used in this subpart, the term ''maintain'' includes maintain, collect, use or disseminate.

(e) *Record*. As used in this subpart, ''record'' means any item, collection, or grouping of information about an individual that is maintained by the Department or a bureau thereof, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains the individual's

name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print, or a photograph.

(f) *System of records*. As used in this subpart, ''System of records'' means a group of any records under the control of the Department or a bureau thereof from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

(g) *Medical records*. As used in this subpart, ''medical records'' means records which relate to the identification, prevention, cure or alleviation of any disease, illness or injury including psychological disorders, alcoholism and drug addiction.

(h) *Office of Personnel Management personnel records*. As used in the subpart, ''Office of Personnel Management personnel records'' means records maintained for the Office of Personnel Management by the Department and used for personnel management programs or processes such as staffing, employee development, retirement, and grievances and appeals.

(i) *Statistical records*. As used in this subpart, ''statistical records'' means records in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual.

(j) *Routine use*. As used in this subpart, ''routine use'' means a use of a record for a purpose which is compatible with the purpose for which it was collected.

(k) *System notice*. As used in this subpart, ''system notice'' means the notice describing a system of records required by 5 U.S.C. 552a(e)(4) to be published in the FEDERAL REGISTER upon establishment or revision of the system of records.

(l) *System manager*. As used in this subpart, ''system manager'' means the official designated in a system notice as having administrative responsibility for a system of records.

(m) *Departmental Privacy Act Officer*. As used in this subpart, ''Departmental Privacy Act Officer'' means the official in the Office of the Assistant Secretary—Policy, Budget and Administration charged with responsibility for assisting the Assistant Secretary—Policy, Budget and Administration in carrying out the functions assigned in this subpart and for coordinating the activities of the bureaus of the Department in carrying out the functions which they are assigned in this subpart.

(n) *Bureau Privacy Act Officer*. As used in this subpart, ''Bureau Privacy Act Officer'' means the official within each bureau assigned responsibility for bureau implementation of the Act and the regulations of this subpart.

(o) *Working day*. As used in this subpart, ''working day'' means a regular Federal work day. It does not include Saturdays, Sundays or public legal holidays.

[40 FR 44505, Sept. 26, 1975, as amended at 47 FR 38327, Aug. 31, 1982; 48 FR 56583, Dec. 22, 1983; 53 FR 3749, Feb. 9, 1988]

§ 2.222 Records subject to Privacy Act.

The Privacy Act applies to all ''records,'' as that term is defined in § 2.46(e), which the Department maintains in a ''system of records,'' as that term is defined in § 2.46(f).

§ 2.223 Standards for maintenance of records subject to the Act.

(a) *Content of records*. Records subject to the Act shall contain only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or Executive Order of the President.

(b) *Standards of accuracy*. Records subject to the Act which are used in making any determination about any individual shall be maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making the determination.

(c) *Collection of information*. (1) Information which may be used in making determinations about an individual's rights, benefits, and privileges under Federal programs shall, to the greatest extent practicable, be collected directly from that individual.

(2) In deciding whether collection of information from an individual, as opposed to a third party source, is practicable, the following factors, among others, may be considered:

(i) Whether the nature of the information sought is such that it can only be obtained from a third party;

(ii) Whether the cost of collecting the information from the individual is unreasonable when compared with the cost of collecting it from a third party;

(iii) Whether there is a risk that information collected from third parties, if inaccurate, could result in an adverse determination to the individual concerned;

(iv) Whether the information, if supplied by the individual, would have to be verified by a third party; or

(v) Whether provisions can be made for verification, by the individual, of information collected from third parties.

(d) *Advice to individuals concerning uses of information.* (1) Each individual who is asked to supply information about him or herself which will be added to a system of records shall be informed of the basis for requesting the information, how it may be used, and what the consequences, if any, are of not supplying the information.

(2) At a minimum, the notice to the individual must state:

(i) The authority (whether granted by statute or Executive Order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(ii) The principal purpose or purposes for which the information is intended to be used;

(iii) The routine uses which may be made of the information; and

(iv) The effects on the individual, if any, of not providing all or any part of the requested information.

(3)(i) When information is collected on a standard form, the notice to the individual shall be provided on the form, on a tear-off sheet attached to the form, or on a separate sheet, whichever is most practical.

(ii) When information is collected by an interviewer, the interviewer shall provide the individual with a written notice which the individual may retain. If the interview is conducted by telephone, however, the interviewer may summarize the notice for the individual and need not provide a copy to the individual unless the individual requests a copy.

(iii) An individual may be asked to acknowledge, in writing, that the notice required by this section has been provided.

(e) *Records concerning activity protected by the First Amendment.* No record may be maintained describing how any individual exercises rights guaranteed by the First Amendment to the Constitution unless the maintenance of the record is (1) expressly authorized by statute or by the individual about whom the record is maintained or (2) pertinent to and within the scope of an authorized law enforcement activity.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56583, Dec. 22, 1983]

§ 2.224 [Reserved]

§ 2.225 Federal Register notices describing systems of records.

(a) The Privacy Act requires publication of a notice in the FEDERAL REGISTER describing each system of records subject to the Act. Such notice will be published prior to the establishment or a revision of the system of records. 5 U.S.C. 552a(e)(4).

(b) Each bureau shall notify the Departmental Privacy Act Officer promptly of any modifications or amendments which are required in the then-current notice describing a system of records for which it is responsible.

(c) A bureau desiring to establish a new system of records or a new use for an existing system of records shall notify the Departmental Privacy Act Officer, no fewer than ninety (90) calendar days in advance.

[48 FR 56583, Dec. 22, 1983]

§ 2.226 Assuring integrity of records.

(a) *Statutory requirement.* The Privacy Act requires that records subject to the Act be maintained with appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity

which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained, 5 U.S.C. 552a(e)(10).

(b) *Records maintained in manual form.* When maintained in manual form, records subject to the Privacy Act shall be maintained in a manner commensurate with the sensitivity of the information contained in the system of records. The following minimum safeguards, or safeguards affording comparable protection, are applicable to Privacy Act systems of records containing sensitive information:

(1) Areas in which the records are maintained or regularly used shall be posted with an appropriate warning stating that access to the records is limited to authorized persons. The warning also shall summarize the requirements of § 2.52 and state that the Privacy Act contains a criminal penalty for the unauthorized disclosure of records to which it applies.

(2) During working hours, (i) the area in which the records are maintained or regularly used shall be occupied by authorized personnel or (ii) access to the records shall be restricted by their storage in locked metal file cabinets or a locked room.

(3) During non-working hours, access to the records shall be restricted by their storage in locked metal file cabinets or a locked room.

(4) Where a locked room is the method of security provided for a system, the bureau responsible for the system shall supplement that security by (i) providing lockable file cabinets or containers for the records or (ii) changing the lock or locks for the room so that they may not be opened with a master key. For the purposes of this paragraph, a master key is a key which may be used to open rooms other than the room containing records subject to the Privacy Act, unless those rooms are utilized by officials or employees authorized to have access to the records subject to the Privacy Act.

(c) *Records maintained in computerized form.* When maintained in computerized form, records subject to the Privacy Act shall be maintained, at a minimum, subject to safeguards based on those recommended in the National Bureau of Standard's booklet ''Computer Security Guidelines for Implementing the Privacy Act of 1974'' (May 30, 1975), and any supplements thereto, which are adequate and appropriate to assuring the integrity of records in the system.

(d) *Office of Personnel Management personnel records.* A system of records made up of Office of Personnel Management personnel records shall be maintained under the security requirements set out in 5 CFR 293.106 and 293.107.

(e) *Bureau responsibility.* (1) The bureau responsible for a system of records shall be responsible for assuring that specific procedures are developed to assure that the records in the system are maintained with security meeting the requirements of the Act and this section.

(2) These procedures shall be in writing and shall be posted or otherwise periodically brought to the attention of employees working with the records contained in the system.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56583, Dec. 22, 1983]

§ 2.227 Conduct of employees.

(a) *Handling of records subject to the Act.* Employees whose duties require handling of records subject to the Privacy Act shall, at all times, take care to protect the integrity, security and confidentiality of these records.

(b) *Disclosure of records.* No employee of the Department may disclose records subject to the Privacy Act unless disclosure is permitted under § 2.56 or is to the individual to whom the record pertains.

(c) *Alteration of records.* No employee of the Department may alter or destroy a record subject to the Privacy Act unless (1) such alteration or destruction is properly undertaken in the course of the employee's regular duties or (2) such alteration or destruction is required by a decision under §§ 2.70 through 2.75 or the decision of a court of competent jurisdiction.

(d) *Bureau responsibility.* The bureau responsible for a system of records shall be responsible for assuring that employees with access to the system are made aware of the requirements of this section and of 5 U.S.C. 552a(i)(1), which imposes criminal penalties for

knowingly and willfully disclosing a record about an individual without the written request or consent of that individual unless disclosure is permitted under one of the exceptions listed in § 2.56 (b) and (c).

§ 2.228 Government contracts.

(a) *Required contract provisions.* When a contract provides for the operation by or on behalf of the Department of a system of records to accomplish a Department function, the contract shall, consistent with the Department's authority, cause the requirements of 5 U.S.C. 552a and the regulations contained in this subpart to be applied to such system.

(b) *System manager.* The head of the bureau responsible for the contract shall designate a regular employee of the bureau to be the manager for a system of records operated by a contractor.

§§ 2.229–2.230 [Reserved]

§ 2.231 Disclosure of records.

(a) *Prohibition of disclosure.* No record contained in a system of records may be disclosed by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.

(b) *General exceptions.* The prohibition contained in paragraph (a) does not apply where disclosure of the record would be:

(1) To those officers or employees of the Department who have a need for the record in the performance of their duties; or

(2) Required by the Freedom of Information Act, 5 U.S.C. 552.

(c) *Specific exceptions.* The prohibition contained in paragraph (a) of this section does not apply where disclosure of the record would be:

(1) For a routine use as defined in § 2.46(j) which has been described in a system notice published in the FEDERAL REGISTER;

(2) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13, U.S. Code.

(3) To a recipient who has provided the system manager responsible for the system in which the record is maintained with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(4) To the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(5) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the Department specifying the particular portion desired and the law enforcement activity for which the record is sought;

(6) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(7) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(8) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(9) Pursuant to the order of a court of competent jurisdiction; or

(10) To a consumer reporting agency in accordance with section 3(d) of the Federal Claims Collection Act of 1966, as amended (31 U.S.C. 3711(f)).

(d) *Reviewing records prior to disclosure.* (1) Prior to any disclosure of a record about an individual, unless disclosure is required by the Freedom of Information Act, reasonable efforts shall be made to assure that the

records are accurate, complete, timely and relevant for agency purposes.

(2) When a record is disclosed in connection with a Freedom of Information request made under subpart B of this part and it is appropriate and administratively feasible to do so, the requester shall be informed of any information known to the Department indicating that the record may not be fully accurate, complete, or timely.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56584, Dec. 22, 1983; 50 FR 45114, Oct. 30, 1985]

§ 2.232 Accounting for disclosures.

(a) *Maintenance of an accounting.* (1) Where a record is disclosed to any person, or to another agency, under any of the specific exceptions provided by § 2.56 (c), an accounting shall be made.

(2) The accounting shall record (i) the date, nature, and purpose of each disclosure of a record to any person or to another agency and (ii) the name and address of the person or agency to whom the disclosure was made.

(3) Accountings prepared under this section shall be maintained for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made.

(b) *Access to accountings.* (1) Except for accountings of disclosures made under § 2.56(c)(5), accountings of all disclosures of a record shall be made available to the individual to whom the record relates at the individual's request.

(2) An individual desiring access to an accounting of disclosures of a record pertaining to the individual shall submit a request by following the procedures of § 2.63.

(c) *Notification of disclosure.* When a record is disclosed pursuant to § 2.56(c)(9) as the result of the order of a court of competent jurisdiction, reasonable efforts shall be made to notify the individual to whom the record pertains as soon as the order becomes a matter of public record.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56584, Dec. 22, 1983]

§§ 2.233–2.234 [Reserved]

§ 2.235 Request for notification of existence of records: Submission.

(a) *Submission of requests.* (1)(i) Individuals desiring to determine under the Privacy Act whether a system of records contains records pertaining to them shall address inquiries to the system manager having responsibility for the system unless the system notice describing the system prescribes or permits submission to some other official or officials.

(ii) If a system notice describing a system requires individuals to contact more than two officials concerning the existence of records in the system, individuals desiring to determine whether the system contains records pertaining to them may contact the system manager for assistance in determining which official is most likely to be in possession of records pertaining to those individuals.

(2) Individuals desiring to determine whether records pertaining to them are maintained in two or more systems shall make a separate inquiry concerning each system.

(b) *Form of request.* (1) An inquiry to determine whether a system of records contains records pertaining to an individual shall be in writing.

(2) To insure expeditious handling, the request shall be prominently marked, both on the envelope and on the face of the request, with the legend "PRIVACY ACT INQUIRY."

(3) The request shall state that the individual is seeking information concerning records pertaining to him or herself and shall supply such additional identifying information, if any, as is called for in the system notice describing the system.

(4) Individuals who have reason to believe that information pertaining to them may be filed under a name other than the name they are currently using (e.g., maiden name), shall include such information in the request.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56584, Dec. 22, 1983]

§ 2.236 Requests for notification of existence of records: Action on.

(a) *Decisions on request.* (1) Individuals inquiring to determine whether a system of records contains records pertaining to them shall be promptly advised whether the system contains records pertaining to them unless (i) the records were compiled in reasonable anticipation of a civil action or proceeding or (ii) the system of records is one which has been excepted from the notification provisions of the Privacy Act by rulemaking (§ 2.79).

(2) If the records were compiled in reasonable anticipation of a civil action or proceeding or the system of records is one which has been excepted from the notification provisions of the Privacy Act by rulemaking, the individuals will be promptly notified that they are not entitled to notification of whether the system contains records pertaining to them.

(b) *Authority to deny requests.* A decision to deny a request for notification of the existence of records shall be made by the system manager responsible for the system of records concerning which inquiry has been made and shall be concurred in by the bureau Privacy Act officer for the bureau which maintains the system, provided, however that the head of a bureau may, in writing, require (1) that the decision be made by the bureau Privacy Act officer and/or (2) that the bureau head's own concurrence in the decision be obtained.

(c) *Form of decision.* (1) No particular form is required for a decision informing individuals whether a system of records contains records pertaining to them.

(2) A decision declining to inform an individual whether or not a system of records contains records pertaining to him or her shall be in writing and shall:

(i) State the basis for denial of the request.

(ii) Advise the individual that an appeal of the declination may be made to the Assistant Secretary—Policy, Budget and Administration pursuant to § 2.65 by writing to the Privacy Act Officer, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, Washington, DC 20240.

(iii) State that the appeal must be received by the foregoing official within twenty (20) working days of the date of the decision.

(3) If the decision declining a request for notification of the existence of records involves Department employee records which fall under the jurisdiction of the Office of Personnel Management, the individual shall be informed in a written response which shall:

(i) State the reasons for the denial.

(ii) Include the name, position title, and address of the official responsible for the denial.

(iii) Advise the individual that an appeal of the declination may be made only to the Assistant Director for Workforce Information, Personnel Systems Oversight Group, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

(4) Copies of decisions declining a request for notification of the existence of records made pursuant to paragraphs (c)(2) and (c)(3) of this section shall be provided to the Departmental and Bureau Privacy Act Officers.

[48 FR 56584, Dec. 22, 1983, as amended at 53 FR 3749, Feb. 9, 1988]

§ 2.237 Requests for access to records.

The Privacy Act permits individuals, upon request, to gain access to their records or to any information pertaining to them which is contained in a system and to review the records and have a copy made of all or any portion thereof in a form comprehensive to them. 5 U.S.C. 552a(d)(1). A request for access shall be submitted in accordance with the procedures in this subpart.

[48 FR 56584, Dec. 22, 1983]

§ 2.238 Requests for access to records: Submission.

(a) *Submission of requests.* (1)(i) Requests for access to records shall be submitted to the system manager having responsibility for the system in which the records are maintained unless the system notice describing the system prescribes or permits submission to some other official or officials.

(ii) If a system notice describing a system requires individuals to contact more than two officials concerning access to records in the system, individuals desiring to request access to records pertaining to them may contact the system manager for assistance in determining which official is most likely to be in custody of records pertaining to that individual.

(2) Individuals desiring access to records maintained in two or more separate systems shall submit a separate request for access to the records in each system.

(b) *Form of request.* (1) A request for access to records subject to the Privacy Act shall be in writing.

(2) To insure expeditious handling, the request shall be prominently marked, both on the envelope and on the face of the request, with the legend ''PRIVACY ACT REQUEST FOR ACCESS.''

(3) Requesters shall specify whether they seek all of the records contained in the system which relate to them or only some portion thereof. If only a portion of the records which relate to the individual are sought, the request shall reasonably describe the specific record or records sought.

(4) If the requester seeks to have copies of the requested records made, the request shall state the maximum amount of copying fees which the requester is willing to pay. A request which does not state the amount of fees the requester is willing to pay will be treated as a request to inspect the requested records. Requesters are further notified that under § 2.64(d) the failure to state willingness to pay fees as high as are anticipated by the Department will delay processing of a request.

(5) The request shall supply such identifying information, if any, as is called for in the system notice describing the system.

(6) Requests failing to meet the requirements of this paragraph shall be returned to the requester with a written notice advising the requester of the deficiency in the request.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56585, Dec. 22, 1983]

§ 2.239 Requests for access to records: Initial decision.

(a) *Decisions on requests.* A request made under this subpart for access to a record shall be granted promptly unless (1) the record was compiled in reasonable anticipation of a civil action or proceeding or (2) the record is contained in a system of records which has been excepted from the access provisions of the Privacy Act by rulemaking (§ 2.79).

(b) *Authority to deny requests.* A decision to deny a request for access under this subpart shall be made by the system manager responsible for the system of records in which the requested record is located and shall be concurred in by the bureau Privacy Act officer for the bureau which maintains the system, provided, however, that the head of a bureau may, in writing, require (1) that the decision be made by the bureau Privacy Act officer and/or (2) that the bureau head's own concurrence in the decision be obtained.

(c) *Form of decision.* (1) No particular form is required for a decision granting access to a record. The decision shall, however, advise the individual requesting the record as to where and when the record is available for inspection or, as the case may be, where and when copies will be available. If fees are due under § 2.64(d), the individual requesting the record shall also be notified of the amount of fees due or, if the exact amount has not been determined, the approximate amount of fees due.

(2) A decision denying a request for access, in whole or part, shall be in writing and shall:

(i) State the basis for denial of the request.

(ii) Contain a statement that the denial may be appealed to the Assistant Secretary—Policy, Budget and Administration pursuant to § 2.65 by writing to the Privacy Act Officer, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, Washington, DC 20240.

(iii) State that the appeal must be received by the foregoing official within twenty (20) working days of the date of the decision.

(3) If the decision denying a request for access involves Department employee records which fall under the jurisdiction of the Office of Personnel Management, the individual shall be informed in a written response which shall:

(i) State the reasons for the denial.

(ii) Include the name, position title, and address of the official responsible for the denial.

(iii) Advise the individual that an appeal of the denial may be made only to the Assistant Director for Workforce Information, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

(4) Copies of decisions denying requests for access made pursuant to paragraphs (c)(2) and (c)(3) of this section will be provided to the Departmental and Bureau Privacy Act Officers.

(d) *Fees*. (1) No fees may be charged for the cost of searching for or reviewing a record in response to a request made under § 2.63.

(2) Fees for copying a record in response to a request made under § 2.63 shall be charged in accordance with the schedule of charges contained in Appendix A to this part, unless the official responsible for processing the request determines that reduction or waiver of fees is appropriate.

(3) Where it is anticipated that fees chargeable in connection with a request will exceed the amount the person submitting the request has indicated a willingness to pay, the official processing the request shall notify the requester and shall not complete processing of the request until the requester has agreed, in writing, to pay fees as high as are anticipated.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56585, Dec. 22, 1983; 53 FR 3749, Feb. 9, 1988]

§ 2.240 Requests for notification of existence of records and for access to records: Appeals.

(a) *Right of appeal*. Except for appeals pertaining to Office of Personnel Management records, individuals who have been notified that they are not entitled to notification of whether a system of records contains records pertaining to them or have been denied access, in whole or part, to a requested record may appeal to the Assistant Secretary—Policy, Budget and Administration.

(b) *Time for appeal*. (1) An appeal must be received by the Privacy Act Officer no later than twenty (20) working days after the date of the initial decision on a request.

(2) The Assistant Secretary—Policy, Budget and Administration may, for good cause shown, extend the time for submission of an appeal if a written request for additional time is received within twenty (20) working days of the date of the initial decision on the request.

(c) *Form of appeal*. (1) An appeal shall be in writing and shall attach copies of the initial request and the decision on the request.

(2) The appeal shall contain a brief statement of the reasons why the appellant believes the decision on the initial request to have been in error.

(3) The appeal shall be addressed to Privacy Act Officer, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, Washington, DC 20240.

(d) *Action on appeals*. (1) Appeals from decisions on initial requests made pursuant to §§ 2.61 and 2.63 shall be decided for the Department by the Assistant Secretary—Policy, Budget and Administration or an official designated by the Assistant Secretary after consultation with the Solicitor.

(2) The decision on an appeal shall be in writing and shall state the basis for the decision.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56585, Dec. 22, 1983; 53 FR 3749, Feb. 9, 1988]

§ 2.241 Requests for access to records: Special situations.

(a) *Medical records*. (1) Medical records shall be disclosed to the individual to whom they pertain unless it is determined, in consultation with a medical doctor, that disclosure should be made to a medical doctor of the individual's choosing.

(2) If it is determined that disclosure of medical records directly to the individual to whom they pertain could

have an adverse effect on that individual, the individual may designate a medical doctor to receive the records and the records will be disclosed to that doctor.

(b) *Inspection in presence of third party*. (1) Individuals wishing to inspect records pertaining to them which have been opened for their inspection may, during the inspection, be accompanied by a person of their own choosing.

(2) When such a procedure is deemed appropriate, individuals to whom the records pertain may be required to furnish a written statement authorizing discussion of their records in the accompanying person's presence.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56585, Dec. 22, 1983]

§§ 2.242–2.244 [Reserved]

§ 2.245 Amendment of records.

The Privacy Act permits individuals to request amendment of records pertaining to them if they believe the records are not accurate, relevant, timely or complete. 5 U.S.C. 552a(d)(2). A request for amendment of a record shall be submitted in accordance with the procedures in this subpart.

[48 FR 56585, Dec. 22, 1983]

§ 2.246 Petitions for amendment: Submission and form.

(a) *Submission of petitions for amendment*. (1) A request for amendment of a record shall be submitted to the system manager for the system of records containing the record unless the system notice describing the system prescribes or permits submission to a different official or officials. If an individual wishes to request amendment of records located in more than one system, a separate petition must be submitted to each system manager.

(2) A petition for amendment of a record may be submitted only if the individual submitting the petition has previously requested and been granted access to the record and has inspected or been given a copy of the record.

(b) *Form of petition*. (1) A petition for amendment shall be in writing and shall specifically identify the record for which amendment is sought.

(2) The petition shall state, in detail, the reasons why the petitioner believes the record, or the objectionable portion thereof, is not accurate, relevant, timely or complete. Copies of documents or evidence relied upon in support of these reasons shall be submitted with the petition.

(3) The petition shall state, specifically and in detail, the changes sought in the record. If the changes involve rewriting the record or portions thereof or involve adding new language to the record, the petition shall propose specific language to implement the changes.

[48 FR 56585, Dec. 22, 1983]

§ 2.247 Petitions for amendment: Processing and initial decision.

(a) *Decisions on petitions*. In reviewing a record in response to a petition for amendment, the accuracy, relevance, timeliness and completeness of the record shall be assessed against the criteria set out in § 2.48. In addition, personnel records shall be assessed against the criteria for determining record quality published in the Federal Personnel Manual and the Departmental Manual addition thereto.

(b) *Authority to decide*. An initial decision on a petition for amendment may be made only by the system manager responsible for the system of records containing the challenged record. If the system manager declines to amend the record as requested, the bureau Privacy Act officer for the bureau which maintains the system must concur in the decision, provided, however, that the head of a bureau may, in writing, require (1) that the decision be made by the bureau Privacy Act officer and/or (2) that the bureau head's own concurrence in the decision be obtained.

(c) *Acknowledgement of receipt*. Unless processing of a petition is completed within ten (10) working days, the receipt of the petition for amendment shall be acknowledged in writing by the system manager to whom it is directed.

(d) *Inadequate petitions*. (1) If a petition does not meet the requirements of § 2.71, the petitioner shall be so advised and shall be told what additional information must be submitted to meet the requirements of § 2.71.

(2) If the petitioner fails to submit the additional information within a

reasonable time, the petition may be rejected. The rejection shall be in writing and shall meet the requirements of paragraph (e) of this section.

(e) *Form of decision.* (1) A decision on a petition for amendment shall be in writing and shall state concisely the basis for the decision.

(2) If the petition for amendment is rejected, in whole or part, the petitioner shall be informed in a written response which shall:

(i) State concisely the basis for the decision.

(ii) Advise the petitioner that the rejection may be appealed to the Assistant Secretary—Policy, Budget and Administration by writing to the Privacy Act Officer, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, Washington, DC 20240.

(iii) State that the appeal must be received by the foregoing official within twenty (20) working days of the decision.

(3) If the petition for amendment involves Department employee records which fall under the jurisdiction of the Office of Personnel Management and is rejected, in whole or part, the petitioner shall be informed in a written response which shall:

(i) State concisely the basis for the decision.

(ii) Advise the petitioner that an appeal of the rejection may be made pursuant to 5 CFR 297.306 only to the Assistant Director for Workforce Information, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

(4) Copies of rejections of petitions for amendment made pursuant to paragraphs (e)(2) and (e)(3) of this section will be provided to the Departmental and Bureau Privacy Act Officers.

(f) *Implementation of initial decision.* If a petition for amendment is accepted, in whole or part, the bureau maintaining the record shall:

(1) Correct the record accordingly and,

(2) Where an accounting of disclosures has been made pursuant to § 2.57, advise all previous recipients of the record that the correction was made and the substance of the correction.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56585, Dec. 22, 1983; 53 FR 3750, Feb. 9, 1988]

§ 2.248 Petitions for amendments: Time limits for processing.

(a) *Acknowledgement of receipt.* The acknowledgement of receipt of a petition required by § 2.72(c) shall be dispatched not later than ten (10) working days after receipt of the petition by the system manager responsible for the system containing the challenged record, unless a decision on the petition has been previously dispatched.

(b) *Decision on petition.* A petition for amendment shall be processed promptly. A determination whether to accept or reject the petition for amendment shall be made within thirty (30) working days after receipt of the petition by the system manager responsible for the system containing the challenged record.

(c) *Suspension of time limit.* The thirty (30) day time limit for a decision on a petition shall be suspended if it is necessary to notify the petitioner, pursuant to § 2.72(d), that additional information in support of the petition is required. Running of the thirty (30) day time limit shall resume on receipt of the additional information by the system manager responsible for the system containing the challenged record.

(d) *Extensions of time.* (1) The thirty (30) day time limit for a decision on a petition may be extended if the official responsible for making a decision on the petition determines that an extension is necessary for one of the following reasons:

(i) A decision on the petition requires analysis of voluminous record or records;

(ii) Some or all of the challenged records must be collected from facilities other than the facility at which the official responsible for making the decision is located.

(iii) Some or all of the challenged records are of concern to another bureau of the Department or another agency of the Federal Government whose assistance and views are being sought in processing the request.

(2) If the official responsible for making a decision on the petition determines that an extension is necessary, the official shall promptly inform the petitioner of the extension and the date on which a decision is expected to be dispatched.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56586, Dec. 22, 1983; 53 FR 3750, Feb. 9, 1988]

§ 2.249 Petitions for amendment: Appeals.

(a) *Right of appeal.* Except for appeals pertaining to Office of Personnel Management records, where a petition for amendment has been rejected in whole or in part, the individual submitting the petition may appeal the denial to the Assistant Secretary—Policy, Budget and Administration.

(b) *Time for appeal.* (1) An appeal must be received no later than twenty (20) working days after the date of the decision on a petition.

(2) The Assistant Secretary—Policy, Budget and Administration may, for good cause shown, extend the time for submission of an appeal if a written request for additional time is received within twenty (20) working days of the date of the decision on a petition.

(c) *Form of appeal.* (1) An appeal shall be in writing and shall attach copies of the initial petition and the decision on that petition.

(2) The appeal shall contain a brief statement of the reasons why the appellant believes the decision on the petition to have been in error.

(3) The appeal shall be addressed to Privacy Act Officer, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, Washington, DC 20240.

[40 FR 44505, Sept. 26, 1975, as amended at 47 FR 38328, Aug. 31, 1982; 53 FR 3750, Feb. 9, 1988]

§ 2.250 Petitions for amendment: Action on appeals.

(a) *Authority.* Appeals from decisions on initial petitions for amendment shall be decided for the Department by the Assistant Secretary—Policy, Budget and Administration or an official designated by the Assistant Secretary, after consultation with the Solicitor.

(b) *Time limit.* (1) A final determination on any appeal shall be made within thirty (30) working days after receipt of the appeal.

(2) The thirty (30) day period for decision on an appeal may be extended, for good cause shown, by the Secretary of the Interior. If the thirty (30) day period is extended, the individual submitting the appeal shall be notified of the extension and of the date on which a determination on the appeal is expected to be dispatched.

(c) *Form of decision.* (1) The final determination on an appeal shall be in writing and shall state the basis for the determination.

(2) If the determination upholds, in whole or part, the initial decision rejecting the petition for amendment, the determination shall also advise the individual submitting the appeal:

(i) Of his or her right to file a concise statement of the reasons for disagreeing with the decision of the agency;

(ii) Of the procedure established by § 2.77 for the filing of the statement of disagreement;

(iii) That the statement which is filed will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Department, a brief statement by the Department summarizing its reasons for refusing to amend the record;

(iv) That prior recipients of the challenged record will be provided a copy of any statement of dispute to the extent that an accounting of disclosure was maintained; and

(v) Of his or her right to seek judicial review of the Department's refusal to amend the record.

(3) If the determination reverses, in whole or in part, the initial decision rejecting the petition for amendment, the system manager responsible for the system containing the challenged record shall be directed to:

(i) Amend the challenged record accordingly; and

(ii) If an accounting of disclosures has been made, advise all previous recipients of the record of the amendment and its substance.

[40 FR 44505, Sept. 26, 1975, as amended at 48 FR 56586, Dec. 22, 1983; 53 FR 3750, Feb. 9, 1988]

§ 2.251 [Reserved]

§ 2.252 Statements of disagreement.

(a) *Filing of statement*. If the determination of the Assistant Secretary—Policy, Budget and Administration under § 2.75 rejects in whole or part, a petition for amendment, the individual submitting the petition may file with the system manager for the system containing the challenged record a concise written statement setting forth the reasons for disagreement with the determination of the Department.

(b) *Disclosure of statements*. In any disclosure of a record containing information about which an individual has filed a statement of disagreement under this section which occurs after the filing of the statement, the disputed portion of the record will be clearly noted and the recipient shall be provided copies of the statement of disagreement. If appropriate, a concise statement of the reasons of the Department for not making the requested amendments may also be provided to the recipient.

(c) *Maintenance of statements*. System managers shall develop procedures to assure that statements of disagreement filed with them shall be maintained in such a way as to assure dissemination of the statements to recipients of the records to which the statements pertain.

[48 FR 56586, Dec. 22, 1983]

§ 2.253 [Reserved]

§ 2.254 Exemptions.

(a) *Criminal law enforcement records exempt under 5 U.S.C. 552a(j)(2)*. Pursuant to 5 U.S.C 552a(j)(2) the following systems of records have been exempted from all of the provisions of 5 U.S.C. 552a and the regulations in the subpart except paragraphs (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i) of 5 U.S.C. 552a and the portions of the regulations in this subpart implementing these paragraphs:

(1) Investigative Case File System, Interior/FWS–20.

(2) Law Enforcement Services System, Interior/BIA–18.

(3) Law Enforcement Statistical Reporting System, Interior/NPS–19.

(4) Investigative Records, Interior/Office of Inspector General—2.

(b) *Law enforcement records exempt under 5 U.S.C. 552a(k)(2)*. Pursuant to 5 U.S.C. 552a(k)(2), the following systems of records have been exempted from paragraphs (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of 5 U.S.C. 552a and the provisions of the regulations in this subpart implementing these paragraphs:

(1) Investigative Records, Interior/Office of Inspector General—2.

(2) Permits System, Interior/FWS–21.

(3) Criminal Case Investigation System, Interior/BLM–18.

(4) Civil Trespass Case Investigations, Interior/BLM–19.

(5) Employee Conduct Investigations, Interior/BLM–20.

(6)–(7) [Reserved]

(8) Employee Financial Irregularities, Interior/NPS–17.

(9) Trespass Cases, Interior/Reclamation–37.

(10) Litigation, Appeal and Case Files System, Interior/Office of the Solicitor–1 to the extent that it consists of investigatory material compiled for law enforcement purposes.

(11) Endangered Species Licenses System, Interior/FWS–19.

(12) Investigative Case File, Interior/FWS–20.

(13) Timber Cutting and Trespass Claims Files, Interior/BIA–24.

(14) Debarment and Suspension Program, DOI–11.

(c) Investigatory records exempt under 5 U.S.C. 552a(k)(5), the following systems of records have been exempted from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of 5 U.S.C. 552a and the provisions of the regulations in this subpart implementing these subsections:

(1) [Reserved]

(2) National Research Council Grants Program, Interior/GS–9

(3) Committee Management Files, Interior/Office of the Secretary—68.

(4) Debarment and Suspension Program, DOI–11.

(5 U.S.C. 301, 552a and 5 U.S.C. app. sections 9(a)(1)(D) and 9(b); 5 U.S.C. 301, 552, and 552a; 31 U.S.C. 483a; and 43 U.S.C. 1460)

[40 FR 44505, Sept. 26, 1975, as amended at 40 FR 54790, Nov. 26, 1975; 47 FR 38328, Aug. 31, 1982; 48 FR 37412, Aug. 18, 1983; 48 FR 56586, Dec. 22, 1983; 49 FR 6907, Feb. 24, 1984; 79 FR 49014, Aug. 19, 2014]

EFFECTIVE DATE NOTE: At 79 FR 51917, Sept. 2, 2014, § 2.254 was amended by revising paragraph (a) introductory text, adding paragraph (a)(5), revising paragraph (b) introductory text, and adding paragraph (b)(15), effective Oct. 2, 2014. For the convenience of the user, the added and revised text is set forth as follows:

§ 2.254 Exemptions.

(a) *Criminal law enforcement records exempt under 5 U.S.C. 552a(j)(2).* Pursuant to 5 U.S.C. 552a(j)(2) the following systems of records have been exempted from all of the provisions of 5 U.S.C. 552a and the regulations in the subpart except paragraphs (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) of 5 U.S.C. 552a and the portions of the regulations in this subpart implementing these paragraphs:

* * * * *

(5) Incident Management, Analysis and Reporting System, DOI–10.

(b) *Law enforcement records exempt under 5 U.S.C. 552a(k)(2).* Pursuant to 5 U.S.C. 552a(k)(2), the following systems of records have been exempted from paragraphs (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of 5 U.S.C. 552a and the provisions of the regulations in this subpart implementing these paragraphs:

* * * * *

(15) Incident Management, Analysis and Reporting System, DOI–10.

* * * * *

Subpart L—Legal Process: Testimony by Employees and Production of Records

SOURCE: 65 FR 46369, July 28, 2000, unless otherwise noted. Redesignated at 67 FR 64530, Oct. 21, 2002. Redesignated at 77 FR 76902, Dec. 31, 2012; 78 FR 6216, Jan. 30, 2013.

GENERAL INFORMATION

§ 2.280 What does this subpart cover?

(a) This subpart describes how the Department of the Interior (including all its bureaus and offices) responds to requests or subpoenas for:

(1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;

(2) Testimony by employees in Federal court civil proceedings in which the United States is not a party concerning information acquired while performing official duties or because of an employee's official status;

(3) Testimony by employees in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest;

(4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.

(b) In this subpart, ''employee'' means a current or former Department employee, including a contract or special government employee.

(c) This subpart does not apply to:

(1) Congressional requests or subpoenas for testimony or records;

(2) Federal court civil proceedings in which the United States is a party;

(3) Federal administrative proceedings;

(4) Federal, State and Tribal criminal court proceedings;

(5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Department. *See* 5 CFR §§ 2635.702(b), 2635.807 (b).

(6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by § 2.90.

(d) This subpart does not affect the rights of any individual or the procedures for obtaining records under the

Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Department FOIA and Privacy Act regulations are found at 43 CFR part 2, subparts B and D.

(e) Nothing in this subpart is intended to impede the appropriate disclosure under applicable laws of Department information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to create any enforceable right or benefit against the United States.

§ 2.281 What is the Department's policy on granting requests for employee testimony or Department records?

(a) Except for proceedings covered by § 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the Department will consider whether to allow testimony or production of records under this subpart. The Department's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Department employee may testify or produce records in any proceeding to which this subpart applies unless authorized by the Department under §§ 2.80 through 2.90 *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

RESPONSIBILITIES OF REQUESTERS

§ 2.282 How can I obtain employee testimony or Department records?

(a) To obtain employee testimony, you must submit:

(1) A written request (hereafter a ''*Touhy* Request;'' *see* § 2.84 and *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a check for costs to the Department of the Interior, in accordance with § 2.85, if your *Touhy* Request is granted.

(b) To obtain official Department records, you must submit:

(1) A *Touhy* Request; and

(2) A Statement that you agree to pay the costs of duplication in accordance with 43 CFR part 2, appendix A, if your *Touhy* Request is granted.

(c) You must send your *Touhy* Request to:

(1) The employee's office address;

(2) The official in charge of the employee's bureau, division, office or agency; and

(3) The appropriate unit of the Solicitor's Office.

(d) To obtain employee testimony or records of the Office of Inspector General, you must send your *Touhy* Request to the General Counsel for the Office of Inspector General.

(e) 43 CFR part 2, appendix B contains a list of the addresses of the Department's bureaus and offices and the units of the Solicitor's Office. The General Counsel for the Inspector General is located at the address for the Office of the Inspector General. If you do not know the employee's address, you may obtain it from the employee's bureau or office.

§ 2.283 If I serve a subpoena *duces tecum*, must I also submit a *Touhy* request?

Yes. If you serve a subpoena for employee testimony, you also must submit a request under *United States ex rel. Touhy* v. *Regan*, 340 U.S. 462 (1951)? If you serve a subpoena *duces tecum* for records in the possession of the Department, you also must submit a *Touhy* Request.

§ 2.284 What information must I put in my *Touhy* Request?

Your *Touhy* Request must:

(a) Identify the employee or record;

(b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;

(c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;

(d) Show that the desired testimony or records are not reasonably available from any other source;

(e) Show that no record could be provided and used in lieu of employee testimony;

(f) Provide the substance of the testimony expected of the employee; and

(g) Explain why you believe your *Touhy* Request complies with § 2.88.

§ 2.285 How much will I be charged?

We will charge you the costs, including travel expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record production under 43 CFR part 2, appendix A. Costs must be paid by check or money order payable to the Department of the Interior.

§ 2.286 Can I get an authenticated copy of a Department record?

Yes. We may provide an authenticated copy of a Department record, for purposes of admissibility under Federal, State or Tribal law. We will do this only if the record has been officially released or would otherwise be released under § 2.13 or this subpart.

RESPONSIBILITY OF THE DEPARTMENT

§ 2.287 How will the Department process my *Touhy* Request?

(a) The appropriate Department official will decide whether to grant or deny your *Touhy* Request. Our Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, may negotiate with you or your attorney to refine or limit both the timing and content of your *Touhy* Request. When necessary, the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit our decision to allow employee testimony to the scope of your *Touhy* Request.

(c) If you fail to follow the requirements of this Subpart, we will not allow the testimony or produce the records.

(d) If your *Touhy* Request is complete, we will consider the request under § 2.88.

§ 2.288 What criteria will the Department consider in responding to my *Touhy* Request?

In deciding whether to grant your *Touhy* Request, the appropriate Department official will consider:

(a) Your ability to obtain the testimony or records from another source;

(b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and

(c) Our ability to:

(1) Conduct our official business unimpeded;

(2) Maintain impartiality in conducting our business;

(3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;

(4) Avoid spending public employee's time for private purposes;

(5) Avoid the negative cumulative effect of granting similar requests;

(6) Ensure that privileged or protected matters remain confidential; and

(7) Avoid undue burden on us.

RESPONSIBILITIES OF EMPLOYEES

§ 2.289 What must I, as an employee, do upon receiving a request?

(a) If you receive a request or subpoena that does not include a *Touhy* Request, you must immediately notify your supervisor and the Solicitor's Office, or the General Counsel of the Office of the Inspector General, as applicable, for assistance in issuing the proper response.

(b) If you receive a *Touhy* Request, you must promptly notify your supervisor and forward the request to the head of your bureau, division or office. After consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the *Touhy* Request under § 2.88.

(c) All decisions granting or denying a *Touhy* Request must be in writing. The official in charge must ask the applicable unit of the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Department record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

(1) Consult your delegated authority to determine if you can grant a request for authentication of records; and

(2) Consult the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

§ 2.290 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any judicial or administrative proceeding in which the United States is a party or has a direct and substantial interest. This procedure means:

(1) You must obtain the written approval of your Deputy Ethics Official;

(2) You must be in an approved leave status if you testify during duty hours; and

(3) You must state for the record that you are appearing as a private individual and that your testimony does not represent the official views of the Department.

(b) If you testify as an expert witness on a matter outside the scope of your official duties, and which is not covered by paragraph (a) of this section, you must comply with 5 CFR 2635.802 and 5 CFR 3501.105.

APPENDIX A TO PART 2—FEE SCHEDULE

Types of Records	Fee
(1) Physical records:	
Pages no larger than 8.5 × 14 inches, when reproduced by standard office copying machines or scanned into an electronic format	$.15 per page ($.30 for double-sided copying).
Color copies of pages no larger than 8.5 × 11 inches	$.90 per page.
Pages larger than 8.5 × 14 inches	Direct cost to DOI.
Color copies of pages no larger than 11 × 17 inches	$1.50 per page.
Photographs and records requiring special handling (for example, because of age, size, or format).	Direct cost to DOI.
(2) Electronic records:	
Charges for services related to processing requests for electronic records	Direct cost to DOI.
(3) Certification	Fee.
Each certificate of verification attached to authenticate copies of records	$.25
(4) Postage:	
Charges that exceed the cost of first class postage, such as express mail or overnight delivery	Postage or delivery charge.
(5) Other Services:	
Cost of special services or materials, other than those provided for by this fee schedule, when requester is notified of such costs in advance and agrees to pay them.	Direct cost to DOI.

[77 FR 76914, Dec. 31, 2012]

APPENDIX B TO PART 2—MINERAL LEASING ACT AND MINERAL LEASING ACT FOR ACQUIRED LANDS—SPECIAL RULES

(a) *Definitions.* As used in the section:

(1) *Exploration license* means a license issued by the Secretary of the Interior to conduct coal exploration operations on land subject to the Mineral Leasing Act, under 30 U.S.C. 201(b), or subject to the Mineral Leasing Act for Acquired Lands, under 30 U.S.C. 351–360.

(2) *Fair-market value of coal to be leased* means the minimum amount of a bid the Secretary is willing to accept in leasing coal within leasing tracts offered in general lease sales or reserved and offered for lease to public bodies, including Federal agencies, rural electric cooperatives, or non-profit corporations controlled by any of such entities, under 30 U.S.C. 201(a)(1) or 30 U.S.C. 351–360.

(3) *Information* means data, statistics, samples and other facts, whether analyzed or processed or not, pertaining to Federal coal resources.

(b) *Applicability*. This Appendix applies to the following categories of information:

(1) *Category A*. Information provided to or obtained by a bureau under 30 U.S.C. 201(b)(3) (and corresponding information under 30 U.S.C. 351–360) from the holder of an exploration license;

(2) *Category B*. Information acquired from commercial or other sources under service contract with United States Geological Survey (USGS) under 30 U.S.C. 208–1(b) (and corresponding information under 30 U.S.C. 351–360), and information developed by USGS under an exploratory program authorized by 30 U.S.C. 208–1 (and corresponding information under 30 U.S.C. 351–360);

(3) *Category C*. Information obtained from commercial sources which the commercial source acquired while not under contract with the United States Government;

(4) *Category D*. Information provided to the Secretary by a Federal department or agency under 30 U.S.C. 208–1(e) (and corresponding information under 30 U.S.C. 351–360); and

(5) *Category E*. The fair-market value of coal to be leased and comments received by the Secretary with respect to such value.

(c) *Availability of information*. Information obtained by the Department from various sources will be made available to the public as follows:

(1) *Category A—Information*. Category A information must not be disclosed to the public until after the areas to which the information pertains have been leased by the Department, or until the Secretary determines that release of the information to the public would not damage the competitive position of the holder of the exploration license, whichever comes first.

(2) *Category B—Information*. Category B information must not be withheld from the public; it will be made available by means of and at the time of open filing or publication by USGS.

(3) *Category C—Information*. To the extent Category C information is proprietary, such information must not be made available to the public until after the areas to which the information pertains have been leased by the Department.

(4) *Category D—Information*. To the extent Category D information is proprietary, the Department will withhold the information from the public for the length of time the department or agency providing the information agreed to when it obtained the information.

(5) *Category E—Information*. Category E information must not be made public until the lands to which the information pertains have been leased, or until the Secretary has determined that its release prior to the issuance of a lease is in the public interest.

[67 FR 64541, Oct. 21, 2002. Redesignated at 77 FR 76915, Dec. 31, 2012]

PART 3—PRESERVATION OF AMERICAN ANTIQUITIES

Sec.
3.1 Jurisdiction.
3.2 Limitation on permits granted.
3.3 Permits; to whom granted.
3.4 No exclusive permits granted.
3.5 Application.
3.6 Time limit of permits granted.
3.7 Permit to become void.
3.8 Applications referred for recommendation.
3.9 Form and reference of permit.
3.10 Reports.
3.11 Restoration of lands.
3.12 Termination.
3.13 Report of field officer.
3.14 Examinations by field officer.
3.15 Persons who may apprehend or cause to be arrested.
3.16 Seizure.
3.17 Preservation of collection.

AUTHORITY: Secs. 3, 4, 34 Stat. 225, as amended; 16 U.S.C. 432.

SOURCE: 19 FR 8838, Dec. 23, 1954, unless otherwise noted.

§3.1 Jurisdiction.

Jurisdiction over ruins, archeological sites, historic and prehistoric monuments and structures, objects of antiquity, historic landmarks, and other objects of historic and scientific interest, shall be exercised under the act by the respective Departments as follows:

(a) By the Secretary of Agriculture over lands within the exterior limits of forest reserves;

(b) By the Secretary of the Army over lands within the exterior limits of military reservations;

(c) By the Secretary of the Interior over all other lands owned or controlled by the Government of the United States, *Provided*, The Secretaries of the Army and Agriculture may by agreement cooperate with the Secretary of the Interior in the supervision of such monuments and objects covered by the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431–433), as may be located on lands near or adjacent to forest reserves and military reservations, respectively.

§ 3.2 Limitation on permits granted.

No permit for the removal of any ancient monument or structure which can be permanently preserved under the control of the United States in situ, and remain an object of interest, shall be granted.

§ 3.3 Permits; to whom granted.

Permits for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity will be granted, by the respective Secretaries having jurisdiction, to reputable museums, universities, colleges, or other recognized scientific or educational institutions, or to their duly authorized agents.

§ 3.4 No exclusive permits granted.

No exclusive permits shall be granted for a larger area than the applicant can reasonably be expected to explore fully and systematically within the time limit named in the permit.

§ 3.5 Application.

Each application for a permit should be filed with the Secretary having jurisdiction, and must be accompanied by a definite outline of the proposed work, indicating the name of the institution making the request, the date proposed for beginning the field work, the length of time proposed to be devoted to it, and the person who will have immediate charge of the work. The application must also contain an exact statement of the character of the work, whether examination, excavation, or gathering, and the public museum in which the collections made under the permit are to be permanently preserved. The application must be accompanied by a sketch plan or description of the particular site or area to be examined, excavated, or searched, so definite that it can be located on the map with reasonable accuracy.

§ 3.6 Time limit of permits granted.

No permit will be granted for a period of more than 3 years, but if the work has been diligently prosecuted under the permit, the time may be extended for proper cause upon application.

§ 3.7 Permit to become void.

Failure to begin work under a permit within 6 months after it is granted, or failure to diligently prosecute such work after it has been begun, shall make the permit void without any order or proceeding by the Secretary having jurisdiction.

§ 3.8 Applications referred for recommendation.

Applications for permits shall be referred to the Smithsonian Institution for recommendation.

§ 3.9 Form and reference of permit.

Every permit shall be in writing and copies shall be transmitted to the Smithsonian Institution and the field officer in charge of the land involved. The permitee will be furnished with a copy of the regulations in this part.

§ 3.10 Reports.

At the close of each season's field work the permitee shall report in duplicate to the Smithsonian Institution, in such form as its secretary may prescribe, and shall prepare in duplicate a catalogue of the collections and of the photographs made during the season, indicating therein such material, if any, as may be available for exchange.

§ 3.11 Restoration of lands.

Institutions and persons receiving permits for excavation shall, after the completion of the work, restore the lands upon which they have worked to their customary condition, to the satisfaction of the field officer in charge.

§ 3.12 Termination.

All permits shall be terminable at the discretion of the Secretary having jurisdiction.

§ 3.13 Report of field officer.

The field officer in charge of land owned or controlled by the Government of the United States shall, from time to time, inquire and report as to the existence, on or near such lands, of ruins and archaeological sites, historic or prehistoric ruins or monuments, objects of antiquity, historic landmarks, historic and prehistoric structures, and

other objects of historic or scientific interest.

§ 3.14 Examinations by field officer.

The field officer in charge may at all times examine the permit of any person or institution claiming privileges granted in accordance with the act and this part, and may fully examine all work done under such permit.

§ 3.15 Persons who may apprehend or cause to be arrested.

All persons duly authorized by the Secretaries of Agriculture, Army and Interior may apprehend or cause to be arrested, as provided in the Act of February 6, 1905 (33 Stat. 700) any person or persons who appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity on lands under the supervision of the Secretaries of Agriculture, Army, and Interior, respectively.

§ 3.16 Seizure.

Any object of antiquity taken, or collection made, on lands owned or controlled by the United States, without a permit, as prescribed by the act and this part, or there taken or made, contrary to the terms of the permit, or contrary to the act and this part, may be seized wherever found and at any time, by the proper field officer or by any person duly authorized by the Secretary having jurisdiction, and disposed of as the Secretary shall determine, by deposit in the proper national depository or otherwise.

§ 3.17 Preservation of collection.

Every collection made under the authority of the act and of this part shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum, which is a depository of any collection made under the provisions of the act and this part, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

Subpart A—General; Office of Hearings and Appeals

Sec.

4.1 Scope of authority; applicable regulations.
4.2 Membership of appeals boards; decisions, functions of Chief Judges.
4.3 Representation before appeals boards.
4.4 Public records; locations of field offices.
4.5 Power of the Secretary and Director.

Subpart B—General Rules Relating to Procedures and Practice

4.20 Purpose.
4.21 General provisions.
4.22 Documents.
4.23 Transcript of hearings.
4.24 Basis of decision.
4.25 Oral argument.
4.26 Subpoena power and witness provisions generally.
4.27 Standards of conduct.
4.28 Interlocutory appeals.
4.29 Remands from courts.
4.30 Information required by forms.
4.31 Request for limiting disclosure of confidential information.

Subpart C [Reserved]

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

SCOPE OF SUBPART; DEFINITIONS

4.200 How to use this subpart.
4.201 Definitions.
4.202–4.308 [Reserved]

GENERAL RULES APPLICABLE TO PROCEEDINGS ON APPEAL BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

4.310 Documents.
4.311 Briefs on appeal.
4.312 Board decisions.
4.313 Amicus Curiae; intervention; joinder motions.
4.314 Exhaustion of administrative remedies.
4.315 Reconsideration of a Board decision.
4.316 Remands from courts.
4.317 Standards of conduct.
4.318 Scope of review.

APPEALS TO THE BOARD OF INDIAN APPEALS IN PROBATE MATTERS

4.320 Who may appeal a judge's decision or order?
4.321 How do I appeal a judge's decision or order?
4.322 What must an appeal contain?
4.323 Who receives service of the notice of appeal?
4.324 How is the record on appeal prepared?
4.325 How will the appeal be docketed?
4.326 What happens to the record after disposition?

APPEALS TO THE BOARD OF INDIAN APPEALS FROM ADMINISTRATIVE ACTIONS OF OFFICIALS OF THE BUREAU OF INDIAN AFFAIRS: ADMINISTRATIVE REVIEW IN OTHER INDIAN MATTERS NOT RELATING TO PROBATE PROCEEDINGS

4.330 Scope.
4.331 Who may appeal.
4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.
4.333 Service of notice of appeal.
4.334 Extensions of time.
4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.
4.336 Docketing.
4.337 Action by the Board.
4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.
4.339 Exceptions or comments regarding recommended decision by administrative law judge.
4.340 Disposition of the record.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

4.350 Authority and scope.
4.351 Commencement of the determination process.
4.352 Determination of administrative judge and notice thereof.
4.353 Record.
4.354 Reconsideration or rehearing.
4.355 Omitted compensation.
4.356 Appeals.
4.357 Guardians for minors and incompetents.

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

APPEALS PROCEDURES

Appeals Procedures; General

4.400 Definitions.
4.401 Documents.
4.402 Summary dismissal.
4.403 Finality of decision; reconsideration.
4.404 Consolidation.
4.405 Extensions of time.
4.406 Intervention; amicus curiae.
4.407 Motions.

APPEALS TO THE BOARD OF LAND APPEALS

4.410 Who may appeal.
4.411 Appeal; how taken, mandatory time limit.
4.412 Statement of reasons; statement of standing; reply briefs.
4.413 Service of notice of appeal.
4.414 Answers.

ACTIONS BY BOARD OF LAND APPEALS

4.415 Motion for a hearing on an appeal involving questions of fact.
4.416 Appeals of wildfire management decisions.

HEARINGS PROCEDURES

Hearings Procedures; General

4.420 Applicability of general rules.
4.421 Definitions.
4.422 Documents.
4.423 Subpoena power and witness provisions.

HEARINGS ON APPEALS INVOLVING QUESTIONS OF FACT

4.430 Prehearing conferences.
4.431 Fixing of place and date for hearing; notice.
4.432 Postponements.
4.433 Authority of the administrative law judge.
4.434 Conduct of hearing.
4.435 Evidence.
4.436 Reporter's fees.
4.437 Copies of transcript.
4.438 Action by administrative law judge.

CONTEST AND PROTEST PROCEEDINGS

4.450 Private contests and protests.
4.450–1 By whom private contest may be initiated.
4.450–2 Protests.
4.450–3 Initiation of contest.
4.450–4 Complaints.
4.450–5 Service.
4.450–6 Answer to complaint.
4.450–7 Action by manager.
4.450–8 Amendment of answer.
4.451 Government contests.
4.451–1 How initiated.
4.451–2 Proceedings in Government contests.
4.452 Proceedings before the administrative law judge.
4.452–1 Prehearing conferences.
4.452–2 Notice of hearing.
4.452–3 Postponements.
4.452–4 Authority of administrative law judge.

4.452–5 Conduct of hearing.
4.452–6 Evidence.
4.452–7 Reporter's fees.
4.452–8 Findings and conclusions; decision by administrative law judge.
4.452–9 Appeal to Board.

GRAZING PROCEDURES (INSIDE AND OUTSIDE GRAZING DISTRICTS)

4.470 How to appeal a final BLM grazing decision to an administrative law judge.
4.471 How to petition for a stay of a final BLM grazing decision.
4.472 Action on an appeal and petition for a stay.
4.473 Time and place of hearing; notice; intervenors.
4.474 Authority of administrative law judge.
4.475 Service.
4.476 Conduct of hearing; reporter's fees; transcript.
4.477 Findings and conclusions; decision by administrative law judge.
4.478 Appeals to the Board of Land Appeals; judicial review.
4.479 Effectiveness of decision during appeal.
4.480 Conditions of decision action.

Subpart F—Implementation of the Equal Access to Justice Act in Agency Proceedings

GENERAL PROVISIONS

4.601 What is the purpose of this subpart?
4.602 What definitions apply to this subpart?
4.603 What proceedings are covered by this subpart?
4.604 When am I eligible for an award?
4.605 Under what circumstances may I receive an award?
4.606 What fees and expenses may be allowed?

INFORMATION REQUIRED FROM APPLICANTS

4.610 What information must my application for an award contain?
4.611 What information must I include in my net worth exhibit?
4.612 What documentation of fees and expenses must I provide?
4.613 When may I file an application for an award?

PROCEDURES FOR CONSIDERING APPLICATIONS

4.620 How must I file and serve documents?
4.621 When may the Department or other agency file an answer?
4.622 When may I file a reply?
4.623 When may other parties file comments?
4.624 When may further proceedings be held?
4.625 How will my application be decided?
4.626 How will my appeal from a decision be handled?
4.627 May I seek judicial review of a final decision?
4.628 How will I obtain payment of an award?

Subpart G—Special Rules Applicable to Other Appeals and Hearings

4.700 Who may appeal.
4.701 Notice of appeal.
4.702 Transmittal of appeal file.
4.703 Pleadings.
4.704 Decisions on appeals.

Subpart H [Reserved]

Subpart I—Special Procedural Rules Applicable to Practice and Procedure for Hearings, Decisions, and Administrative Review Under Part 17 of This Title—Nondiscrimination in Federally Assisted Programs of the Department of the Interior—Effectuation of Title VI of the Civil Rights Act of 1964

GENERAL

4.800 Scope and construction of rules.
4.801 Suspension of rules.
4.802 Definitions.
4.803 Computation of time.
4.804 Extensions of time.
4.805 Reduction of time to file documents.

DESIGNATION AND RESPONSIBILITIES OF ADMINISTRATIVE LAW JUDGE

4.806 Designation.
4.807 Authority and responsibilities.

APPEARANCE AND PRACTICE

4.808 Participation by a party.
4.809 Determination of parties.
4.810 Complainants not parties.
4.811 Determination and participation of amici.

FORM AND FILING OF DOCUMENTS

4.812 Form.
4.813 Filing and service.
4.814 Certificate of service.

PROCEDURES

4.815 How proceedings are commenced.
4.816 Notice of hearing and response thereto.
4.817 Notice of opportunity to request a hearing and response thereto.
4.818 Answer.
4.819 Amendment of notice or answer.
4.820 Consolidated or joint hearings.
4.821 Motions.
4.822 Disposition of motions.
4.823 Interlocutory appeals.
4.824 Exhibits.

4.825 Admissions as to facts and documents.
4.826 Discovery.
4.827 Depositions.
4.828 Use of depositions at hearing.
4.829 Interrogatories to parties.
4.830 Production of documents and things and entry upon land for inspection and other purposes.
4.831 Sanctions.
4.832 Consultation and advice.

PREHEARING

4.833 Prehearing conferences.

HEARING

4.834 Purpose.
4.835 Evidence.
4.836 Official notice.
4.837 Testimony.
4.838 Objections.
4.839 Exceptions.
4.840 Offer of proof.
4.841 Official transcript.

POSTHEARING PROCEDURES

4.842 Proposed findings of fact and conclusions of law.
4.843 Record for decision.
4.844 Notification of right to file exceptions.
4.845 Final review by Secretary.

Subpart J—Special Rules Applicable to Appeals Concerning Federal Oil and Gas Royalties and Related Matters

4.901 What is the purpose of this subpart?
4.902 What appeals are subject to this subpart?
4.903 What definitions apply to this subpart?
4.904 When does my appeal commence and end?
4.905 What if a due date falls on a day the Department or relevant office is not open for business?
4.906 What if the Department does not issue a decision by the date my appeal ends?
4.907 What if an IBLA decision requires MMS or a delegated State to recalculate royalties or other payments?
4.908 What is the administrative record for my appeal if it is deemed decided?
4.909 How do I request an extension of time?

Subpart K [Reserved]

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

GENERAL PROVISIONS

4.1100 Definitions.
4.1101 Jurisdiction of the Board.
4.1102 Construction.
4.1103 Eligibility to practice.
4.1104 General rules relating to procedure and practice.
4.1105 Parties.
4.1106 Hearing sites.
4.1107 Filing of documents.
4.1108 Form of documents.
4.1109 Service.
4.1110 Intervention.
4.1111 Voluntary dismissal.
4.1112 Motions.
4.1113 Consolidation of proceedings.
4.1114 Advancement of proceedings.
4.1115 Waiver of right to hearing.
4.1116 Status of notices of violation and orders of cessation pending review by the Office of Hearings and Appeals.
4.1117 Reconsideration.

EVIDENTIARY HEARINGS

4.1120 Presiding officers.
4.1121 Powers of administrative law judges.
4.1122 Conduct of administrative law judges.
4.1123 Notice of hearing.
4.1124 Certification of interlocutory ruling.
4.1125 Summary decision.
4.1126 Proposed findings of fact and conclusions of law.
4.1127 Initial orders and decisions.
4.1128 Effect of initial order or decision.
4.1129 Certification of record.

DISCOVERY

4.1130 Discovery methods.
4.1131 Time for discovery.
4.1132 Scope of discovery.
4.1133 Sequence and timing of discovery.
4.1134 Supplementation of responses.
4.1135 Motion to compel discovery.
4.1136 Failure to comply with orders compelling discovery.
4.1137 Depositions upon oral examination or upon written questions.
4.1138 Use of depositions.
4.1139 Written interrogatories to parties.
4.1140 Production of documents and things and entry upon land for inspection and other purposes.
4.1141 Admissions.

PETITIONS FOR REVIEW OF PROPOSED ASSESSMENTS OF CIVIL PENALTIES

4.1150 Who may file.
4.1151 Time for filing.
4.1152 Contents of petition; payment required.
4.1153 Answer.
4.1154 Review of waiver determination.
4.1155 Burdens of proof in civil penalty proceedings.
4.1156 Summary disposition.
4.1157 Determination by administrative law judge.
4.1158 Appeals.

REVIEW OF SECTION 521 NOTICES OF VIOLATION AND ORDERS OF CESSATION

4.1160 Scope.
4.1161 Who may file.
4.1162 Time for filing.
4.1163 Effect of failure to file.
4.1164 Contents of application.
4.1165 Answer.
4.1166 Contents of answer.
4.1167 Notice of hearing.
4.1168 Amendments to pleadings.
4.1169 Failure to state a claim.
4.1170 Related notices or orders.
4.1171 Burden of proof in review of section 521 notices or orders.

EXPEDITED REVIEW OF SECTION 521(a)(2) OR 521(a)(3) ORDERS OF CESSATION

4.1180 Purpose.
4.1181 Who may file.
4.1182 Where to file.
4.1183 Time for filing.
4.1184 Contents of application.
4.1185 Computation of time for decision.
4.1186 Waiver of the 30-day decision requirement.
4.1187 Procedure if 30-day decision requirement is not waived.

PROCEEDINGS FOR SUSPENSION OR REVOCATION OF PERMITS UNDER SECTION 521(a)(4) OF THE ACT

4.1190 Initiation of proceedings.
4.1191 Answer.
4.1192 Contents of answer.
4.1193 Notice of hearing.
4.1194 Burden of proof in suspension or revocation proceedings.
4.1195 Determination by the administrative law judge.
4.1196 Summary disposition.
4.1197 Appeals.

APPLICATIONS FOR REVIEW OF ALLEGED DISCRIMINATORY ACTS UNDER SECTION 703 OF THE ACT

4.1200 Filing of the application for review with the Office of Hearings and Appeals.
4.1201 Request for scheduling of a hearing.
4.1202 Response to request for the scheduling of a hearing.
4.1203 Application for temporary relief from alleged discriminatory acts.
4.1204 Determination by administrative law judge.
4.1205 Appeals.

APPLICATIONS FOR TEMPORARY RELIEF

4.1260 Scope.
4.1261 When to file.
4.1262 Where to file.
4.1263 Contents of application.
4.1264 Response to application.
4.1265 Determination on application concerning a notice of violation issued pursuant to section 521(a)(3) of the Act.
4.1266 Determination on application concerning an order of cessation.
4.1267 Appeals.

APPEALS TO THE BOARD FROM DECISIONS OR ORDERS OF ADMINISTRATIVE LAW JUDGES

4.1270 Petition for discretionary review of a proposed civil penalty.
4.1271 Notice of appeal.
4.1272 Interlocutory appeals.
4.1273 Briefs.
4.1274 Remand.
4.1275 Final decisions.

APPEALS TO THE BOARD FROM DECISIONS OF THE OFFICE OF SURFACE MINING

4.1280 Scope.
4.1281 Who may appeal.
4.1282 Appeals; how taken.
4.1283 Service.
4.1284 Answer.
4.1285 Summary dismissal.
4.1286 Motion for a hearing on an appeal involving issues of fact.

PETITIONS FOR AWARD OF COSTS AND EXPENSES UNDER SECTION 525(e) OF THE ACT

4.1287 Action by administrative law judge.
4.1290 Who may file.
4.1291 Where to file; time for filing.
4.1292 Contents of petition.
4.1293 Answer.
4.1294 Who may receive an award.
4.1295 Awards.
4.1296 Appeals.

PETITIONS FOR REVIEW OF PROPOSED INDIVIDUAL CIVIL PENALTY ASSESSMENTS UNDER SECTION 518(f) OF THE ACT

4.1300 Scope.
4.1301 Who may file.
4.1302 Time for filing.
4.1303 Contents and service of petition.
4.1304 Answer, motion, or statement of OSM.
4.1305 Amendment of petition.
4.1306 Notice of hearing.
4.1307 Elements; burdens of proof.
4.1308 Decision by administrative law judge.
4.1309 Petition for discretionary review.

REQUEST FOR HEARING ON A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS UNDER SECTION 510(c) OF THE ACT, 30 U.S.C. 1260(c) (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

4.1350 Scope.
4.1351 Preliminary finding by OSM.
4.1352 Who may file; where to file; when to file.
4.1353 Contents of request.
4.1354 Determination by the administrative law judge.
4.1355 Burden of proof.

4.1356 Appeals.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS, PERMIT REVISIONS, PERMIT RENEWALS, THE TRANSFER, ASSIGNMENT OR SALE OF RIGHTS GRANTED UNDER PERMIT (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS) AND FOR COAL EXPLORATION PERMITS (FEDERAL PROGRAM)

4.1360 Scope.
4.1361 Who may file.
4.1362 Where to file; when to file.
4.1363 Contents of request; amendment of request; responses.
4.1364 Time for hearing; notice of hearing; extension of time for hearing.
4.1365 Status of decision pending administrative review.
4.1366 Burdens of proof.
4.1367 Request for temporary relief.
4.1368 Determination by the Administrative Law Judge.
4.1369 Petition for discretionary review; judicial review.

REVIEW OF OSM DECISIONS PROPOSING TO SUSPEND OR RESCIND OR SUSPENDING OR RESCINDING IMPROVIDENTLY ISSUED PERMITS

4.1370 Scope.
4.1371 Who may file, where to file, when to file.
4.1372 Contents of request for review, response to request, amendment of request.
4.1373 Hearing.
4.1374 Burdens of proof.
4.1375 Time for initial decision.
4.1376 Petition for temporary relief from notice of proposed suspension or rescission or notice of suspension or rescission; appeals from decisions granting or denying temporary relief.
4.1377 Petition for discretionary review of initial decision.

REVIEW OF OFFICE OF SURFACE MINING WRITTEN DECISIONS CONCERNING OWNERSHIP OR CONTROL CHALLENGES

4.1380 Scope.
4.1381 Who may file; when to file; where to file.
4.1382 Contents of request for review; response to request; amendment of request.
4.1383 Hearing.
4.1384 Burdens of proof.
4.1385 Time for initial decision.
4.1386 Petition for temporary relief from decision; appeals from decisions granting or denying temporary relief.
4.1387 Petition for discretionary review of initial decisions.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR PART 761 (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

4.1390 Scope.
4.1391 Who may file; where to file; when to file; filing of administrative record.
4.1392 Contents of request; amendment of request; responses.
4.1393 Status of decision pending administrative review.
4.1394 Burden of proof.

Subpart M—Special Procedural Rules Applicable to Appeals of Decisions Made Under OMB Circular A–76

4.1600 Purpose and nature of the appeal process.
4.1601 Basis for appeal.
4.1602 Who may appeal under this procedure.
4.1603 Appeal period.
4.1604 Method of filing an appeal.
4.1605 Action by the Office of Hearings and Appeals.
4.1606 Department representation.
4.1607 Processing the appeal.
4.1608 Oral presentations.
4.1609 Multiple appeals.
4.1610 Decision of the appeals official.

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

SOURCE: 36 FR 7186, Apr. 15, 1971, unless otherwise noted.

Subpart A—General; Office of Hearings and Appeals

§ 4.1 Scope of authority; applicable regulations.

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. The Office may hear, consider, and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary. Principal components of the Office include:

(a) One or more Hearings Divisions consisting of administrative law judges who are authorized to conduct hearings

in cases required by law to be conducted under 5 U.S.C. 554, and other deciding officials who are authorized to conduct hearings in cases arising under statutes and regulations of the Department; and

(b) Appeals Boards, shown below, with administrative jurisdiction and special procedural rules as indicated. General rules applicable to all types of proceedings are set forth in subpart B of this part. Therefore, for information as to applicable rules, reference should be made to the special rules in the subpart relating to the particular type of proceeding, as indicated, and to the general rules in subpart B of this part. Wherever there is any conflict between one of the general rules in subpart B of this part and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern. Reference should be made also to the governing laws, substantive regulations and policies of the Department relating to the proceeding. In addition, reference should be made to part 1 of this subtitle which regulates practice before the Department of the Interior.

(1) *Board of Indian Appeals*. The Board decides finally for the Department appeals to the head of the Department pertaining to:

(i) Administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR chapter I, except as limited in 25 CFR chapter I or §4.330 of this part, and

(ii) Decisions and orders of administrative law judges and Indian probate judges in Indian probate matters, other than those involving estates of the Five Civilized Tribes of Indians. The Board also decides such other matters pertaining to Indians as are referred to it by the Secretary, the Director of the Office of Hearings and Appeals, or the Assistant Secretary-Indian Affairs for exercise of review authority of the Secretary. Special regulations applicable to proceedings before the Board are contained in subpart D of this part.

(2) *Board of Land Appeals*. The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to: (i) The use and disposition of public lands and their resources, including land selections arising under the Alaska Native Claims Settlement Act, as amended; (ii) the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf; and (iii) the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977. Special procedures for hearings, appeals and contests in public land cases are contained in subpart E of this part; special procedures for hearings and appeals under the Surface Mining Control and Reclamation Act of 1977 are contained in subpart L of this part.

(3) *Ad Hoc Board of Appeals*. Appeals to the head of the Department which do not lie within the appellate review jurisdiction of an established Appeals Board and which are not specifically excepted in the general delegation of authority to the Director may be considered and ruled upon by the Director or by Ad Hoc Boards of Appeals appointed by the Director to consider the particular appeals and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for the complete adjudication of the issues. Jurisdiction of the Boards would include, but not be limited to, the appellate and review authority of the Secretary referred to in parts 13, 21, and 230 of this title, and in 36 CFR parts 8 and 20. Special regulations applicable to proceedings in such cases are contained in subpart G of this part.

(Sec. 525, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275, and sec. 301, Administrative Procedure Act, 5 U.S.C. 301)

[36 FR 7186, Apr. 15, 1971, as amended at 40 FR 33172, Aug. 6, 1975; 47 FR 26392, June 18, 1982; 49 FR 7565, Mar. 1, 1984; 54 FR 6485, Feb. 10, 1989; 61 FR 47434, Sept. 9, 1996; 61 FR 49976, Sept. 24, 1996; 75 FR 64663, Oct. 20, 2010]

§4.2 Membership of appeals boards; decisions, functions of Chief Judges.

(a) The Appeals Boards consist of regular members, who are hereby designated Administrative Judges, one of whom is designated as Chief Administrative Judge, the Director as an ex officio member, and alternate members who may serve, when necessary, in

place of or in addition to regular members. The Chief Administrative Judge of an Appeals Board may direct that an appeal may be decided by a panel of any two Administrative Judges of the Board, but if they are unable to agree upon a decision, the Chief Administrative Judge may assign one or more additional Administrative Judges of the Board to consider the appeal. The concurrence of a majority of the Board Administrative Judges who consider an appeal shall be sufficient for a decision.

(b) Decisions of the Board must be in writing and signed by not less than a majority of the Administrative Judges who considered the appeal. The Director, being an ex officio member, may participate in the consideration of any appeal and sign the resulting decision.

(c) The Chief Administrative Judge of an Appeals Board shall be responsible for the internal management and administration of the Board, and the Chief Administrative Judge is authorized to act on behalf of the Board in conducting correspondence and in carrying out such other duties as may be necessary in the conduct of routine business of the Board.

[39 FR 7931, Mar. 1, 1974]

§ 4.3 Representation before appeals boards.

(a) *Appearances generally*. Representation of parties in proceedings before Appeals Boards of the Office of Hearings and Appeals is governed by Part 1 of this subtitle, which regulates practice before the Department of the Interior.

(b) *Representation of the Government*. Department counsel designated by the Solicitor of the Department to represent agencies, bureaus, and offices of the Department of the Interior in proceedings before the Office of Hearings and Appeals, and Government counsel for other agencies, bureaus or offices of the Federal Government involved in any proceeding before the Office of Hearings and Appeals, shall represent the Government agency in the same manner as a private advocate represents a client.

(c) *Appearances as amicus curiae*. Any person desiring to appear as amicus curiae in any proceeding shall make timely request stating the grounds for such request. Permission to appear, if granted, will be for such purposes as established by the Director or the Appeals Board in the proceeding.

§ 4.4 Public records; locations of field offices.

Part 2 of this subtitle prescribes the rules governing availability of the public records of the Office of Hearings and Appeals. It includes a list of the field offices of the Office of Hearings and Appeals and their locations.

§ 4.5 Power of the Secretary and Director.

(a) *Secretary*. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, except a case before the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978, and render the final decision in the matter after holding such hearing as may be required by law; and

(2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision, except a decision by the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978.

(b) *The Director*. Except for cases or decisions subject to the Contract Disputes Act of 1978, the Director, pursuant to his delegated authority from the Secretary, may assume jurisdiction of any case before any board of the Office or review any decision of any board of the Office or direct reconsideration of any decision by any board of the Office.

(c) *Exercise of reserved power*. If the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after

the review process is completed, a written decision will be issued.

[50 FR 43705, Oct. 29, 1985, as amended at 52 FR 46355, Dec. 7, 1987; 52 FR 47097, Dec. 11, 1987]

Subpart B—General Rules Relating to Procedures and Practice

§4.20 Purpose.

In the interest of establishing and maintaining uniformity to the extent feasible, this subpart sets forth general rules applicable to all types of proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals.

§4.21 General provisions.

(a) *Effect of decision pending appeal.* Except as otherwise provided by law or other pertinent regulation:

(1) A decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effective immediately;

(2) A decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal; a petition for a stay may be filed only by a party who may properly maintain an appeal;

(3) A decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section.

(b) *Standards and procedures for obtaining a stay.* Except as otherwise provided by law or other pertinent regulation:

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

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

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

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

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

(2) The appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted;

(3) The appellant shall serve a copy of its notice of appeal and petition for a stay on each party named in the decision from which the appeal is taken, and on the Director or the Appeals Board to which the appeal is taken, at the same time such documents are served on the appropriate officer of the Department; any party, including the officer who made the decision being appealed, may file a response to the stay petition within 10 days after service; failure to file a response shall not result in a default on the question of whether a stay should be granted; service shall be made by delivering copies personally or by sending them by registered or certified mail, return receipt requested; and

(4) The Director or an Appeals Board shall grant or deny a petition for a stay pending appeal, either in whole or in part, on the basis of the factors listed in paragraph (b)(1) of this section, within 45 calendar days of the expiration of the time for filing a notice of appeal.

(c) *Exhaustion of administrative remedies.* No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

(d) *Finality of decision.* No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by

regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned, and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies.

[36 FR 7186, Apr. 15, 1971, as amended at 58 FR 4942, Jan. 19, 1993; 75 FR 64663, Oct. 20, 2010]

§ 4.22 Documents.

(a) *Filing of documents.* A document is filed in the office where the filing is required only when the document is received in that office during its regular business hours and by a person authorized to receive it. A document received after the office's regular business hours is considered filed on the next business day.

(b) *Service generally.* A copy of each document filed in a proceeding before the Office of Hearings and Appeals must be served by the filing party on the other party or parties in the case, except as otherwise provided by § 4.31. In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his/her client, and service of any document relating to the proceeding shall be made upon such attorney in addition to any other service specifically required by law or by order of a presiding official or an appeals board. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

(c) *Retention of documents.* All documents, books, records, papers, etc., received in evidence in a hearing or submitted for the record in any proceeding before the Office of Hearings and Appeals will be retained with the official record of the proceedings. However, the withdrawal of original documents may be permitted while the case is pending upon the submission of true copies in lieu thereof. When a decision has become final, an appeals board in its discretion may, upon request and after notice to the other party or parties, permit the withdrawal of original exhibits or any part thereof by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal. Transcripts of testimony and/or documents received or reviewed pursuant to § 4.31 of these rules shall be sealed against disclosure to unauthorized persons and retained with the official record, subject to the withdrawal and substitution provisions hereof.

(d) *Record address.* Every person who files a document for the record in connection with any proceeding before the Office of Hearings and Appeals shall at the time of his initial filing in the matter state his address. Thereafter he must promptly inform the office in which the matter is pending of any change in address, giving the docket or other appropriate numbers of all matters in which he has made such a filing. The successors of such person shall likewise promptly inform such office of their interest in the matters and state their addresses. If a person fails to furnish a record address as required herein, he will not be entitled to notice in connection with the proceedings.

(e) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation.

(f) *Extensions of time.* (1) The time for filing or serving any document may be extended by the Appeals Board or other officer before whom the proceeding is pending, except for the time for filing a notice of appeal and except where such extension is contrary to law or regulation.

(2) A request for an extension of time must be filed within the time allowed for the filing or serving of the document and must be filed in the same office in which the document in connection with which the extension is requested must be filed.

[36 FR 7186, Apr. 15, 1971, as amended at 53 FR 49660, Dec. 9, 1988; 75 FR 64663, Oct. 20, 2010]

§4.23 Transcript of hearings.

Hearings will be recorded verbatim and transcripts thereof shall be made when requested by interested parties, costs of transcripts to be borne by the requesting parties. Fees for transcripts prepared from recordings by Office of Hearings and Appeals employees will be at rates which cover the cost of manpower, machine use and materials, plus 25 percent, adjusted to the nearest 5 cents. If the reporting is done pursuant to a contract between the reporter and the Department of the Interior Agency or office which is involved in the proceeding, or the Office of Hearings and Appeals, fees for transcripts will be at rates established by the contract.

§4.24 Basis of decision.

(a) *Record.* (1) The record of a hearing shall consist of the transcript of testimony or summary of testimony and exhibits together with all papers and requests filed in the hearing.

(2) If a hearing has been held on an appeal pursuant to instructions of an Appeals Board, this record shall be the sole basis for decision insofar as the referred issues of fact are involved except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section.

(3) Where a hearing has been held in other proceedings, the record made shall be the sole basis for decision except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section.

(4) In any case, no decision after a hearing or on appeal shall be based upon any record, statement, file, or similar document which is not open to inspection by the parties to the hearing or appeal, except for documents or other evidence received or reviewed pursuant to §4.31(d).

(b) *Official notice.* Official notice may be taken of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice.

[36 FR 7186, Apr. 15, 1971, as amended at 53 FR 49660, Dec. 9, 1988]

§4.25 Oral argument.

The Director or an Appeals Board may, in their discretion, grant an opportunity for oral argument.

§4.26 Subpoena power and witness provisions generally.

(a) *Compulsory attendance of witnesses.* The administrative law judge, on his own motion, or on written application of a party, is authorized to issue subpoenas requiring the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers. Subpoenas will be issued on a form approved by the Director. A subpoena may be served by any person who is not a party and is not less than 18 years of age, and the original subpoena bearing a certificate of service shall be filed with the administrative law judge. A witness may be required to attend a deposition or hearing at a place not more than 100 miles from the place of service.

(b) *Application for subpoena.* Where the file has not yet been transmitted to the administrative law judge, the application for a subpoena may be filed in the office of the officer who made the decision appealed from, or in the office of the Bureau of Land Management in which the complaint was filed, in which cases such offices will forward the application to the examiner.

(c) *Fees payable to witnesses.* (1) Witnesses subpoenaed by any party shall be paid the same fees and mileage as are paid for like service in the District Courts of the United States. The witness fees and mileage shall be paid by

the party at whose instance the witness appears.

(2) Any witness who attends any hearing or the taking of any deposition at the request of any party to the controversy without having been subpoenaed to do so shall be entitled to the same mileage and attendance fees, to be paid by such party, to which he would have been entitled if he had been first duly subpoenaed as a witness on behalf of such party. This paragraph does not apply to Government employees who are called as witnesses by the Government.

§ 4.27 Standards of conduct.

(a) *Inquiries.* All inquiries with respect to any matter pending before the Office of Hearings and Appeals shall be directed to the Director, the Chief Administrative Law Judge, or the Chairman of the appropriate Board.

(b) *Ex parte communication*—(1) *Prohibition.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, there shall be no communication concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office personnel involved or who may reasonably be expected to become involved in the decisionmaking process on that proceeding, unless the communication, if oral, is made in the presence of all other parties or their representatives, or, if written, is furnished to all other parties. Proceedings include cases pending before the Office, rulemakings amending this Part 4 that might affect a pending case, requests for reconsideration or review by the Director, and any other related action pending before the Office. The terms ''interested person'' and ''person interested in the proceeding'' include any individual or other person with an interest in the agency proceeding that is greater than the interest that the public as a whole may have. This regulation does not prohibit communications concerning case status or advice concerning compliance with procedural requirements unless the area of inquiry is in fact an area of controversy in the proceeding. Any oral communication made in violation of this regulation shall be reduced to writing in a memorandum to the file by the person receiving the communication and shall be included in the record. Any written communication made in violation of this regulation shall be included in the record. In proceedings other than informal rulemakings copies of the memorandum or communication shall be provided to all parties, who shall be given an opportunity to respond in writing.

(2) *Sanctions.* The administrative law judge, board, or Director who has responsibility for the matter with respect to which a prohibited communication has been knowingly made may impose appropriate sanctions on the offending person or persons, which may include requiring an offending party to show cause why its claim, motion, or interest should not be dismissed, denied, or otherwise adversely affected; disciplining offending Office personnel pursuant to the Department's standards of conduct (43 CFR part 20); and invoking such sanctions against other offending persons as may be appropriate under the circumstances.

(c) *Disqualification.* (1) An Office of Hearings and Appeals deciding official must withdraw from a case if circumstances exist that would disqualify a judge in such circumstances under the recognized canons of judicial ethics.

(2) A party may file a motion seeking the disqualification of a deciding official, setting forth in detail the circumstances that the party believes require disqualification. Any supporting facts must be established by affidavit or other sufficient evidence. A copy of the motion should be sent to the Director.

(3) The head of the appropriate unit within the Office or the Director may decide whether disqualification is required if the deciding official does not withdraw under paragraph (c)(1) of this section or in response to a motion under paragraph (c)(2) of this section.

(4) For purposes of this section, ''deciding official'' includes an attorney decision maker or Indian probate judge as defined in § 4.201, an administrative

law judge, an administrative judge, or a member of any Board.

[36 FR 7186, Apr. 15, 1971, as amended at 50 FR 43705, Oct. 29, 1985; 53 FR 49660, Dec. 9, 1988; 70 FR 11812, Mar. 9, 2005]

§4.28 Interlocutory appeals.

There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

§4.29 Remands from courts.

Whenever any matter is remanded from any court for further proceedings, and to the extent the court's directive and time limitations will permit, the parties shall be allowed an opportunity to submit to the appropriate Appeals Board, a report recommending procedures to be followed in order to comply with the court's order. The Board will review the reports and enter special orders governing the handling of matters remanded to it for further proceedings by any court.

§4.30 Information required by forms.

Whenever a regulation of the Office of Hearing and Appeals requires a form approved or prescribed by the Director, the Director may in that form require the submission of any information which he considers to be necessary for the effective administration of that regulation.

§4.31 Request for limiting disclosure of confidential information.

(a) If any person submitting a document in a proceeding under this part claims that some or all of the information contained in that document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in section 1905 of title 18 of the United States Code (disclosure of confidential information), or is otherwise exempt by law from public disclosure, the person:

(1) Must indicate in the document that it is exempt, or contains information which is exempt, from disclosure;

(2) Must request the presiding officer or appeals board not to disclose such information except to the parties to the proceeding under the conditions provided in paragraphs (b) and (c) of this section, and must serve the request upon the parties to the proceeding. The request shall include the following items:

(i) A copy of the document from which has been deleted the information for which the person requests nondisclosure; if it is not practicable to submit such copy of the document because deletion of the information would render the document unintelligible, a description of the document may be substituted;

(ii) A statement specifying why the information is confidential, if the information for which nondisclosure is requested is claimed to come within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information:

(iii) A statement specifying the justification for nondisclosure, if the information for which nondisclosure is requested is not within the exception in 5 U.S.C. 552(b)(4).

(b) If information is submitted in accordance with paragraph (a) of this section, the information will not be disclosed except as provided in the Freedom of Information Act, in accordance with part 2 of this title, or upon request from a party to the proceeding under the restrictions stated in paragraph (c) of this section.

(c) At any time, a party may request the presiding officer or appeals board to direct a person submitting information under paragraph (a) of this section to provide that information to the party. The presiding officer or board will so direct, unless paragraph (d) of this section is applicable, if the party requesting the information agrees under oath in writing:

(1) Not to use or disclose the information except in the context of the proceeding conducted pursuant to this part; and

(2) To return all copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

(d) If any person submitting a document in a proceeding under this Part other than a hearing conducted pursuant to 5 U.S.C. 554 claims that a disclosure of information in that document to another party to the proceeding is prohibited by law, notwithstanding the protection provided under paragraph (c) of this section, such person:

(1) Must indicate in the original document that it contains information of which disclosure is prohibited;

(2) Must request that the presiding officer or appeals board review such evidence as a basis for its decision without disclosing it to the other party or parties, and serve the request upon the parties to the proceeding. The request shall include a copy of the document or description as required by paragraph (a)(2)(i) of this section and state why disclosure is prohibited, citing pertinent statutory or regulatory authority. If the prohibition on disclosure is intended to protect the interest of a person who is not a party to the proceeding, the party making the request must demonstrate that such person refused to consent to the disclosure of the evidence to other parties to the proceeding.

(3) If the presiding officer or an appeals board denies the request, the person who made the request shall be given an opportunity to withdraw the evidence before it is considered by the presiding official or board unless a Freedom of Information Act request, administrative appeal from the denial of a request, or lawsuit seeking release of the information is pending.

(e) If the person submitting a document does not submit the copy of the document or description required by paragraph (a)(2)(i) or (d)(2) of this section, the presiding officer or appeals board may assume that there is no objection to public disclosure of the document in its entirety.

(f) Where a decision by a presiding officer or appeals board is based in whole or in part on evidence not included in the public record or disclosed to all parties, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered shall be retained under seal as part of the official record.

[53 FR 49661, Dec. 9, 1988]

Subpart C [Reserved]

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410; Pub. L. 99–264, 100 Stat. 61, as amended.

CROSS REFERENCE: For regulations pertaining to the processing of Indian probate matters within the Bureau of Indian Affairs, see 25 CFR part 15. For regulations pertaining to the probate of Indian trust estates within the Probate Hearings Division, Office of Hearings and Appeals, see 43 CFR part 30. For regulations pertaining to the authority, jurisdiction, and membership of the Board of Indian Appeals, Office of Hearings and Appeals, see subpart A of this part. For regulations generally applicable to proceedings before the Hearings Divisions and Appeal Boards of the Office of Hearings and Appeals, see subpart B of this part.

SCOPE OF SUBPART; DEFINITIONS

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§ 4.200 How to use this subpart.

(a) The following table is a guide to the relevant contents of this subpart by subject matter.

For provisions relating to . . .	Consult . . .
(1) Appeals to the Board of Indian Appeals generally.	§§ 4.310 through 4.318.
(2) Appeals to the Board of Indian Appeals from decisions of the Probate Hearings Division in Indian probate matters.	§§ 4.201 and 4.320 through 4.326.
(3) Appeals to the Board of Indian Appeals from actions or decisions of BIA.	§§ 4.201 and 4.330 through 4.340.
(4) Review by the Board of Indian Appeals of other matters referred to it by the Secretary, Assistant Secretary-Indian Affairs, or Director-Office of Hearings and Appeals.	§§ 4.201 and 4.330 through 4.340.

For provisions relating to . . .	Consult . . .
(5) Determinations under the White Earth Reservation Land Settlement Act of 1985.	§§4.350 through 4.357.

(b) Except as limited by the provisions of this part, the regulations in subparts A and B of this part apply to these proceedings.

[73 FR 67287, Nov. 13, 2008]

§4.201 Definitions.

Administrative law judge (ALJ) means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

Agency means:

(1) The Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land and trust personalty; and

(2) Any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

BIA means the Bureau of Indian Affairs within the Department of the Interior.

Board means the Interior Board of Indian Appeals within OHA.

Day means a calendar day.

Decedent means a person who is deceased.

Decision or order (or *decision and order*) means:

(1) A written document issued by a judge making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty;

(2) The decision issued by an attorney decision maker in a summary probate proceeding; or

(3) A decision issued by a judge finding that the evidence is insufficient to determine that a person is deceased by reason of unexplained absence.

Devise means a gift of property by will. Also, to give property by will.

Devisee means a person or entity that receives property under a will.

Estate means the trust or restricted land and trust personalty owned by the decedent at the time of death.

Formal probate proceeding means a proceeding, conducted by a judge, in which evidence is obtained through the testimony of witnesses and the receipt of relevant documents.

Heir means any individual or entity eligible to receive property from a decedent in an intestate proceeding.

Individual Indian Money (IIM) account means an interest-bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary.

Indian probate judge (IPJ) means an attorney with OHA, other than an ALJ, to whom the Secretary has delegated the authority to hear and decide Indian probate cases.

Interested party means any of the following:

(1) Any potential or actual heir;

(2) Any devisee under a will;

(3) Any person or entity asserting a claim against a decedent's estate;

(4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or

(5) Any co-owner exercising a purchase option.

Intestate means that the decedent died without a valid will as determined in the probate proceeding.

Judge, except as used in the term ''administrative judge,'' means an ALJ or IPJ.

LTRO means the Land Titles and Records Office within BIA.

Probate means the legal process by which applicable tribal, Federal, or State law that affects the distribution of a decedent's estate is applied in order to:

(1) Determine the heirs;

(2) Determine the validity of wills and determine devisees;

(3) Determine whether claims against the estate will be paid from trust personalty; and

(4) Order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive them.

Restricted property means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the Secretary's consent. For the purposes of probate proceedings, restricted property is

treated as if it were trust property. Except as the law may provide otherwise, the term ''restricted property'' as used in this part does not include the restricted lands of the Five Civilized Tribes of Oklahoma or the Osage Nation.

Secretary means the Secretary of the Interior or an authorized representative.

Trust personalty means all tangible personal property, funds, and securities of any kind that are held in trust in an IIM account or otherwise supervised by the Secretary.

Trust property means real or personal property, or an interest therein, the title to which is held in trust by the United States for the benefit of an individual Indian or tribe.

Will means a written testamentary document that was executed by the decedent and attested to by two disinterested adult witnesses, and that states who will receive the decedent's trust or restricted property.

[73 FR 67287, Nov. 13, 2008]

§§ 4.202–4.308 [Reserved]

GENERAL RULES APPLICABLE TO PROCEEDINGS ON APPEAL BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

SOURCE: 70 FR 11825, Mar. 9, 2005, unless otherwise noted.

§ 4.310 Documents.

(a) *Filing*. The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is:

(1) For most documents, the date of mailing or the date of personal delivery; or

(2) For a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e), the date that the Board receives the motion.

(b) *Serving notices of appeal and pleadings*. Any party filing a notice of appeal or pleading before the Board must serve copies on all interested parties in the proceeding. Service must be accomplished by personal delivery or mailing.

(1) Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party.

(2) Where a party is represented by more than one attorney, service on any one attorney is sufficient.

(3) The certificate of service on an attorney or representative must include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service*. Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document:

(1) The day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included;

(2) The last day of the period is to be included, unless it is a nonbusiness day (*e.g.*, Saturday, Sunday, or Federal holiday), in which event the period runs until the end of the next business day; and

(3) When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal holidays, and other nonbusiness days are excluded from the computation.

(d) *Extensions of time*. (1) The Board may extend the time for filing or serving any document except a notice of appeal.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents*. All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

§ 4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receiving the

notice of docketing. The appellant must serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel will have 30 days from receiving the appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other interested parties. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) The appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel must be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) BIA is considered an interested party in any proceeding before the Board. The Board may request that BIA submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date may not be less than the appropriate period of time established in this section.

§ 4.312 Board decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of an administrative law judge, Indian probate judge, or BIA official. Distribution of decisions must be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect.

§ 4.313 Amicus curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene, to join other parties, to appear as amicus curiae, or to obtain an order in an appeal before the Board must apply in writing to the Board stating the grounds for the action sought. The Board may grant the permission or relief requested for specified purposes and subject to limitations it established. This section will be liberally construed.

(b) Motions to intervene, to appear as amicus curiae, to join additional parties, or to obtain an order in an appeal pending before the Board must be served in the same manner as appeal briefs.

§ 4.314 Exhaustion of administrative remedies.

(a) No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§ 4.315 Reconsideration of a Board decision.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and must contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§ 4.316 Remands from courts.

Whenever any matter is remanded from any Federal court to the Board for further proceedings, the Board will remand the matter to an administrative law judge, an Indian probate judge,

or BIA. In the alternative, to the extent the court's directive and time limitations permit, the parties will be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

§ 4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries about any matter pending before the Board must be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems this action appropriate. If, before a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the OHA Director will determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

APPEALS TO THE BOARD OF INDIAN APPEALS IN PROBATE MATTERS

SOURCE: 70 FR 11826, Mar. 9, 2005, unless otherwise noted.

§ 4.320 Who may appeal a judge's decision or order?

Any interested party has a right to appeal to the Board if he or she is adversely affected by a decision or order of a judge under part 30 of this subtitle:

(a) On a petition for rehearing;

(b) On a petition for reopening;

(c) Regarding purchase of interests in a deceased Indian's estate; or

(d) Regarding modification of the inventory of an estate.

[76 FR 7505, Feb. 10, 2011]

§ 4.321 How do I appeal a judge's decision or order?

(a) A person wishing to appeal a decision or order within the scope of § 4.320 must file a written notice of appeal within 30 days after we have mailed the judge's decision or order and accurate appeal instructions. We will dismiss any appeal not filed by this deadline.

(b) The notice of appeal must be signed by the appellant, the appellant's attorney, or other qualified representative as provided in § 1.3 of this subtitle, and must be filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

[73 FR 67288, Nov. 13, 2008]

§ 4.322 What must an appeal contain?

(a) Each appeal must contain a written statement of the errors of fact and law upon which the appeal is based. This statement may be included in either the notice of appeal filed under § 4.321(a) or an opening brief filed under § 4.311(a).

(b) The notice of appeal must include the names and addresses of the parties served.

[73 FR 67288, Nov. 13, 2008]

§ 4.323 Who receives service of the notice of appeal?

(a) The appellant must deliver or mail the original notice of appeal to the Board.

(b) A copy of the notice of appeal must be served on the judge whose decision is being appealed, as well as on every other interested party.

(c) The notice of appeal filed with the Board must include a certification that service was made as required by this section.

[73 FR 67288, Nov. 13, 2008]

§4.324 How is the record on appeal prepared?

(a) On receiving a copy of the notice of appeal, the judge whose decision is being appealed must notify:

(1) The agency concerned; and

(2) The LTRO where the original record was filed under §30.233 of this subtitle.

(b) If a transcript of the hearing was not prepared, the judge must have a transcript prepared and forwarded to the LTRO within 30 days after receiving a copy of the notice of appeal. The LTRO must include the original transcript in the record.

(c) Within 30 days of the receipt of the transcript, the LTRO must do the following:

(1) Prepare a table of contents for the record;

(2) Make two complete copies of the original record, including the transcript and table of contents;

(3) Certify that the record is complete;

(4) Forward the certified original record, together with the table of contents, to the Board by certified mail or other service with delivery confirmation; and

(5) Send one copy of the complete record to the agency.

(d) While the appeal is pending, the copies of the record will be available for inspection at the LTRO and the agency.

(e) Any party may file an objection to the record. The party must file his or her objection with the Board within 15 days after receiving the notice of docketing under §4.325.

(f) For any of the following appeals, the judge must prepare an administrative record for the decision and a table of contents for the record and must forward them to the Board:

(1) An interlocutory appeal under §4.28;

(2) An appeal from a decision under §§30.126 or 30.127 regarding modification of an inventory of an estate; or

(3) An appeal from a decision under §30.124 determining that a person for whom a probate proceeding is sought to be opened is not deceased.

[76 FR 7505, Feb. 10, 2011]

§4.325 How will the appeal be docketed?

The Board will docket the appeal on receiving the probate record from the LTRO or the administrative record from the judge, and will provide a notice of the docketing and the table of contents for the record to all interested parties as shown by the record on appeal. The docketing notice will specify the deadline for filing briefs and will cite the procedural regulations governing the appeal.

[73 FR 67288, Nov. 13, 2008]

§4.326 What happens to the record after disposition?

(a) After the Board makes a decision other than a remand, it must forward to the designated LTRO:

(1) The record filed with the Board under §4.324(d) or (f); and

(2) All documents added during the appeal proceedings, including any transcripts and the Board's decision.

(b) The LTRO must conform the duplicate record retained under §4.324(b) to the original sent under paragraph (a) of this section and forward the duplicate record to the agency concerned.

[73 FR 67288, Nov. 13, 2008]

APPEALS TO THE BOARD OF INDIAN APPEALS FROM ADMINISTRATIVE ACTIONS OF OFFICIALS OF THE BUREAU OF INDIAN AFFAIRS: ADMINISTRATIVE REVIEW IN OTHER INDIAN MATTERS NOT RELATING TO PROBATE PROCEEDINGS

SOURCE: 54 FR 6487, Feb. 10, 1989, unless otherwise noted.

§4.330 Scope.

(a) The definitions set forth in 25 CFR 2.2 apply also to these special rules. These regulations apply to the practice and procedure for: (1) Appeals to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in 25 CFR chapter 1, and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians which are referred to it for exercise of review authority of the Secretary or the Assistant Secretary—Indian Affairs.

(b) Except as otherwise permitted by the Secretary or the Assistant Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

(1) Tribal enrollment disputes;

(2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or

(3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

§ 4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—

(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or

(c) Where otherwise provided by law or regulation.

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

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary—Indian Affairs. As required by § 4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

(1) A full identification of the case;

(2) A statement of the reasons for the appeal and of the relief sought; and

(3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary—Indian Affairs may decide to review the appeal. If the Assistant Secretary—Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary—Indian Affairs.

(c) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

[54 FR 6487, Feb. 10, 1989, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each known interested party, upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken, and upon the Assistant Secretary—Indian Affairs. The notice of appeal filed with the Board shall certify that service was made as required by this section and shall show the names and addresses of all parties served. If the appellant is an Indian or an Indian tribe not represented by

counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing.

§4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal which, as specified in §4.332 of this part, may not be extended.

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

(a) Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, at a minimum, inclusion of the following:

(1) The decision appealed from;

(2) The notice of appeal or copy thereof; and

(3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

(c) If the deciding official receives notification that the Assistant Secretary—Indian Affairs has decided to review the appeal before the administrative record is transmitted to the Board, the administrative record shall be forwarded to the Assistant Secretary—Indian Affairs rather than to the Board.

§4.336 Docketing.

An appeal shall be assigned a docket number by the Board 20 days after receipt of the notice of appeal unless the Board has been properly notified that the Assistant Secretary—Indian Affairs has assumed jurisdiction over the appeal. A notice of docketing shall be sent to all interested parties as shown by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to §4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to §4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the Board. Simultaneously, the entire record of the proceedings, including the

transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other comments regarding the recommended decision with the Board in accordance with § 4.339 of this part.

§ 4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to or other comments on the decision with the Board.

§ 4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

SOURCE: 56 FR 61383, Dec. 3, 1991, unless otherwise noted.

§ 4.350 Authority and scope.

(a) The rules and procedures set forth in §§ 4.350 through 4.357 apply only to the determination through intestate succession of the heirs of persons who died entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985, Public Law 99–264 (100 Stat. 61), amended by Public Law 100–153 (101 Stat. 886) and Public Law 100–212 (101 Stat. 1433).

(b) Whenever requested to do so by the Project Director, an administrative judge shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Settlement Act of 1985 as amended, notwithstanding the decedent may have died testate.

(c) As used herein, the following terms shall have the following meanings:

(1) The term *Act* means the White Earth Reservation Land Settlement Act of 1985 as amended.

(2) The term *Board* means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary.

(3) The term *Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs official with delegated authority from the Minneapolis Area Director to serve as the federal officer in charge of the White Earth Reservation Land Settlement Project.

(4) The term *party (parties) in interest* means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent.

(5) The term *compensation* means a monetary sum, as determined by the Project Director, pursuant to section 8(c) of the Act.

(6) The term *administrative judge* means an administrative judge or an administrative law judge, attorney-advisor, or other appropriate official of the Office of Hearings and Appeals to whom the Director of the Office of Hearings and Appeals has redelegated his authority, as designee of the Secretary, for making heirship determinations as provided for in these regulations.

(7) The term *appellant* means a party aggrieved by a final order or final order upon reconsideration issued by an administrative judge who files an appeal with the Board.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991, as amended at 64 FR 13363, Mar. 18, 1999]

§ 4.351 Commencement of the determination process.

(a) Unless an heirship determination which is recognized by the Act already exists, the Project Director shall commence the determination of the heirs of those persons who died entitled to receive compensation by filing with

the administrative judge all data, identifying the purpose for which they are being submitted, shown in the records relative to the family of the decedent.

(b) The data shall include but are not limited to:

(1) A copy of the death certificate if one exists. If there is no death certificate, then another form of official written evidence of the death such as a burial or transportation of remains permit, coroner's report, or church registry of death. Secondary forms of evidence of death such as an affidavit from someone with personal knowledge concerning the fact of death or an obituary or death notice from a newspaper may be used only in the absence of any official proof or evidence of death.

(2) Data for heirship finding and family history, certified by the Project Director. Such data shall contain:

(i) The facts and alleged facts of the decedent's marriages, separations and divorces, with copies of necessary supporting documents;

(ii) The names and last known addresses of probable heirs at law and other known parties in interest;

(iii) Information on whether the relationships of the probable heirs at law to the decedent arose by marriage, blood, or adoption.

(3) Known heirship determinations, including those recognized by the Act determining the heirs of relatives of the decedent, and including those rendered by courts from Minnesota or other states, by tribal courts, or by tribunals authorized by the laws of other countries.

(4) A report of the compensation due the decedent, including interest calculated to the date of death of the decedent, and an outline of the derivation of such compensation, including its real property origins and the succession of the compensation to the deceased, citing all of the intervening heirs at law, their fractional shares, and the amount of compensation attributed to each of them.

(5) A certification by the Project Director or his designee that the addresses provided for the parties in interest were furnished after having made a due and diligent search.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991]

§4.352 Determination of administrative judge and notice thereof.

(a) Upon review of all data submitted by the Project Director, the administrative judge will determine whether or not there are any apparent issues of fact that need to be resolved.

(b) If there are no issues of fact requiring determination, the administrative judge will enter a preliminary determination of heirs based upon inheritance laws in accordance with the Act. Such preliminary determination will be entered without a hearing, and, when possible and based upon the data furnished and/or information supplementary thereto, shall include the names, birth dates, relationships to the decedent, and shares of the heirs, or the fact that the decedent died without heirs.

(1) Upon issuing a preliminary determination, the administrative judge shall issue a notice of such action and shall mail a copy of said notice, together with a copy of the preliminary determination, to each party in interest allowing forty (40) days in which to show cause in writing why the determination should not become final. The administrative judge shall cause a certificate to be made as to the date and manner of such mailing.

(2) The Project Director shall also cause, within seven (7) days of receipt of such notice, the notice of the preliminary determination to be posted in the following sites:

The White Earth Band, Box 418, White Earth, Minnesota 56591
The Minnesota Chippewa Tribe, Box 217, Cass Lake, Minnesota 56633
Minnesota Agency, Bureau of Indian Affairs, Room 418, Federal Building, 522 Minnesota Avenue, NW, Bemidji, Minnesota 56601–3062

and in such other sites as may be deemed appropriate by the Project Director. Such other sites may include, but not be limited to:

Elbow Lake Community Center, R.R. #2, Waubun, Minnesota 56589
Postmaster, Callaway, Minnesota 56521
Community Center, Route 2, Bagley, Minnesota 56621
Community Center, Star Route, Mahnomen, Minnesota 56557
Postmaster, Mahnomen, Minnesota 56557
Rice Lake Community Center, Route 2, Bagley, Minnesota 56621

Postmaster, Ogema, Minnesota 56569
Pine Point Community Center, Ponsford, Minnesota 56575
Postmaster, White Earth, Minnesota 56591
White Earth IHS, White Earth, Minnesota 56591
Postmaster, Ponsford, Minnesota 56575
American Indian Center, 1113 West Broadway, Minneapolis, Minnesota 55411
American Indian Center, 1530 East Franklin Avenue, Minneapolis, Minnesota 55404
American Indian Center, 341 University Avenue, St. Paul, Minnesota 55103
Little Earth of United Tribes Community Services, 2501 Cedar Avenue South, Minneapolis, Minnesota 55404
Naytahwaush Community Center, Naytahwaush, Minnesota 56566

The Project Director shall provide a certificate showing when the notice of the preliminary determination was forwarded for posting, and to which locations. A posting certificate showing the date and place of posting shall be signed by the person or official who performs the act and returned to the Project Director. The Project Director shall file with the administrative judge the original posting certificates and the Project Director's certificate of mailing showing the posting locations and when the notice of the preliminary determination was forwarded for posting.

(3) If no written request for hearing or written objection is received in the office of the administrative judge within the forty (40) days of issuance of the notice, the administrative judge shall issue a final order declaring the preliminary determination to be final thirty (30) days from the date on which the final order is mailed to each party in interest.

(c) When the administrative judge determines either before or after issuance of a preliminary determination that there are issues which require resolution, or when a party objects to the preliminary determination and/or requests a hearing, the administrative judge may either resolve the issues informally or schedule and conduct a prehearing conference and/or a hearing. Any prehearing conference, hearing, or rehearing, conducted by the administrative judge shall be governed insofar as practicable by the regulations applicable to other hearings under this part and the general rules in subpart B of this part. After receipt of the testimony and/or evidence, if any, the administrative judge shall enter a final order determining the heirs of the decedent, which shall become final thirty (30) days from the date on which the final order is mailed to each party in interest.

(d) The final order determining the heirs of the decedent shall contain, where applicable, the names, birth dates, relationships to the decedent, and shares of heirs, or the fact that the decedent died without heirs.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991; 57 FR 2319, Jan. 21, 1992, as amended at 64 FR 13363, Mar. 18, 1999]

§ 4.353 Record.

(a) The administrative judge shall lodge the original record with the Project Director.

(b) The record shall contain, where applicable, the following materials:

(1) A copy of the posted public notice of preliminary determination and/or hearing showing the posting certifications, the administrative judge's certificate of mailing, the posting certificates, and the Project Director's certificate of mailing.

(2) A copy of each notice served on parties in interest, with proof of mailing;

(3) The record of evidence received, including any transcript made of testimony;

(4) Data for heirship finding and family history, and data supplementary thereto;

(5) The final order determining the heirs of the decedent and the administrative judge's notices thereof; and

(6) Any other material or documents deemed relevant by the administrative judge.

§ 4.354 Reconsideration or rehearing.

(a) Any party aggrieved by the final order of the administrative judge may, within thirty (30) days after the date of mailing such decision, file with the administrative judge a written petition for reconsideration and/or rehearing. Such petition must be under oath and must state specifically and concisely the grounds upon which it is based. If it is based upon newly discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what

the new evidence or testimony is to be. It shall also state justifiable reasons for the prior failure to discover and present the evidence.

(b) If proper grounds are not shown, or if the petition is not filed within the time prescribed in paragraph (a) of this section, the administrative judge shall issue an order denying the petition and shall set forth therein the reasons therefor. The administrative judge shall serve copies of such order on all parties in interest.

(c) If the petition appears to show merit, or if the administrative judge becomes aware of sufficient additional evidence to justify correction of error even without the filing of a petition, or upon remand from the Board following an appeal resulting in vacating the final order, the administrative judge shall cause copies of the petition, supporting papers, and other data, or in the event of no petition an order to show cause or decision of the Board vacating the final order in appropriate cases, to be served on all parties in interest. The parties in interest will be allowed a reasonable, specified time within which to submit answers or legal briefs in opposition to the petition or order to show cause or Board decision. The administrative judge shall then reconsider, with or without hearing, the issues of fact and shall issue a final order upon reconsideration, affirming, modifying, or vacating the original final order and making such further orders as are deemed warranted. The final order upon reconsideration shall be served on all parties in interest and shall become final thirty (30) days from the date on which it is mailed.

(d) Successive petitions for reconsideration and/or rehearing shall not be permitted. Nothing herein shall be considered as a bar to the remand of a case by the Board for further reconsideration, hearing, or rehearing after appeal.

§4.355 Omitted compensation.

When, subsequent to the issuance of a final order determining heirs under §4.352, it is found that certain additional compensation had been due the decedent and had not been included in the report of compensation, the report shall be modified administratively by the Project Director. Copies of such modification shall be furnished to all heirs as previously determined and to the appropriate administrative judge.

§4.356 Appeals.

(a) A party aggrieved by a final order of an administrative judge under §4.352, or by a final order upon reconsideration of an administrative judge under §4.354, may appeal to the Board (address: Board of Indian Appeals, Office of Hearings and Appeals, 801 North Quincy Street, Arlington, Virginia 22203). A copy of the notice of appeal must also be sent to the Project Director and to the administrative judge whose decision is being appealed.

(b) The notice of appeal must be filed with the Board no later than thirty (30) days from the date on which the final order of the administrative judge was mailed, or, if there has been a petition for reconsideration or rehearing filed, no later than thirty (30) days from the date on which the final order upon reconsideration of the administrative judge was mailed. A notice of appeal that is not timely filed will be dismissed.

(c) The Project Director shall ensure that the record is expeditiously forwarded to the Board.

(d) Within thirty (30) days after the notice of appeal is filed, the appellant shall file a statement of the reasons why the final order or final order upon reconsideration is in error. If the Board finds that the appellant has set forth sufficient reasons for questioning the final order or final order upon reconsideration, the Board will issue an order giving all parties in interest an opportunity to respond, following which a decision shall be issued. If the Board finds that the appellant has not set forth sufficient reasons for questioning the final order, the Board may issue a decision on the appeal without further briefing.

(e) The Board may issue a decision affirming, modifying, or vacating the final order or final order upon reconsideration. A decision on appeal by the Board either affirming or modifying the final order or final order upon reconsideration shall be final for the Department of the Interior. In the event

the final order or final order upon reconsideration is vacated, the proceeding shall be remanded to the appropriate administrative judge for reconsideration and/or rehearing.

[56 FR 61383, Dec. 3, 1991, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.357 Guardians for minors and incompetents.

Persons less than 18 years of age and other legal incompetents who are parties in interest may be represented at all hearings by legally appointed guardians or by guardians *ad litem* appointed by the administrative judge.

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

AUTHORITY: Sections 4.470 to 4.480 are also issued under authority of 43 U.S.C. 315a.

CROSS REFERENCE: See subpart A for the authority, jurisdiction and membership of the Board of Land Appeals within the Office of Hearings and Appeals. For general rules applicable to proceedings before the Board of Land Appeals as well as the other Appeals Boards of the Office of Hearings and Appeals, see subpart B.

APPEALS PROCEDURES

APPEALS PROCEDURES; GENERAL

§ 4.400 Definitions.

As used in this subpart:

Administrative law judge means an administrative law judge in the Office of Hearings and Appeals, appointed under 5 U.S.C. 3105.

BIA means the Bureau of Indian Affairs.

BLM means the Bureau of Land Management.

Board means the Interior Board of Land Appeals in the Office of Hearings and Appeals. The address of the Board is 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203. The telephone number is 703–235–3750, and the facsimile number is 703–235–8349.

BOEMRE means the Bureau of Ocean Energy Management, Regulation and Enforcement.

Bureau or Office means BIA, BLM, BOEMRE, ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, or any successor organization, as appropriate.

Last address of record means the address in a person's most recent filing in an appeal or, if there has not been any filing, the person's address as provided in the Bureau or Office decision under appeal.

ONRR means the Office of Natural Resources Revenue.

Office or *officer* includes ''administrative law judge'' or ''Board'' where the context so requires.

Party includes a party's representative(s) where the context so requires.

Secretary means the Secretary of the Interior or an authorized representative.

[75 FR 64663, Oct. 20, 2010; 75 FR 68704, Nov. 9, 2010]

§ 4.401 Documents.

(a) *Grace period for filing*. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed.

(b) *Transferees and encumbrancers*. Transferees and encumbrancers of land the title to which is claimed or is in the process of acquisition under any public land law shall, upon filing notice of the transfer or encumbrance in the proper land office, become entitled to receive and be given the same notice of any appeal, or other proceeding thereafter initiated affecting such interest which is required to be given to a party to the proceeding. Every such notice of a transfer or encumbrance will be noted upon the records of the land office. Thereafter such transferee or encumbrancer must be made a party to any proceedings thereafter initiated adverse to the entry.

(c) *Service of documents.* (1) A party that files any document under this subpart must serve a copy of it concurrently as follows:

(i) On the appropriate official of the Office of the Solicitor under §4.413(c) and (d);

(ii) For a notice of appeal and statement of reasons, on each person named in the decision under appeal; and

(iii) For all other documents, on each party to the appeal (including intervenors).

(2) Service on a person or party known to be represented by counsel or other designated representative must be made on the representative.

(3) Service must be made at the last address of record of the person or party (if unrepresented) or the representative, unless the person, party, or representative has notified the serving party of a subsequent change of address.

(4) Service may be made as shown in the following table:

If the document is . . .	Service may be made by . . .
(i) A notice of appeal	(A) Personal delivery; (B) Registered or certified mail, return receipt requested; (C) Delivery service, delivery receipt requested, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has previously consented to that means in writing.
(ii) Not a notice of appeal	(A) Personal delivery; (B) Mail; (C) Delivery service, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has previously consented to that means in writing.

(5) At the conclusion of any document that a party must serve under the regulations in this subpart, the party must sign a written statement that:

(i) Certifies that service has been or will be made in accordance with the applicable rules; and

(ii) Specifies the date and manner of service.

(6) Service that complies with paragraphs (c)(2) through (4) of this section is complete as shown in the following table:

If service is made by . . .	Service is complete when the document is . . .
(i) Personal delivery	Delivered to the party.
(ii) Mail or delivery service	Delivered to the party.
(iii) Electronic means	Transmitted to the party, unless the serving party learns that it did not reach the party to be served.

(7) In the absence of evidence to the contrary, delivery under paragraph (c)(6)(ii) of this section is deemed to take place 5 business days after the document was sent. A document is considered sent when it is given to the U.S. Postal Service (or deposited in one of its mailboxes), properly addressed and with proper postage affixed, or when it is given to a delivery service (or deposited in one of its receptacles), properly addressed and with the delivery cost prepaid.

(d) *Document format.* (1) The format requirements in paragraph (d)(2) of this section apply to any pleading, motion, brief, or other document filed in a case under this subpart, other than an exhibit or attachment or the administrative record.

(i) An exhibit or attachment must be 8½ by 11 inches in size or, if larger, folded to 8½ by 11 inches and attached to the document.

(ii) Any document that does not comply with the requirements in this paragraph (d) may be rejected.

(2) A document filed in a case must:

(i) Be 8½ by 11 inches in size;

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

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

(iv) Use 11 point font size or larger;

(v) Be double-spaced except for the case caption, argument headings, long quotations, and footnotes, which may be single-spaced;

(vi) Have margins of at least 1 inch;

(vii) Be numbered sequentially, starting on the second page; and

(vii) Be stapled in the upper left-hand corner, if stapled, or bound on the left side, if bound.

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 15117, Aug. 13, 1971; 68 FR 33803, June 5, 2003; 75 FR 64664, Oct. 20, 2010]

§ 4.402 Summary dismissal.

An appeal to the Board will be subject to summary dismissal by the Board for any of the following causes:

(a) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required;

(b) If the notice of appeal is not served upon adverse parties within the time required; and

(c) If the statement of reasons, if not contained in the notice of appeal, is not served upon adverse parties within the time required.

(d) If the statement of standing required by § 4.412(b) is not filed with the Board or is not served upon adverse parties within the time required.

[36 FR 7186, Apr. 15, 1971, as amended at 47 FR 26392, June 18, 1982]

§ 4.403 Finality of decision; reconsideration.

(a) The Board's decision is final agency action and is effective on the date it is issued, unless the decision itself provides otherwise.

(b) The Board may reconsider its decision in extraordinary circumstances.

(1) A party that wishes to request reconsideration of a Board decision must file a motion for reconsideration with the Board within 60 days after the date of the decision.

(2) The motion may include a request that the Board stay the effectiveness of its decision.

(3) Any other party to the original appeal may file a response to a motion for reconsideration with the Board within 21 days after service of the motion, unless the Board orders otherwise.

(4) A motion for reconsideration will not stay the effectiveness or affect the finality of the Board's decision unless so ordered by the Board for good cause.

(5) A party does not need to file a motion for reconsideration in order to exhaust its administrative remedies.

(c) A motion for reconsideration must:

(1) Specifically describe the extraordinary circumstances that warrant reconsideration; and

(2) Include all arguments and supporting documents.

(d) Extraordinary circumstances that may warrant granting reconsideration include, but are not limited to:

(1) Error in the Board's interpretation of material facts;

(2) Recent judicial development;

(3) Change in Departmental policy; or

(4) Evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision.

(e) If the motion cites extraordinary circumstances under paragraph (d)(4) of this section, it must explain why the evidence was not provided to the Board during the course of the original appeal.

(f) The Board will not grant a motion for reconsideration that:

(1) Merely repeats arguments made in the original appeal, except in cases of demonstrable error; or

(2) Seeks relief from the legally binding consequences of a statute or regulation.

[75 FR 64664, Oct. 20, 2010]

§ 4.404 Consolidation.

If the facts or legal issues in two or more appeals pending before the Board are the same or similar, the Board may consolidate the appeals, either on motion by a party or at the initiative of the Board.

[75 FR 64665, Oct. 20, 2010]

§ 4.405 Extensions of time.

(a) If a document other than a notice of appeal is required to be filed or served within a definite time, a party may seek additional time by filing with the Board a motion requesting an extension of time.

(b) A motion requesting an extension must be filed no later than the day before the date the document is due, absent compelling circumstances. The motion may be filed and served by facsimile. Section 4.401(a) does not apply to a motion requesting an extension of time.

(c) Except as provided in paragraph (f) of this section, before filing a motion requesting an extension of time, the moving party must make reasonable efforts to contact each other party to determine whether the party opposes the motion. The moving party must state in its motion:

(1) Whether any party it reached opposes the motion; and

(2) What steps it took to contact any party it was unable to reach.

(d) Except as provided in paragraph (f) of this section, the party must support its motion requesting an extension of time by showing there is good cause to grant it.

(e) A Board order granting or denying a motion requesting an extension will state when the document must be filed. Except as provided in paragraph (f) of this section, if the Board does not act on a motion before the document is due, the document must be filed no later than 15 days after the original due date, unless the Board orders otherwise.

(f) A party seeking additional time to file an answer may have one automatic extension, not to exceed 30 days, of the deadline in §4.414(a) by filing a motion for such extension under paragraphs (a) and (b) of this section.

[75 FR 64665, Oct. 20, 2010]

§4.406 Intervention; amicus curiae.

(a) A person who wishes to intervene in an appeal must file a motion to intervene within 30 days after the person knew or should have known that the decision had been appealed to the Board.

(b) A motion to intervene must set forth the basis for the proposed intervention, including:

(1) Whether the person had a right to appeal the decision under §4.410 or would be adversely affected if the Board reversed, vacated, set aside, or modified the decision; and

(2) How and when the person learned of the appeal.

(c) The Board may:

(1) Grant the motion to intervene;

(2) Deny the motion to intervene for good cause, e.g., where granting it would disadvantage the rights of the existing parties or unduly delay adjudication of the appeal; or

(3) Grant the motion to intervene but limit the person's participation in the appeal.

(d) A person may file a motion at any time to file a brief as an amicus curiae.

(1) The motion must state the person's interest in the appeal and how its brief will be relevant to the issues involved.

(2) The Board may grant or deny the motion in its discretion. The Board may also allow a person to file a brief as amicus curiae if it denies the person's motion to intervene.

(e) A person granted full or limited intervenor status is a party to the appeal, while an amicus curiae is not. A person granted amicus curiae status must serve its brief on the parties to the appeal.

[75 FR 64665, Oct. 20, 2010]

§4.407 Motions.

(a) Any motion filed with the Board must provide a concise statement of the reasons supporting the motion.

(b) When a person or party files a motion, other than a motion for an extension of time under §4.405, any party has 15 days after service of the motion to file a written response, unless a provision of this subpart or the Board by order provides otherwise.

(c) The Board will rule on any motion as expeditiously as possible.

(d) The requirements of §4.401(d) apply to a motion.

[75 FR 64665, Oct. 20, 2010]

APPEALS TO THE BOARD OF LAND APPEALS

§4.410 Who may appeal.

(a) Any party to a case who is adversely affected by a decision of the Bureau or Office or an administrative law judge has the right to appeal to the Board, except:

(1) As otherwise provided in Group 2400 of chapter II of this title,

(2) To the extent that decisions of Bureau of Land Management officers must first be appealed to an administrative law judge under § 4.470 and part 4100 of this title,

(3) Where a decision has been approved by the Secretary, and

(4) As provided in paragraph (e) of this section.

(b) A party to a case, as set forth in paragraph (a) of this section, is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, *e.g.*, by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action.

(c) Where the Bureau or Office provided an opportunity for participation in its decisionmaking process, a party to the case, as set forth in paragraph (a) of this section, may raise on appeal only those issues:

(1) Raised by the party in its prior participation; or

(2) That arose after the close of the opportunity for such participation.

(d) A party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.

(e) For decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board.

[47 FR 26392, June 18, 1982, as amended at 68 FR 33803, June 5, 2003; 75 FR 64665, Oct. 20, 2010]

§ 4.411 Appeal; how taken, mandatory time limit.

(a) A person who wishes to appeal to the Board must file a notice that the person wishes to appeal.

(1) The notice of appeal must be filed in the office of the officer who made the decision (not the Board).

(2) Except as otherwise provided by law:

(i) A person served with the decision being appealed must transmit the notice of appeal in time for it to be received in the appropriate office no later than 30 days after the date of service of the decision; and

(ii) If a decision is published in the FEDERAL REGISTER, a person not served with the decision must transmit the notice of appeal in time for it to be received in the appropriate office no later than 30 days after the date of publication.

(b) The notice of appeal must give the serial number or other identification of the case. The notice of appeal may include a statement of reasons for the appeal, and a statement of standing if required by § 4.412(b).

(c) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed after the grace period provided in § 4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. If the notice of appeal is filed during the grace period provided in § 4.401(a) and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the appeal will be dismissed by the Board.

(d) After receiving a timely notice of appeal, the office of the officer who made the decision must promptly forward to the Board:

(1) The notice of appeal;

(2) Any statement of reasons, statement of standing, and other documents included with the notice of appeal; and

(3) The complete administrative record compiled during the officer's consideration of the matter leading to the decision being appealed.

(R.S. 2478, as amended, 43 U.S.C. 1201; sec. 25, Alaska Native Claims Settlement Act, as amended, 43 U.S.C. 1601–1628; and the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*)

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 15117, Aug. 13, 1971; 49 FR 6373, Feb. 21, 1984; 75 FR 64665, Oct. 20, 2010]

§4.412 Statement of reasons; statement of standing; reply briefs.

(a) An appellant must file a statement of reasons for appeal with the Board no later than 30 days after the notice of appeal was filed. Unless the Board orders otherwise upon motion for good cause shown, the text of a statement of reasons may not exceed 30 pages, excluding exhibits, declarations, or other attachments.

(b) Where the decision being appealed relates to land selections under the Alaska Native Claims Settlement Act, as amended, the appellant also shall file with the Board a statement of facts upon which the appellant relies for standing under §4.410(b) within 30 days after filing of the notice of appeal. The statement may be included with the notice of appeal filed pursuant to §4.411 or the statement of reasons filed pursuant to paragraph (a) of this section or may be filed as a separate document.

(c) Failure to file the statement of reasons and statement of standing within the time required will subject the appeal to summary dismissal as provided in §4.402, unless the delay in filing is waived as provided in §4.401(a).

(d) The filing of a reply brief is discouraged. However, an appellant who wishes to file a reply brief may do so within 15 days after service of an answer under §4.414.

(1) The reply brief is limited to the issues raised in the answer.

(2) Unless the Board orders otherwise upon motion for good cause shown, the text of a reply brief may not exceed 20 pages, excluding exhibits, declarations, or other attachments.

(e) The requirements of §4.401(d) apply to a statement of reasons and a reply brief.

[47 FR 26392, June 18, 1982, as amended at 67 FR 4368, Jan. 30, 2002; 75 FR 64666, Oct. 20, 2010]

§4.413 Service of notice of appeal.

(a) The appellant must serve a copy of the notice of appeal on each person named in the decision from which the appeal is taken and on the Office of the Solicitor as identified in paragraphs (c) and (d) of this section. Service must be accomplished and certified as prescribed in §4.401(c).

(b) Failure to serve a notice of appeal will subject the appeal to summary dismissal as provided in §4.402.

(c) The appellant must serve a copy of the notice of appeal on the Office of the Solicitor as shown in the following table.

If the appeal is taken from a decision of . . .	Then the appellant must serve the notice on . . .
(1) ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, or BIA concerning royalties.	Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215.
(2) BOEMRE	Associate Solicitor, Division of Mineral Resources, U.S. Department of the Interior, Washington, DC 20240.
(3) The Director, BLM	(i) If the decision concerns use and disposition of public lands, including land selections under the Alaska Native Claims Settlement Act, as amended: Associate Solicitor, Division of Land and Water Resources, U.S. Department of the Interior, Washington, DC 20240; or (ii) If the decision concerns use and disposition of mineral resources: Associate Solicitor, Division of Mineral Resources, U.S. Department of the Interior, Washington, DC 20240.
(4) A BLM State Office (including all District, Field, and Area Offices within that State Office's jurisdiction).	The appropriate office identified in paragraph (d) of this section.
(5) An Administrative Law Judge	The persons identified in paragraph (e) of this section.

(d) This paragraph applies to any appeal taken from a decision of a BLM State Office, including all District, Field, and Area Offices within that State Office's jurisdiction. The appellant must serve documents on the Office of the Solicitor in accordance with the following table, unless the decision identifies a different official:

BLM state office	Mailing address
(1) Alaska	Regional Solicitor, Alaska Region, U.S. Department of the Interior, 4230 University Drive, Suite 300, Anchorage, AK 99508–4626.

BLM state office	Mailing address
(2) Arizona	Field Solicitor, U.S. Department of the Interior, U.S. Courthouse, Suite 404, 401 W. Washington St. SPC 44, Phoenix, AZ 85003.
(3) California	Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, 2800 Cottage Way, Room E–1712, Sacramento, CA 95825–1890.
(4) Colorado	Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215.
(5) Eastern States	(i) For decisions involving Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, or Wisconsin: Regional Solicitor, Northeast Region, U.S. Department of the Interior, One Gateway Center, Suite 612, Newton, MA 02458. (ii) For decisions involving Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, or Tennessee: Regional Solicitor, Southeast Region, U.S. Department of the Interior, 75 Spring Street, SW., Suite 304, Atlanta, Georgia 30303.
(6) Idaho	Field Solicitor, U.S. Department of the Interior, University Plaza, 960 Broadway Avenue, Suite 400, Boise, ID 83706.
(7) Montana (covers the states of Montana, North Dakota, and South Dakota).	(i) Deliveries by U.S. Mail: Field Solicitor, U.S. Department of the Interior, P.O. Box 31394, Billings, MT 59107–1394. (ii) All other deliveries: Field Solicitor, U.S. Department of the Interior, 316 North 26th Street, Room 3005, Billings, MT 59101.
(8) Nevada	Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, 2800 Cottage Way, Room E–1712, Sacramento, CA 95825–1890.
(9) New Mexico (covers the states of New Mexico, Kansas, Oklahoma, and Texas).	Regional Solicitor, Southwest Region, U.S. Department of the Interior, 505 Marquette Ave., NW., Suite 1800, Albuquerque, NM 87102.
(10) Oregon (covers the states of Oregon and Washington).	Regional Solicitor, Pacific Northwest Region, U.S. Department of the Interior, 805 SW. Broadway, Suite 600, Portland, OR 97205.
(11) Utah	Regional Solicitor, Intermountain Region, U.S. Department of the Interior, 6201 Federal Building, 125 South State Street, Salt Lake City, UT 84138–1180.
(12) Wyoming (covers the states of Wyoming and Nebraska).	Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215.

(e) This paragraph applies to any appeal taken from a decision of an administrative law judge.

(1) Except as provided in paragraph (e)(2) of this section, the appellant must serve either:

(i) The attorney from the Office of the Solicitor who represented the Bureau or Office at the hearing; or

(ii) If there was no hearing, the attorney who was served with a copy of the decision by the administrative law judge.

(2) If the decision involved a mining claim on national forest land, the appellant must serve either:

(i) The attorney from the Office of General Counsel, U.S. Department of Agriculture, who represented the U.S. Forest Service at the hearing; or

(ii) If there was no hearing, the attorney who was served with a copy of the decision by the administrative law judge.

(f) Parties must serve the Office of the Solicitor as required by this section until a particular attorney of the Office of the Solicitor files and serves a Notice of Appearance or Substitution of Counsel. Thereafter, parties must serve the Office of the Solicitor as indicated by the Notice of Appearance or Substitution of Counsel.

(g) The appellant must certify service as provided in § 4.401(c)(5).

[75 FR 64666, Oct. 20, 2010]

§ 4.414 Answers.

(a) Any person served with a notice of appeal who wishes to participate in the appeal must file an answer or appropriate motion with the Board within 30 days after service of the statement of reasons for appeal. The answer must respond to the statement of reasons for appeal.

(b) Unless the Board orders otherwise upon motion for good cause shown:

(1) The text of the answer or motion may not exceed 30 pages, excluding exhibits, declarations, or other attachments; and

(2) The party may not file any further pleading.

(c) Failure to file an answer or motion will not result in a default. If an answer or motion is filed or served after the time required, the Board may

disregard it in deciding the appeal, unless the delay in filing is waived as provided in §4.401(a).

(d) The requirements of §4.401(d) apply to an answer or motion.

[75 FR 64666, Oct. 20, 2010]

§4.415 Motion for a hearing on an appeal involving questions of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided, and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with §4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§4.430 to 4.438 and the general rules in subpart B of this part. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

[75 FR 64666, Oct. 20, 2010]

§4.416 Appeals of wildfire management decisions.

The Board must decide appeals from decisions under §4190.1 and §5003.1(b) of this title within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed.

[68 FR 33803, June 5, 2003]

HEARINGS PROCEDURES

Hearings procedures; general

§4.420 Applicability of general rules.

To the extent they are not inconsistent with these special rules, the general rules of the Office of Hearings and Appeals in subpart B of this part are also applicable to hearings, procedures.

§4.421 Definitions.

In addition to the definitions in §4.400, as used in this subpart:

Director means the Director of BLM or a BLM Deputy Director or Assistant Director.

Manager means the BLM official with direct jurisdiction over the public lands that are pertinent to the decision or contest.

Person named in the decision means any of the following persons identified in a final BLM grazing decision: An affected applicant, permittee, lessee, or agent or lienholder of record, or an interested public as defined in §4100.0–5 of this title.

State Director means the supervising BLM officer for the State in which a particular range lies, or an authorized representative.

[75 FR 64667, Oct. 20, 2010]

§ 4.422 Documents.

(a) *Grace period for filing*. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal or contest in connection with which the document is required to be filed. This paragraph does not apply to requests for postponement of hearings under §§ 4.452–1 and 4.452–2.

(b) *Transferees and encumbrancers*. Transferees and encumbrancers of land, the title to which is claimed or is in the process of acquisition under any public land law shall, upon filing notice of the transfer or encumbrance in the proper land office, become entitled to receive and be given the same notice of any contest, appeal, or other proceeding thereafter initiated affecting such interest which is required to be given to a party to the proceeding. Every such notice of a transfer or encumbrance will be noted upon the records of the land office. Thereafter such transferee or encumbrancer must be made a party to any proceedings thereafter initiated adverse to the entry.

(c) *Service of documents*. (1) A party that files any document under this subpart must serve a copy of it concurrently as follows:

(i) On the appropriate official of the Office of the Solicitor under § 4.413(c) and (d);

(ii) For a notice of appeal and statement of reasons, on each person named in the decision under appeal; and

(iii) For all other documents, on each party to the appeal.

(2) Service on a party known to be represented by counsel or other designated representative must be made on the representative.

(3) Service must be made at the last address of record of the party (if unrepresented) or the representative, unless the party or representative has notified the serving party of a subsequent change of address.

(4) Service may be made as shown in the following table:

If the document is . . .	Service may be made by . . .
(i) An appeal under § 4.470	(A) Personal delivery; (B) Registered or certified mail, return receipt requested; (C) Delivery service, delivery receipt requested, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has previously consented to that means of service in writing.
(ii) A complaint under § 4.450–4 or 4.451–2.	(A) Any of the methods specified in paragraph (c)(4)(i) of this paragraph; or (B) Publication as specified in § 4.450–5.
(iii) Neither an appeal nor a complaint.	(A) Personal delivery; (B) Mail; (C) Delivery service, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has consented to that means in writing.

(5) At the conclusion of any document that a party must serve under the regulations in this subpart, the party must sign a written statement that:

(i) Certifies that service has been or will be made in accordance with the applicable rules; and

(ii) Specifies the date and manner of service.

(6) Service that complies with paragraphs (c)(2) through (4) of this section is complete as shown in the following table:

If service is made by . . .	Service is complete when . . .
(i) Personal delivery	The document is delivered to the party.

If service is made by . . .	Service is complete when . . .
(ii) Mail or delivery service	The document is delivered to the party.
(iii) Electronic means	The document is transmitted to the party, unless the serving party learns that it did not reach the party to be served.
(iv) Publication	The final notice is published under §4.450–5(b)(3).

(7) In the absence of evidence to the contrary, delivery under paragraph (c)(6)(ii) of this section is deemed to take place 5 business days after the document was sent.

(d) The manager or administrative law judge, as the case may be, may extend the time for filing or serving any document in a contest, other than a notice of appeal under §4.452–9.

[36 FR 7186, Apr. 15, 1971, as amended at 36 FR 15117, Aug. 13, 1971; 68 FR 33803, June 5, 2003; 75 FR 64667, Oct. 20, 2010]

§4.423 Subpoena power and witness provisions.

The administrative law judge is authorized to issue subpoenas directing the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers, for the purpose of taking testimony but not for discovery. The issuance of subpoenas, service, attendance fees, and similar matters shall be governed by the Act of January 31, 1903 (43 U.S.C. 102–106), and 28 U.S.C. 1821.

HEARINGS ON APPEALS INVOLVING QUESTIONS OF FACT

§4.430 Prehearing conferences.

(a) The administrative law judge may, in his discretion, on his own motion or motion of one of the parties or of the Bureau or Office direct the parties or their representatives to appear at a specified time and place for a prehearing conference to consider: (1) The possibility of obtaining stipulations, admissions of facts and agreements to the introduction of documents, (2) the limitation of the number of expert witnesses, and (3) any other matters which may aid in the disposition of the proceedings.

(b) The administrative law judge shall issue an order which recites the action taken at the conference and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements. Such order shall control the subsequent course of the proceeding before the administrative law judge unless modified for good cause, by subsequent order.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64668, Oct. 20, 2010]

§4.431 Fixing of place and date for hearing; notice.

The administrative law judge shall fix a place and date for the hearing and notify all parties and the Bureau or Office. All hearings held in connection with land selection appeals arising under the Alaska Native Claims Settlement Act, as amended, shall be conducted within the State of Alaska, unless the parties agree otherwise.

[47 FR 26392, June 18, 1982, as amended at 75 FR 64668, Oct. 20, 2010]

§4.432 Postponements.

(a) Postponements of hearings will not be allowed upon the request of any party or the Bureau or Office except upon a showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the administrative law judge at least 10 days prior to the date of the hearing. In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement. In any such emergency, if time does not permit the filing of such request prior to the hearing, it may be made orally at the hearing.

(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witnesses, it must state what the substance of the

testimony of the absent witnesses would be. No postponement will be granted if the adverse party or parties file with the examiner within 5 days after the service of the request a statement admitting that the witnesses on account of whose absence the postponement is desired would, if present, testify as stated in the request. If time does not permit the filing of such statement prior to the hearing, it may be made orally at the hearing.

(c) Only one postponement will be allowed to a party on account of the absence of witnesses unless the party requesting a further postponement shall at the time apply for an order to take the testimony of the alleged absent witness by deposition.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64668, Oct. 20, 2010]

§ 4.433 Authority of the administrative law judge.

(a) The administrative law judge has general authority to conduct the hearing in an orderly and judicial manner, including authority to:

(1) Administer oaths;

(2) Call and question witnesses;

(3) Subpoena witnesses as specified in paragraph (b) of this section;

(4) Issue findings and decisions as specified in paragraph (c) of this section; and

(5) Take any other actions that the Board may prescribe in referring the case for hearing.

(b) The administrative law judge has authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of taking testimony but not for discovery. This authority must be exercised in accordance with the Act of January 31, 1903 (32 Stat. 790; 43 U.S.C. 102 through 106).

(c) The administrative law judge has authority to issue any of the following, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411 within 30 days of receipt of the decision.

(d) The issuance of subpoenas, the attendance of witnesses, and the taking of depositions are governed by §§ 4.423 and 4.26.

[75 FR 64668, Oct. 20, 2010]

§ 4.434 Conduct of hearing.

(a) The administrative law judge may seek to obtain stipulations as to material facts.

(b) Unless the administrative law judge directs otherwise:

(1) The appellant will first present its evidence on the facts at issue; and

(2) The other parties and the Bureau or Office will then present their evidence on such issues.

[75 FR 64668, Oct. 20, 2010]

§ 4.435 Evidence.

(a) All oral testimony shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge may question any witnesses. Documentary evidence may be received if pertinent to any issue. The administrative law judge will summarily stop examination and exclude testimony which is obviously irrelevant and immaterial.

(b) Objections to evidence will be ruled upon by the administrative law judge. Such rulings will be considered, but need not be separately ruled upon, by the Board in connection with its decision. Where a ruling of an administrative law judge sustains an objection to the admission of evidence, the party affected may insert in the record, as a tender of proof, a summary written statement of the substance of the excluded evidence and the objecting party may then make an offer of proof in rebuttal.

§ 4.436 Reporter's fees.

Reporter's fees shall be borne by the Bureau or Office.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64668, Oct. 20, 2010]

§ 4.437 Copies of transcript.

Each party must pay for any copies of the transcript that the party requests. The Bureau or Office will file

the original transcript with the case record.

[75 FR 64668, Oct. 20, 2010]

§ 4.438 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of proposed findings or a recommended decision to file exceptions with the Board.

[75 FR 64668, Oct. 20, 2010]

CONTEST AND PROTEST PROCEEDINGS

§ 4.450 Private contests and protests.

§ 4.450–1 By whom private contest may be initiated.

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the Act of May 14, 1880, as amended (43 U.S.C. 185), or the Act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

§ 4.450–2 Protests.

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

§ 4.450–3 Initiation of contest.

Any person desiring to initiate a private contest must file a complaint in the proper land office (see § 1821.2–1 of chapter II of this title). The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by § 4.422(c), in the office where the complaint was filed within 30 days after service.

§ 4.450–4 Complaints.

(a) *Contents of complaint.* The complaint shall contain the following information, under oath:

(1) The name and address of each party interested;

(2) A legal description of the land involved;

(3) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest, in such land:

(4) A statement in clear and concise language of the facts constituting the grounds of contest;

(5) A statement of the law under which contestant claims or intends to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so;

(6) A statement that the proceeding is not collusive or speculative but is insitituted and will be diligently pursued in good faith;

(7) A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated;

(8) The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant; and

(9) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service

of the notice, the allegations of the complaint will be taken as confessed.

(b) *Amendment of complaint.* Except insofar as the manager, administrative law judge, Director, Board or Secretary may raise issues in connection with deciding a contest, issues not raised in a complaint may not be raised later by the contestant unless the administrative law judge permits the complaint to be amended after due notice to the other parties and an opportunity to object.

(c) *Corroboration required.* All allegations of fact in the complaint which are not matters of official record or capable of being judicially noticed and which, if proved, would invalidate the adverse interest must be corroborated under oath by the statement of witnesses. Each such allegation of fact must be corroborated by the statement of at least one witness having personal knowledge of the alleged fact and such fact must be set forth in the statement. All statements by witnesses shall be attached to the complaint.

(d) *Filing fee.* Each complaint must be accompanied by a filing fee of $10 and a deposit of $20 toward reporter's fees. Any complaint which is not accompanied by the required fee and deposit will not be accepted for filing.

(e) *Waiver of issues.* Any issue not raised by a private contestant in accordance with the provisions of paragraph (b) of this section, which was known to him, or could have been known to him by the exercise of reasonable diligence, shall be deemed to have been waived by him, and he shall thereafter be forever barred from raising such issue.

§ 4.450–5 Service.

The complaint must be served upon every contestee in the manner provided in § 4.422(c)(1). Proof of service must be made in the manner provided in § 4.422(c)(2). In certain circumstances, service may be made by publication as provided in paragraph (b)(1) of this section. When the contest is against the heirs of a deceased entryman, the notice must be served on each heir. If the person to be personally served is an infant or a person who has been legally adjudged incompetent, service of notice must be made by delivering a copy of the notice to the legal guardian or committee, if there is one, of such infant or incompetent person. If there is no guardian or committee, then service must be by delivering a copy of the notice to the person having the infant or incompetent person in charge.

(a) *Summary dismissal; waiver of defect in service.* If a complaint when filed does not meet all the requirements of § 4.450–4(a) and (c), or if the complaint is not served upon each contestee as required by this section, the complaint will be summarily dismissed by the manager and no answer need be filed. However, where prior to the summary dismissal of a complaint a contestee answers without questioning the service or proof of service of the complaint, any defect in service will be deemed waived as to such answering contestee.

(b) *Service by publication*—(1) *When service may be made by publication.* When the contestant has made diligent search and inquiry to locate the contestee, and cannot locate him, the contestant may proceed with service by publication after first filing with the manager an affidavit which shall:

(i) State that the contestee could not be located after diligent search and inquiry made within 15 days prior to the filing of the affidavit;

(ii) Be corroborated by the affidavits of two persons who live in the vicinity of the land which state that they have no knowledge of the contestee's whereabouts or which give his last known address;

(iii) State the last known address of the contestee; and

(iv) State in detail the efforts and inquiries made to locate the party sought to be served.

(2) *Contents of published notice.* The published notice must give the names of the parties to the contest, legal description of the land involved, the substance of the charges contained in the complaint, the office in which the contest is pending, and a statement that upon failure to file an answer in such office within 30 days after the completion of publication of such notice, the allegations of the complaint will be taken as confessed. The published notice shall also contain a statement of the dates of publication.

(3) *Publication, mailing and posting of notice.* (i) Notice by publication shall be made by publishing notice at least once a week for 5 successive weeks in some newspaper of general circulation in the county in which the land in contest lies.

(ii) Within 15 days after the first publication of a notice, the contestant shall send a copy of the notice and the complaint by registered or certified mail, return receipt requested, to the contestee at his last known address and also to the contestee in care of the post office nearest the land. The return receipts shall be filed in the office in which the contest is pending.

(iii) A copy of the notice as published shall be posted in the office where the contest is pending and also in a conspicuous place upon the land involved. Such postings shall be made within 15 days after the first publication of the notice.

(c) *Proof of service.* (1) Proof of publication of the notice shall be made by filing in the office where the contest is pending a copy of the notice as published and the affidavit of the publisher or foreman of the newspaper publishing the same showing the publication of the notice in accordance with paragraph (b)(3) of this section.

(2) Proof of posting of the notice shall be by affidavit of the person who posted the notice on the land and by the certificate of the manager or the Director of the Bureau of Land Management as to posting in his office.

(3) Proof of the mailing of notice shall be by affidavit of the person who mailed the notice to which shall be attached the return receipt.

[36 FR 7186, Apr. 15, 1971, as amended at 68 FR 33803, June 5, 2003]

§ 4.450–6 Answer to complaint.

Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in § 4.450–5(b)(3). The answer shall contain or be accompanied by the address to which all notices or other papers shall be sent for service upon contestee.

§ 4.450–7 Action by manager.

(a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the manager will decide the case without a hearing.

(b) If an answer is filed and unless all parties waive a hearing, the manager will refer the case to an administrative law judge upon determining that the elements of a private contest appear to have been established.

§ 4.450–8 Amendment of answer.

At the hearing, any allegation not denied by the answer will be considered admitted. The administrative law judge may permit the answer to be amended after due notice to other parties and an opportunity to object.

§ 4.451 Government contests.

§ 4.451–1 How initiated.

The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim.

§ 4.451–2 Proceedings in Government contests.

The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests with the following exceptions:

(a) No corroboration shall be required of a Government complaint and the complaint need not be under oath.

(b) A Government contest complaint will not be insufficient and subject to dismissal for failure to name all parties interested, or for failure to serve every party who has been named.

(c) No filing fee or deposit toward reporter's fee shall be required of the Government.

(d) Any action required of the contestant may be taken by any authorized Government employee.

(e) The statements required by § 4.450–4(a) (5) and (6) need not be included in the complaint.

(f) No posting of notice of publication on the land in issue shall be required of the Government.

(g) Where service is by publication, the affidavits required by § 4.450–5(b)(1) need not be filed. The contestant shall file with the manager a statement of diligent search which shall state that the contestee could not be located after diligent search and inquiry, the last known address of the contestee and the detail of efforts and inquiries made to locate the party sought to be served. The diligent search shall be concluded not more than 15 days prior to the filing of the statement.

(h) In lieu of the requirements of § 4.450–5(b)(3)(ii) the contestant shall, as part of the diligent search before the publication or within 15 days after the first publication send a copy of the complaint by certified mail, return receipt requested, to the contestee at the last address of record. The return receipts shall be filed in the office in which the contest is pending.

(i) The affidavit required by § 4.450–5(c)(3) need not be filed.

(j) The provisions of paragraph (e) of § 4.450–4(e) shall be inapplicable.

§ 4.452 Proceedings before the administrative law judge.

§ 4.452–1 Prehearing conferences.

(a) The administrative law judge may in his discretion, on his own motion or on motion of one of the parties, or of the Bureau, direct the parties or their representatives to appear at a specified time and place for a prehearing conference to consider:

(1) The simplification of the issues,

(2) The necessity of amendments to the pleadings,

(3) The possibility of obtaining stipulations, admissions of facts and agreements to the introduction of documents,

(4) The limitation of the number of expert witnesses, and

(5) Such other matters as may aid in the disposition of the proceedings.

(b) The administrative law judge shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admission or agreements. Such order shall control the subsequent course of the proceedings before the administrative law judge unless modified for good cause, by subsequent order.

§ 4.452–2 Notice of hearing.

The administrative law judge shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date. The notice shall include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted. All hearings held in connection with land selection appeals arising under the Alaska Native Claims Settlement Act, as amended, shall be conducted within the state of Alaska, unless the parties agree otherwise.

[47 FR 26392, June 18, 1982]

§ 4.452–3 Postponements.

(a) Postponements of hearings will not be allowed upon the request of any party or the Bureau except upon a showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the administrative law judge at least 10 days prior to the date of the hearing. In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement. In any such emergency, if time does not permit the filing of such request prior to the hearing, it may be made orally at the hearing.

(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witnesses, it must state what the substance of the testimony of the absent witnesses would be. No postponement will be granted if the adverse party or parties file with the administrative law judge within 5 days after the service of the request a statement admitting that the

witnesses on account of whose absence the postponement is desired would, if present, testify as stated in the request. If time does not permit the filing of such statement prior to the hearing, it may be made orally at the hearing.

(c) Only one postponement will be allowed to a party on account of the absence of witnesses unless the party requesting a further postponement shall at the time apply for an order to take the testimony of the alleged absent witness by deposition.

§ 4.452–4 Authority of administrative law judge.

The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner, including authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of tasking testimony but not for discovery in accordance with the act of January 31, 1903 (43 U.S.C. 102–106), to administer oaths, to call and question witnesses, and to make a decision. The issuance of subpoenas, the attendance of witnesses and the taking of depositions shall be governed by §§ 4.423 and 4.26 of the general rules in subpart B of this part.

§ 4.452–5 Conduct of hearing.

So far as not inconsistent with a prehearing order, the administrative law judge may seek to obtain stipulations as to material facts and the issues involved and may state any other issues on which he may wish to have evidence presented. He may exclude irrelevant issues. The contestant will then present his case following which the other parties (and in private contests the Bureau, if it intervenes) will present their cases.

§ 4.452–6 Evidence.

(a) All oral testimony shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge may question any witness. Documentary evidence may be received if pertinent to any issue. The administrative law judge will summarily stop examination and exclude testimony which is obviously irrelevant and immaterial.

(b) Objections to evidence will be ruled upon by the administrative law judge. Such rulings will be considered, but need not be separately ruled upon, by the Board in connection with its decision. Where a ruling of an administrative law judge sustains an objection to the admission of evidence, the party affected may insert in the record, as a tender of proof, a summary written statement of the substance of the excluded evidence, and the objecting party may then make an offer of proof in rebuttal.

§ 4.452–7 Reporter's fees.

(a) The Government agency initiating the proceedings will pay all reporting fees in hearings in Government contest proceedings, in hearings under the Surface Resources Act of 1955, as amended, in hearings under the Multiple Mineral Development Act of 1954, as amended, where the United States is a party, and in hearings under the Mining Claims Rights Restoration Act of 1955, regardless of which party is ultimately successful.

(b) In the case of a private contest, each party will be required to pay the reporter's fees covering the party's direct evidence and cross-examination of witnesses, except that if the ultimate decision is adverse to the contestant, he must in addition pay all the reporter's fees otherwise payable by the contestee.

(c) Each party to a private contest shall be required by the administrative law judge to make reasonable deposits for reporter's fees from time to time in advance of taking testimony. Such deposits shall be sufficient to cover all reporter's fees for which the party may ultimately be liable under paragraph (b) of this section. Any part of a deposit not used will be returned to the depositor upon the final determination of the case except that deposits which are required to be made when a complaint is filed will not be returned if the party making the deposit does not appear at the hearing, but will be used to pay the reporter's fee. Reporter's fees will be at the rates established for the local courts, or, if the reporting is done pursuant to a contract, at rates established by the contract.

§ 4.452–8 Findings and conclusions; decision by administrative law judge.

(a) At the conclusion of the testimony the parties at the hearing shall be given a reasonable time by the administrative law judge, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and conclusions of law and reasons in support thereof or to stipulate to a waiver of such findings and conclusions.

(b) As promptly as possible after the time allowed for presenting proposed findings and conclusions, the administrative law judge shall make findings of fact and conclusions of law (unless waiver has been stipulated), giving the reasons therefor, upon all the material issues of fact, law, or discretion presented on the record. The administrative law judge may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. He must rule upon each proposed finding and conclusion submitted by the parties and such ruling shall be shown in the record. The administrative law judge will render a written decision in the case which shall become a part of the record and shall include a statement of his findings and conclusions, as well as the reasons or basis therefor, and his rulings upon the findings and conclusions proposed by the parties if such rulings do not appear elsewhere in the record. A copy of the decision will be served upon all parties to the case.

[36 FR 7186, Apr. 15, 1971, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.452–9 Appeal to Board.

Any party, including the Government, adversely affected by the decision of the administrative law judge may appeal to the Board as provided in § 4.410, and the general rules in Subpart B of this part. No further hearing will be allowed in connection with the appeal to the Board but the Board, after considering the evidence, may remand any case for further hearing if it considers such action necessary to develop the facts.

GRAZING PROCEDURES (INSIDE AND OUTSIDE GRAZING DISTRICTS)

SOURCE: 44 FR 41790, July 18, 1979, unless otherwise noted.

§ 4.470 How to appeal a final BLM grazing decision to an administrative law judge.

(a) Any applicant, permittee, lessee, or other person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge within 30 days after receiving it or within 30 days after a proposed decision becomes final as provided in § 4160.3(a) of this title. To do so, the person must file an appeal with the BLM field office that issued the decision and serve a copy of the appeal on any person named in the decision.

(b) The appeal must state clearly and concisely the reasons why the appellant thinks the BLM grazing decision is wrong.

(c) Any ground for appeal not included in the appeal is waived. The appellant may not present a waived ground for appeal at the hearing unless permitted or ordered to do so by the administrative law judge.

(d) Any person who, after proper notification, does not appeal a final BLM grazing decision within the period provided in paragraph (a) of this section may not later challenge the matters adjudicated in the final BLM decision.

(e) Filing an appeal does not by itself stay the effectiveness of the final BLM decision. To request a stay of the final BLM decision pending appeal, *see* § 4.471.

[68 FR 68770, Dec. 10, 2003]

§ 4.471 How to petition for a stay of a final BLM grazing decision.

(a) An appellant under § 4.470 may petition for a stay of the final BLM grazing decision pending appeal by filing a petition for a stay together with the appeal under § 4.470 with the BLM field office that issued the decision.

(b) Within 15 days after filing the appeal and petition for a stay, the appellant must serve copies on—

(1) Any other person named in the decision from which the appeal is taken; and

(2) The appropriate office of the Office of the Solicitor, in accordance with §4.413(a) and (c).

(c) A petition for a stay of a final BLM grazing decision pending appeal under paragraph (a) of this section must show sufficient justification based on the following standards:

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

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

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

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

(d) The appellant requesting a stay bears the burden of proof to demonstrate that a stay should be granted.

[68 FR 68770, Dec. 10, 2003]

§4.472 Action on an appeal and petition for a stay.

(a) BLM must transmit any documents received under §§4.470 and 4.471, within 10 days after receipt, to the Hearings Division, Office of Hearings and Appeals, Salt Lake City, Utah. If a petition for a stay has been filed, the transmittal must also include any response BLM wishes to file to a petition for a stay and the following documents from the case file: the application, permit, lease, or notice of unauthorized use underlying the final BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant under §4160.2; the final BLM grazing decision; and any other documents that BLM wishes the administrative law judge to consider in deciding the petition for a stay. BLM must serve a copy of any such response on the appellant and any other person named in the decision from which the appeal is taken.

(b) Any person named in the decision from which an appeal is taken (other than the appellant) who wishes to file a response to the petition for a stay may file with the Hearings Division a motion to intervene in the appeal, together with the response, within 10 days after receiving the petition. Within 15 days after filing the motion to intervene and response, the person must serve copies on the appellant, the appropriate office of the Office of the Solicitor in accordance with §4.413(a) and (c), and any other person named in the decision.

(c) If a petition for a stay has not been filed, BLM must promptly transmit the following documents from the case file to the administrative law judge assigned to the appeal, once the appeal has been docketed by the Hearings Division: the application, permit, lease, or notice of unauthorized use underlying the final BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant under §4160.2; and the final BLM grazing decision.

(d) Within 45 days after the expiration of the time for filing a notice of appeal, an administrative law judge must grant or deny—

(1) A petition for a stay filed under §4.471(a), in whole or in part; and

(2) A motion to intervene filed with a response to the petition under paragraph (b) of this section.

(e) Any final BLM grazing decision that is not already in effect and for which a stay is not granted will become effective immediately after the administrative law judge denies a petition for a stay or fails to act on the petition within the time set forth in paragraph (d) of this section.

(f) At any appropriate time, any party may file with the Hearings Division a motion to dismiss the appeal or other appropriate motion. The appellant and any other party may file a response to the motion within 30 days after receiving a copy.

(g) Within 15 days after filing a motion or response under paragraph (f) of this section, any moving or responding party must serve a copy on every other party. Service on BLM must be made on the appropriate office of the Office of the Solicitor in accordance with §4.413(a) and (c).

[68 FR 68770, Dec. 10, 2003]

§4.473 Time and place of hearing; notice; intervenors.

At least 30 days before the date set by the administrative law judge the authorized officer will notify the appellant of the time and place of the hearing within or near the district. Any other person who in the opinion of the

authorized officer may be directly affected by the decision on appeal will also be notified of the hearing; such person may himself appear at the hearing, or by attorney, and upon a proper showing of interest, may be recognized by the administrative law judge as an intervenor in the appeal.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003]

§ 4.474 Authority of administrative law judge.

(a) The administrative law judge is vested with the duty and general authority to conduct the hearing in an orderly, impartial, and judicial manner, including authority to subpoena witnesses, recognize intervenors, administer oaths and affirmations, call and question witnesses, regulate the course and order of the hearing, rule upon offers of proof and the relevancy of evidence, and to make findings of fact, conclusions of law, and a decision. The administrative law judge shall have authority to take or to cause depositions to be taken. Subpoenas, depositions, the attendance of witnesses, and witness and deposition fees shall be governed by § 4.26 of the general rules in Subpart B of this part, to the extent such regulations are applicable.

(b) The administrative law judge also may grant or order continuances, and set the times and places of further hearings. Continuances shall be granted in accordance with § 4.452–3.

(c) The administrative law judge may consider and rule on all motions and petitions, including a petition for a stay of a final BLM grazing decision.

(d) An administrative law judge may consolidate two or more appeals for purposes of hearing and decision when they involve a common issue or issues.

[44 FR 41790, July 18, 1979. Redesignated and amended at 68 FR 68770, 68771, Dec. 10, 2003]

§ 4.475 Service.

Service of notice or other documents required under this subpart shall be governed by §§ 4.413 and 4.422. Proof of such service shall be filed in the same office where the notice or document was filed within 15 days after such service, unless filed with the notice or document.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003]

§ 4.476 Conduct of hearing; reporter's fees; transcript.

(a) The appellant, the State Director or his representative, and recognized intervenors will stipulate so far as possible all material facts and the issue or issues involved. The administrative law judge will state any other issues on which he may wish to have evidence presented. Issues which appear to the administrative law judge to be unnecessary to a proper disposition of the case will be excluded; but the party asserting such issue may state briefly for the record the substance of the proof which otherwise would have been offered in support of the issue. Issues not covered by the appellant's specifications of error may not be admitted except with the consent of the State Director or his representative, unless the administrative law judge rules that such issue is essential to the controversy and should be admitted. The parties will then be given an opportunity to submit offers of settlement and proposals of adjustment for the consideration of the administrative law judge and of the other parties.

(b) Unless the administrative law judge orders otherwise, the State Director or his representative will then make the opening statement, setting forth the facts leading to the appeal. Upon the conclusion of the opening statement, the appellant shall present his case, consistent with his specifications of error. (In the case of a show cause, the State Director shall set forth the facts leading to the issuance of the show cause notice and shall present his case following the opening statement.) Following the appellant's presentation, or upon his failure to make such presentation, the administrative law judge, upon his own motion or upon motion of any of the parties, may order summary dismissal of the appeal with prejudice because of the inadequacy or insufficiency of the appellant's case, to be followed by a written order setting forth the reasons for the dismissal and taking such other action under this subpart as may be proper

and warranted. An appeal may be had from such order as well as from any other final determination made by the administrative law judge.

(c) In the absence or upon denial of such motion the State Director or his representative and recognized intervenors may present evidence if such a presentation appears to the administrative law judge to be necessary for a proper disposition of the matters in controversy, adhering as closely as possible to the issues raised by the appellant. All oral testimony shall be under oath or affirmation, and witnesses shall be subject to cross-examination by any party to the proceeding. The administrative law judge may question any witness whenever it appears necessary. Documentary evidence will be received by the administrative law judge and made a part of the record, if pertinent to any issue, or may be entered by stipulation. No exception need be stated or noted and every ruling of the administrative law judge will be subject to review on appeal. The party affected by an adverse ruling sustaining an objection to the admission of evidence, may insert in the record, as a tender of proof, a brief written statement of the substance of the excluded evidence; and the opposing party may then make an offer of proof in rebuttal. The administrative law judge shall summarily stop examination and exclude testimony on any issue which he determines has been adjudicated previously in an appeal involving the same preference and the same parties or their predecessors in interest, or which is obviously irrelevant and immaterial to the issues in the case. At the conclusion of the testimony the parties at the hearing shall be given a reasonable opportunity, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and conclusions of law, and reasons in support thereof, or to stipulate to a waiver of such findings and conclusions.

(d) The reporter's fees will be borne by the Government. Each party must pay for any copies of the transcript that the party requests. The Government will file the original transcript with the case record.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003, as amended at 75 FR 64669, Oct. 20, 2010]

§4.477 Findings and conclusions; decision by administrative law judge.

As promptly as possible after the time allowed for presenting proposed findings and conclusions, the administrative law judge will make findings of fact and conclusions of law, unless waiver has been stipulated, and will render a decision upon all issues of material fact and law presented on the record. In doing so, he or she may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. The reasons for the findings, conclusions, and decision made will be stated, and along with the findings, conclusions, and decision, will become a part of the record in any further appeal. A copy of the decision must be sent by certified mail to all the parties.

[75 FR 64669, Oct. 20, 2010]

§4.478 Appeals to the Board of Land Appeals; judicial review.

(a) Any person who has a right of appeal under §4.410 or other applicable regulation may appeal to the Board from an order of an administrative law judge granting or denying a petition for a stay in accordance with §4.411.

(b) As an alternative to paragraph (a) of this section, any party other than BLM may seek judicial review under 5 U.S.C. 704 of a final BLM grazing decision if the administrative law judge denies a petition for a stay, either directly or by failing to meet the deadline in §4.472(d).

(c) If a party appeals under paragraph (a) of this section, the Board must issue an expedited briefing schedule and decide the appeal promptly.

(d) Unless the Board or a court orders otherwise, an appeal under paragraph (a) of this section does not—

(1) Suspend the effectiveness of the decision of the administrative law judge; or

(2) Suspend further proceedings before the administrative law judge.

(e) Any party adversely affected by the administrative law judge's decision

on the merits has the right to appeal to the Board under the procedures in this part.

[68 FR 68771, Dec. 10, 2003, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.479 Effectiveness of decision during appeal.

(a) Consistent with the provisions of §§ 4.21(a) and 4.472(e) and except as provided in paragraphs (b) and (c) of this section or other applicable regulation, a final BLM grazing decision will not be effective—

(1) Until the expiration of the time for filing an appeal under § 4.470(a); and

(2) If a petition for a stay is filed under § 4.471(a), until the administrative law judge denies the petition for a stay or fails to act on the petition within the time set forth in § 4.472(d).

(b) Consistent with the provisions of §§ 4160.3 and 4190.1 of this title and notwithstanding the provisions of § 4.21(a), a final BLM grazing decision may provide that the decision will be effective immediately. Such a decision will remain effective pending a decision on an appeal, unless a stay is granted by an administrative law judge under § 4.472 or by the Board under § 4.478(a).

(c) Notwithstanding the provisions of § 4.21(a), when the public interest requires, an administrative law judge may provide that the final BLM grazing decision will be effective immediately.

(d) An administrative law judge or the Board may change or revoke any action that BLM takes under a final BLM grazing decision on appeal.

(e) In order to ensure exhaustion of administrative remedies before resort to court action, a BLM grazing decision is not final agency action subject to judicial review under 5 U.S.C. 704 unless—

(1) A petition for a stay of the BLM decision has been timely filed and the BLM decision has been made effective under § 4.472(e), or

(2) The BLM decision has been made effective under paragraphs (b) or (c) of this section or other applicable regulation, and a stay has not been granted.

(f) Exhaustion of administrative remedies is not required if a stay would not render the challenged portion of the BLM decision inoperative under subpart 4160 of this title.

[68 FR 68771, Dec. 10, 2003]

§ 4.480 Conditions of decision action.

(a) *Record as basis of decision; definition of record.* No decision shall be rendered except on consideration of the whole record or such portions thereof as may be cited by any party or by the State Director and as supported by and in accordance with the reliable, probative, and substantial evidence. The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision.

(b) *Effect of substantial compliance.* No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of part 4100 of this title.

[44 FR 41790, July 18, 1979. Redesignated at 68 FR 68770, Dec. 10, 2003]

Subpart F—Implementation of the Equal Access to Justice Act in Agency Proceedings

AUTHORITY: 5 U.S.C. 504(c)(1).

SOURCE: 71 FR 6366, Feb. 8, 2006, unless otherwise noted.

GENERAL PROVISIONS

§ 4.601 What is the purpose of this subpart?

(a) The Equal Access to Justice Act provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Department of the Interior. Under the Act, an eligible party may receive an award when it prevails over the Department or other agency, unless the position of the Department or other agency was substantially justified or special circumstances make an award unjust. The regulations in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures

and standards that the Office of Hearings and Appeals will use in ruling on those applications.

(b) The regulations in this subpart apply to any application for an award of attorney fees and other expenses that is:

(1) Pending on February 8, 2006; or

(2) Filed on or after February 8, 2006.

§ 4.602 What definitions apply to this subpart?

As used in this subpart:

Act means section 203(a)(1) of the Equal Access to Justice Act, Public Law 96–481, 5 U.S.C. 504, as amended.

Adjudicative officer means the deciding official(s) who presided at the adversary adjudication, or any successor official(s) assigned to decide the application.

Adversary adjudication means any of the following:

(1) An adjudication under 5 U.S.C. 554 in which the position of the Department or other agency is presented by an attorney or other representative who enters an appearance and participates in the proceeding;

(2) An appeal of a decision of a contracting officer made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before the Interior Board of Contract Appeals pursuant to section 8 of that Act (41 U.S.C. 607);

(3) Any hearing conducted under section 6103(a) of the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*); or

(4) Any hearing or appeal involving the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb *et seq.*).

Affiliate means:

(1) Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant; or

(2) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest.

Demand means the express demand of the Department or other agency that led to the adversary adjudication, but does not include a recitation by the Department or other agency of the maximum statutory penalty:

(1) In the administrative complaint; or

(2) Elsewhere when accompanied by an express demand for a lesser amount.

Department means the Department of the Interior or the component of the Department that is a party to the adversary adjudication (e.g., Bureau of Land Management).

Final disposition means the date on which either of the following becomes final and unappealable, both within the Department and to the courts:

(1) A decision or order disposing of the merits of the proceeding; or

(2) Any other complete resolution of the proceeding, such as a settlement or voluntary dismissal.

Other agency means any agency of the United States or the component of the agency that is a party to the adversary adjudication before the Office of Hearings and Appeals, other than the Department of the Interior and its components.

Party means a party as defined in 5 U.S.C. 551(3).

Position of the Department or other agency means:

(1) The position taken by the Department or other agency in the adversary adjudication; and

(2) The action or failure to act by the Department or other agency upon which the adversary adjudication is based.

Proceeding means an adversary adjudication as defined in this section.

You means a party to an adversary adjudication.

§ 4.603 What proceedings are covered by this subpart?

(a) The Act applies to adversary adjudications conducted by the Office of Hearings and Appeals, including proceedings to modify, suspend, or revoke licenses if they are otherwise adversary adjudications.

(b) The Act does not apply to:

(1) Other hearings and appeals conducted by the Office of Hearings and Appeals, even if the Department uses procedures comparable to those in 5 U.S.C. 554 in such cases;

(2) Any proceeding in which the Department or other agency may prescribe a lawful present or future rate; or

(3) Proceedings to grant or renew licenses.

(c) If a hearing or appeal includes both matters covered by the Act and matters excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 4.604 When am I eligible for an award?

(a) To be eligible for an award of attorney fees and other expenses under the Act, you must:

(1) Be a party to the adversary adjudication for which you seek an award; and

(2) Show that you meet all conditions of eligibility in this section.

(b) You are an eligible applicant if you are any of the following:

(1) An individual with a net worth of $2 million or less;

(2) The sole owner of an unincorporated business who has a net worth of $7 million or less, including both personal and business interests, and 500 or fewer employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with 500 or fewer employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with 500 or fewer employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of $7 million or less and 500 or fewer employees; or

(6) For purposes of § 4.605(c), a small entity as defined in 5 U.S.C. 601(6).

(c) For the purpose of eligibility, your net worth and the number of your employees must be determined as of the date the proceeding was initiated.

(1) Your employees include all persons who regularly perform services for remuneration under your direction and control.

(2) Part-time employees must be included on a proportional basis.

(d) You are considered an ''individual'' rather than a ''sole owner of an unincorporated business'' if:

(1) You own an unincorporated business; and

(2) The issues on which you prevail are related primarily to personal interests rather than to business interests.

(e) To determine your eligibility, your net worth and the number of your employees must be aggregated with the net worth and the number of employees of all of your affiliates. However, this paragraph does not apply if the adjudicative officer determines that aggregation would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities.

(f) The adjudicative officer may determine that financial relationships other than those described in the definition of ''affiliate'' in § 4.602 constitute special circumstances that would make an award unjust.

(g) If you participate in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible, you are not eligible for an award.

§ 4.605 Under what circumstances may I receive an award?

(a) You may receive an award for your fees and expenses in connection with a proceeding if:

(1) You prevailed in the proceeding or in a significant and discrete substantive portion of a proceeding; and

(2) The position of the Department or other agency over which you prevailed was not substantially justified. The Department or other agency has the burden of proving that its position was substantially justified.

(b) An award will be reduced or denied if you have unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(c) This paragraph applies to an adversary adjudication arising from an action by the Department or other agency to enforce compliance with a statutory or regulatory requirement:

(1) If the demand of the Department or other agency in the action is excessive and unreasonable compared with the adjudicative officer's decision, then the adjudicative officer must award you your fees and expenses related to defending against the excessive demand, unless:

(i) You have committed a willful violation of law;

(ii) You have acted in bad faith; or

(iii) Special circumstances make an award unjust.

(2) Fees and expenses awarded under this paragraph will be paid only if appropriations to cover the payment have been provided in advance.

§4.606 What fees and expenses may be allowed?

(a) If the criteria in §§4.603 through 4.605 are met, you may receive an award under this subpart only for the fees and expenses of your attorney(s) and expert witness(es).

(b) The adjudicative officer must base an award on rates customarily charged by persons engaged in the business of acting as attorneys and expert witnesses, even if the services were made available to you without charge or at a reduced rate.

(1) The maximum that can be awarded for the fee of an attorney is $125 per hour.

(2) The maximum that can be awarded for the fee of an expert witness is the highest rate at which the Department or other agency pays expert witnesses with similar expertise.

(3) An award may also include the reasonable expenses of the attorney or expert witness as a separate item, if the attorney or expert witness ordinarily charges clients separately for those expenses.

(c) The adjudicative officer may award only reasonable fees and expenses under this subpart. In determining the reasonableness of the fee for an attorney or expert witness, the adjudicative officer must consider the following:

(1) If the attorney or expert witness is in private practice, his or her customary fee for similar services;

(2) If the attorney or expert witness is your employee, the fully allocated cost of the services;

(3) The prevailing rate for similar services in the community in which the attorney or expert witness ordinarily performs services;

(4) The time actually spent in representing you in the proceeding;

(5) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(6) Any other factors that bear on the value of the services provided.

(d) The adjudicative officer may award the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on your behalf to the extent that:

(1) The charge for the service does not exceed the prevailing rate for similar services; and

(2) The study or other matter was necessary for preparation of your case.

INFORMATION REQUIRED FROM APPLICANTS

§4.610 What information must my application for an award contain?

(a) Your application for an award of fees and expenses under the Act must:

(1) Identify you;

(2) Identify the proceeding for which an award is sought;

(3) Show that you have prevailed;

(4) Specify the position of the Department or other agency that you allege was not substantially justified;

(5) Unless you are an individual, state the number of your employees and those of all your affiliates, and describe the type and purpose of your organization or business;

(6) State the amount of fees and expenses for which you seek an award;

(7) Be signed by you or your authorized officer or attorney;

(8) Contain or be accompanied by a written verification under oath or under penalty of perjury that the information in the application is true and correct; and

(9) Unless one of the exceptions in paragraph (b) of this section applies, include a statement that:

(i) Your net worth does not exceed $2 million, if you are an individual; or

(ii) Your net worth and that of all your affiliates does not exceed $7 million in the aggregate, if you are not an individual.

(b) You do not have to submit the statement of net worth required by paragraph (a)(9) of this section if you do any of the following:

(1) Attach a copy of a ruling by the Internal Revenue Service that you

qualify as a tax-exempt organization described in 26 U.S.C. 501(c)(3);

(2) Attach a statement describing the basis for your belief that you qualify under 26 U.S.C. 501(c)(3), if you are a tax-exempt organization that is not required to obtain a ruling from the Internal Revenue Service on your exempt status;

(3) State that you are a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)); or

(4) Seek fees and expenses under § 4.605(c) and provide information demonstrating that you qualify as a small entity under 5 U.S.C. 601.

(c) You may also include in your application any other matters that you wish the adjudicative officer to consider in determining whether and in what amount an award should be made.

§ 4.611 What information must I include in my net worth exhibit?

(a) Unless you meet one of the criteria in § 4.610(b), you must file with your application a net worth exhibit that meets the requirements of this section. The adjudicative officer may also require that you file additional information to determine your eligibility for an award.

(b) The exhibit must show your net worth and that of any affiliates when the proceeding was initiated. The exhibit may be in any form that:

(1) Provides full disclosure of your and your affiliates' assets and liabilities; and

(2) Is sufficient to determine whether you qualify under the standards in this subpart.

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if you object to public disclosure of information in any portion of the exhibit and believe there are legal grounds for withholding it from disclosure, you may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure.

(1) The motion must describe the information sought to be withheld and explain, in detail:

(i) Why it falls within one or more of the exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b);

(ii) Why public disclosure of the information would adversely affect you; and

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

(2) You must serve the net worth exhibit and motion on counsel representing the agency against which you seek an award, but you are not required to serve it on any other party to the proceeding.

(3) If the adjudicative officer finds that the information should not be withheld from disclosure, it must be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit will be disposed of in accordance with the Department's procedures under the Freedom of Information Act, 43 CFR 2.7 *et seq*.

§ 4.612 What documentation of fees and expenses must I provide?

(a) Your application must be accompanied by full documentation of the fees and expenses for which you seek an award, including the cost of any study, analysis, engineering report, test, project, or similar matter.

(b) You must submit a separate itemized statement for each professional firm or individual whose services are covered by the application, showing:

(1) The hours spent in connection with the proceeding by each individual;

(2) A description of the specific services performed;

(3) The rates at which each fee has been computed;

(4) Any expenses for which reimbursement is sought;

(5) The total amount claimed; and

(6) The total amount paid or payable by you or by any other person or entity for the services provided.

(c) The adjudicative officer may require you to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, in accordance with § 4.624.

§4.613 When may I file an application for an award?

(a) You may file an application whenever you have prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding. You must file the application no later than 30 days after the final disposition of the proceeding.

(b) Consideration of an application for an award must be stayed if:

(1) Any party seeks review or reconsideration of a decision in a proceeding in which you believe you have prevailed; or

(2) The Department or other agency (or the United States on its behalf) appeals an adversary adjudication to a court.

(c) A stay under paragraph (b)(1) of this section will continue until there has been a final disposition of the review or reconsideration of the decision. A stay under paragraph (b)(2) of this section will continue until either:

(1) A final and unreviewable decision is rendered by the court on the appeal; or

(2) The underlying merits of the case have been finally determined.

PROCEDURES FOR CONSIDERING APPLICATIONS

§4.620 How must I file and serve documents?

You must file and serve all documents related to an application for an award under this subpart on all other parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in §4.611(c) for confidential information. The Department or other agency and all other parties must likewise file and serve their pleadings and related documents on you and on each other, in the same manner as other pleadings in the proceeding.

§4.621 When may the Department or other agency file an answer?

(a) Within 30 days after service of an application, the Department or other agency against which an award is sought may file an answer to the application. However, if consideration of an application has been stayed under §4.613(b), the answer is due within 30 days after the final disposition of the review or reconsideration of the decision.

(1) Except as provided in paragraph (a)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested. In such case, the adjudicative officer will issue a decision in accordance with §4.625 based on the record before him or her.

(2) Failure to file an answer within the 30-day period will not be treated as a consent to the award requested if the Department or other agency either:

(i) Requests an extension of time for filing; or

(ii) Files a statement of intent to negotiate under paragraph (b) of this section.

(b) If the Department or other agency and you believe that the issues in the fee application can be settled, you may jointly file a statement of intent to negotiate a settlement. Filing this statement will extend for an additional 30 days the time for filing an answer, and the adjudicative officer may grant further extensions if you and the agency counsel so request.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on to support the Department's or other agency's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Department or other agency must include with the answer either supporting affidavits or a request for further proceedings under §4.624.

§4.622 When may I file a reply?

Within 15 days after service of an answer, you may file a reply. If your reply is based on any alleged facts not already in the record of the proceeding, you must include with the reply either supporting affidavits or a request for further proceedings under §4.624.

§4.623 When may other parties file comments?

Any party to a proceeding other than the applicant and the Department or other agency may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party

may not participate further in the proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 4.624 When may further proceedings be held?

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, the adjudicative officer may order further proceedings, which will be held only when necessary for full and fair resolution of the issues and will be conducted as promptly as possible.

(b) The adjudicative officer may order further proceedings on his or her own initiative or in response to a request by you or by the Department or other agency. A request for further proceedings under this section must:

(1) Identify the information sought or the disputed issues; and

(2) Explain why the additional proceedings are necessary to resolve the issues.

(c) As to issues other than substantial justification (such as your eligibility or substantiation of fees and expenses), further proceedings under this section may include an informal conference, oral argument, additional written submissions, pertinent discovery, or an evidentiary hearing.

(d) The adjudicative officer will determine whether the position of the Department or other agency was substantially justified based on the administrative record of the adversary adjudication as a whole.

§ 4.625 How will my application be decided?

The adjudicative officer must issue a decision on the application promptly after completion of proceedings on the application. The decision must include written findings and conclusions on all of the following that are relevant to the decision:

(a) Your eligibility and status as a prevailing party;

(b) The amount awarded, and an explanation of the reasons for any difference between the amount requested and the amount awarded;

(c) Whether the position of the Department or other agency was substantially justified;

(d) Whether you unduly protracted the proceedings; and

(e) Whether special circumstances make an award unjust.

§ 4.626 How will an appeal from a decision be handled?

(a) If the adjudicative officer is an administrative law judge, you or the Department or other agency may appeal his or her decision on the application to the appeals board that would have jurisdiction over an appeal involving the merits of the proceeding. The appeal will be subject to the same regulations and procedures that would apply to an appeal involving the merits of the proceeding. The appeals board will issue the final Departmental or other agency decision on the application.

(b) If the adjudicative officer is a panel of appeals board judges, their decision on the application is final for the Department or other agency.

§ 4.627 May I seek judicial review of a final decision?

You may seek judicial review of a final Departmental or other agency decision on an award as provided in 5 U.S.C. 504(c)(2).

§ 4.628 How will I obtain payment of an award?

(a) To obtain payment of an award against the Department or other agency, you must submit:

(1) A copy of the final decision granting the award; and

(2) A certification that no party is seeking review of the underlying decision in the United States courts, or that the process for seeking review of the award has been completed.

(b) If the award is against the Department:

(1) You must submit the material required by paragraph (a) of this section to the following address:

Director, Office of Financial Management, Policy, Management and Budget, U.S. Department of the Interior, Washington, DC 20240.

(2) Payment will be made by electronic funds transfer whenever possible. A representative of the Department will contact you for the information the Department needs to process the electronic funds transfer.

(c) If the award is against another agency, you must submit the material required by paragraph (a) of this section to the chief financial officer or other disbursing official of that agency. Agency counsel must promptly inform you of the title and address of the appropriate official.

(d) The Department or other agency will pay the amount awarded to you within 60 days of receiving the material required by this section.

Subpart G—Special Rules Applicable to Other Appeals and Hearings

AUTHORITY: 5 U.S.C. 301.

§4.700 Who may appeal.

Any party aggrieved by an adjudicatory action or decision of a Departmental official relating to rights or privileges based upon law in any case or proceeding in which Departmental regulations allow a right of appeal to the head of the Department from such action or decision, should direct his appeal to the Director, Office of Hearings and Appeals, if the case is not one which lies within the appellate review jurisdiction of an established Appeals Board and is not excepted from the review authority delegated to the Director. No appeal will lie when the action of the Departmental official was based solely upon administrative or discretionary authority of such official.

[36 FR 7186, Apr. 15, 1971; 36 FR 7588, Apr. 22, 1971]

§4.701 Notice of appeal.

The appellant shall file a written notice of appeal, signed by him or by his attorney or other qualified representative, in the Office of the Director, within 30 days from the date of mailing of the decision from which the appeal is taken. The notice shall contain an identification of the action or decision appealed from and give a concise but complete statement of the facts relied upon and the relief sought. The appellant shall mail a copy of the notice of appeal, any accompanying statement of reasons therefor, and any written arguments or briefs, to each party to the proceedings or whose rights are involved in the case, and to the Departmental official whose action or decision is being appealed. The notice of appeal shall contain a certificate setting forth the names of the parties served, their addresses, and the dates of mailing.

§4.702 Transmittal of appeal file.

Within 10 days after receipt of a copy of the notice of appeal, the Departmental official whose action or decision is being appealed shall transmit to the Office of the Director the entire official file in the matter, including all records, documents, transcripts of testimony, and other information compiled during the proceedings leading to the decision being appealed.

§4.703 Pleadings.

If the parties wish to file briefs, they must comply with the following requirements: Appellant shall have 30 days from the date of filing of his notice of appeal within which to file an opening brief, and the opposing parties shall have 30 days from the date of receipt of appellant's brief in which to file an answering brief. Additional or rebuttal briefs may be filed upon permission first obtained from the Director or the Ad Hoc Appeals Board appointed by him to consider and decide the particular appeal. Copies of all briefs shall be served upon all other parties or their attorneys of record or other qualified representatives, and a certificate to that effect shall be filed with said brief.

[36 FR 7186, Apr. 15, 1971; 36 FR 7588, Apr. 22, 1971]

§4.704 Decisions on appeals.

The Director, or an Ad Hoc Appeals Board appointed by the Director to consider and decide the particular appeal, will review the record and take such action as the circumstances call for. The Director or the Ad Hoc Appeals Board may direct a hearing on the entire matter or specified portions

thereof, may decide the appeal forthwith upon the record already made, or may make other disposition of the case. Upon request and for good cause shown, the Director or an Ad Hoc Appeals Board may grant an opportunity for oral argument. Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an administrative law judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

[36 FR 7186, Apr. 15, 1971, as amended at 39 FR 2366, Jan. 21, 1974]

Subpart H [Reserved]

Subpart I—Special Procedural Rules Applicable to Practice and Procedure for Hearings, Decisions, and Administrative Review Under Part 17 of This Title—Nondiscrimination in Federally Assisted Programs of the Department of the Interior—Effectuation of Title VI of the Civil Rights Act of 1964

AUTHORITY: 43 CFR 17.8 and 5 U.S.C. 301.

SOURCE: 38 FR 21162, Aug. 6, 1973, unless otherwise noted.

CROSS REFERENCE: See subpart A for the organization, authority and jurisdiction of the Office of Hearings and Appeals, including its Hearings Division. To the extent they are not inconsistent with these special rules, the general rules applicable to all types of proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals, contained in subpart B of this part, are applicable also to proceedings under these regulations.

GENERAL

§ 4.800 Scope and construction of rules.

(a) The rules of procedure in this subpart I supplement part 17 of this title and are applicable to the practice and procedure for hearings, decisions, and administrative review conducted by the Department of the Interior, pursuant to title VI of the Civil Rights Act of 1964 (section 602, 42 U.S.C. 2000d–1) and part 17 of this title, concerning nondiscrimination in Federally-assisted programs in connection with which Federal financial assistance is extended under laws administered in whole or in part by the Department of the Interior.

(b) These regulations shall be liberally construed to secure the just, prompt, and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved and full protection of the rights of all interested parties including the Government.

§ 4.801 Suspension of rules.

Upon notice to all parties, the responsible Department official or the administrative law judge, with respect to matters pending before him, may modify or waive any rule in this part upon his determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

§ 4.802 Definitions.

(a) The definitions set forth in § 17.12 of this title apply also to this subpart.

(b) *Director* means the Director, Office for Equal Opportunity, Department of the Interior.

(c) *Administrative law judge* means an administrative law judge designated by the Office of Hearings and Appeals, Office of the Secretary, in accordance with 5 U.S.C. 3105 and 3344.

(d) *Notice* means a notice of hearing in a proceeding instituted under Part 17 of this title and these regulations.

(e) *Party* means a recipient or applicant; the Director; and any person or organization participating in a proceeding pursuant to § 4.808.

§ 4.803 Computation of time.

Except as otherwise provided by law, in computing any period of time under these rules or in any order issued hereunder, the time begins with the day following the act or event, and includes the last day of the period, unless it is a Saturday, Sunday, or Federal legal holiday, or other nonbusiness day, in which event it includes the next following day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the period of time prescribed or allowed is 7 days or

less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation.

§4.804 Extensions of time.

A request for extension of time should be made to the designated administrative law judge or other appropriate Departmental official with respect to matters pending before him. Such request shall be served on all parties and set forth the reasons for the request. Extensions may be granted upon a showing of good cause by the applicant. Answers to such requests are permitted if made promptly.

§4.805 Reduction of time to file documents.

For good cause, the responsible Departmental official or the administrative law judge, with respect to matters pending before him, may reduce any time limit prescribed by the rules in this part, except as provided by law or in part 17 of this title.

DESIGNATION AND RESPONSIBILITIES OF ADMINISTRATIVE LAW JUDGE

§4.806 Designation.

Hearings shall be held before an administrative law judge designated by the Office of Hearings and Appeals.

§4.807 Authority and responsibilities.

The administrative law judge shall have all powers necessary to preside over the parties and the proceedings, conduct the hearing, and make decisions in accordance with 5 U.S.C. 554 through 557. His powers shall include, but not be limited to, the power to:

(a) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(b) Require parties to state their position with respect to the various issues in the proceedings.

(c) Establish rules for media coverage of the proceedings.

(d) Rule on motions and other procedural items in matters before him.

(e) Regulate the course of the hearing, the conduct of counsel, parties, witnesses, and other participants.

(f) Administer oaths, call witnesses on his own motion, examine witnesses, and direct witnesses to testify.

(g) Receive, rule on, exclude, or limit evidence.

(h) Fix time limits for submission of written documents in matters before him.

(i) Take any action authorized by these regulations, by 5 U.S.C. 556, or by other pertinent law.

APPEARANCE AND PRACTICE

§4.808 Participation by a party.

Subject to the provisions contained in part 1 of this subtitle, a party may appear in person, by representative, or by counsel, and participate fully in any proceeding held pursuant to part 17 of this title and these regulations. A State agency or any instrumentality thereof, a political subdivision of the State or instrumentality thereof, or a corporation may appear by any of its officers or employees duly authorized to appear on its behalf.

§4.809 Determination of parties.

(a) The affected applicant or recipient to whom a notice of hearing or a notice of an opportunity for hearing has been mailed in accordance with part 17 of this title and §4.815, and the Director, are the initial parties to the proceeding.

(b) Other persons or organizations shall have the right to participate as parties if the final decision could directly and adversely affect them or the class they represent, and if they may contribute materially to the disposition of the proceedings.

(c) A person or organization wishing to participate as a party under this section shall submit a petition to the administrative law judge within 15 days after the notice has been served. The petition should be filed with the administrative law judge and served on the affected applicant or recipient, on the Director, and on any other person or organization who has been made a party at the time of filing. Such petition shall concisely state: (1) Petitioner's interest in the proceeding, (2) how his participation as a party will

contribute materially to the disposition of the proceeding, (3) who will appear for petitioner, (4) the issues on which petitioner wishes to participate, and (5) whether petitioner intends to present witnesses.

(d) The administrative law judge shall promptly ascertain whether there are objections to the petition. He shall then determine whether petitioners have the requisite interest to be a party in the proceedings, as defined in paragraphs (a) and (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he may recognize one or more of such petitioners to represent all such petitioners. The administrative law judge shall give each such petitioner written notice of the decision on his petition. If the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The administrative law judge shall give written notice to each party of each petition granted.

(e) Persons or organizations whose petition for party participation is denied may appeal the decision to the Director, Office of Hearings and Appeals, within 7 days of receipt of denial. The Director, Office of Hearings and Appeals, will make the final decision for the Department to grant or deny the petition.

§ 4.810 Complainants not parties.

A person submitting a complaint pursuant to § 17.6 of this title is not a party to the proceedings governed by part 17 of this title and these regulations, but may petition, after proceedings are initiated, to become an amicus curiae. In any event a complainant shall be advised of the time and place of the hearing.

§ 4.811 Determination and participation of amici.

(a) Any interested person or organization wishing to participate as amicus curiae in the proceeding shall file a petition before the commencement of the hearing. Such petition shall concisely state the petitioner's interest in the hearing and who will represent petitioner.

(b) The administrative law judge will grant the petition if he finds that the petitioner has an interest in the proceedings and may contribute materially to the disposition of the proceedings. The administrative law judge shall give the petitioner written notice of the decision on his petition.

(c) An amicus curiae is not a party and may not introduce evidence at a hearing but may only participate as provided in paragraph (d) of this section.

(d) An amicus curiae may submit a written statement of position to the administrative law judge at any time prior to the beginning of a hearing, and shall serve a copy on each party. He may also file a brief or written statement on each occasion a decision is to be made or a prior decision is subject to review. His brief or written statement shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(e) When all parties have completed their initial examination of a witness, any amicus curiae may request the administrative law judge to propound specific questions to the witness. The administrative law judge, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

FORM AND FILING OF DOCUMENTS

§ 4.812 Form.

Documents filed pursuant to a proceeding herein shall show the docket description and title of the proceeding, the party or amicus submitting the document, the dates signed, and the title, if any, and address of the signatory. The original will be signed in ink by the party representing the party or amicus. Copies need not be signed, but

the name of the person signing the original shall be reproduced.

§4.813 Filing and service.

(a) All documents submitted in a proceeding shall be served on all parties. The original and two copies of each document shall be submitted for filing. Filings shall be made with the administrative law judge or other appropriate Departmental official before whom the proceeding is pending. With respect to exhibits and transcripts of testimony, only originals need be filed.

(b) Service upon a party or amicus shall be made by delivering one copy of each document requiring service in person or by certified mail, return receipt requested, properly addressed with postage prepaid, to the party or amicus or his attorney, or designated representative. Filing will be made in person or by certified mail, return receipt requested, to the administrative law judge or other appropriate Departmental official before whom the proceeding is pending.

(c) The date of filing or of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person.

§4.814 Certificate of service.

The original of every document filed and required to be served upon parties shall be endorsed with a certificate of service signed by the party or amicus curiae making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service.

PROCEDURES

§4.815 How proceedings are commenced.

Proceedings are commenced by the Director by mailing to an applicant or recipient a notice of alleged noncompliance with the Act and the regulations thereunder. The notice shall include either a notice of hearing fixing a date therefor or a notice of an opportunity for a hearing as provided in §17.8 of this title. The notice shall advise the applicant or recipient of the action proposed to be taken, the specific provisions of part 17 of this title under which the proposed action is to be taken, and the matters of fact or law asserted as the basis of the action.

§4.816 Notice of hearing and response thereto.

A notice of hearing shall fix a date not less than 30 days from the date of service of the notice of a hearing on matters alleged in the notice. If the applicant recipient does not desire a hearing, he should so state in writing, in which case the applicant or recipient shall have the right to further participate in the proceeding. Failure to appear at the time set for a hearing, without good cause, shall be deemed a waiver of the right to a hearing under section 602 of the Act and the regulations thereunder and consent to the making of a decision on such information as is available which may be presented for the record.

§4.817 Notice of opportunity to request a hearing and response thereto.

A notice of opportunity to request a hearing shall set a date not less than 20 days from service of said notice within which the applicant or recipient may file a request for a hearing, or may waive a hearing and submit written information and argument for the record, in which case, the applicant or recipient shall have the right to further participate in the proceeding. When the applicant or recipient elects to file a request for a hearing, a time shall be set for the hearing at a date not less than 20 days from the date applicant or recipient is notified of the date set for the hearing. Failure of the applicant or recipient to request a hearing or to appear at the date set shall be deemed a waiver of the right to a hearing, under section 602 of the Act and the regulations thereunder and consent to the making of a decision on such information as is available which may be presented for the record.

§4.818 Answer.

In any case covered by §4.816 or §4.817, the applicant or recipient shall file an answer. Said answer shall admit or deny each allegation of the notice, unless the applicant or recipient is without knowledge, in which case the

answer shall so state, and the statement will be considered a denial. Failure to file an answer shall be deemed an admission of all allegations of fact in the notice. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged in the answer as affirmative defenses shall be separately stated and numbered. The answer under § 4.816 shall be filed within 20 days from the date of service of the notice of hearing. The answer under § 4.817 shall be filed within 20 days of service of the notice of opportunity to request a hearing.

§ 4.819 Amendment of notice or answer.

The Director may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer is filed, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Other amendments of the notice or of the answer to the notice shall be made only by leave of the administrative law judge. An amended notice shall be answered within 10 days of its service, or within the time for filing an answer to the original notice, whichever period is longer.

§ 4.820 Consolidated or joint hearings.

As provided in § 17.8(e) of this title, the Secretary may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceedings consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 4.821 Motions.

Motions and petitions shall state the relief sought, the basis for relief and the authority relied upon. If made before or after the hearing itself, these matters shall be in writing. If made at the hearing, they may be stated orally; but the administrative law judge may require that they be reduced to writing and filed and served on all parties. Within 8 days after a written motion or petition is served, any party may file a response to a motion or petition. An immediate oral response may be made to an oral motion. Oral argument on motions will be at the discretion of the administrative law judge.

§ 4.822 Disposition of motions.

The administrative law judge may not grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately.

§ 4.823 Interlocutory appeals.

Except as provided in § 4.809(e), a ruling of the administrative law judge may not be appealed to the Director, Office of Hearings and Appeals, prior to consideration of the entire proceeding by the administrative law judge unless permission is first obtained from the Director, Office of Hearings and Appeals, and the administrative law judge has certified the interlocutory ruling on the record or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Director, Office of Hearings and Appeals. If an appeal is allowed, any party may file a brief within such period as the Director, Office of Hearings and Appeals, directs. Upon affirmance, reversal, or modification of the administrative law judge's interlocutory ruling or order, by the Director, Office of Hearings and Appeals, the case will be remanded promptly to the administrative law judge for further proceedings.

§4.824 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing, if the administrative law judge so directs. Proposed exhibits not so exchanged in accordance with the administrative law judge's order may be denied admission as evidence. The authenticity of all exhibits submitted prior to the hearing, under direction of the administrative law judge, will be deemed admitted unless written objection thereto is filed and served on all parties, or unless good cause is shown for failure to file such written objection.

§4.825 Admissions as to facts and documents.

Not later than 15 days prior to the date of the hearing any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in, and exhibited with, the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters as to which an admission is requested shall be deemed admitted, unless within a period of 10 days, the party to whom the request is directed serves upon the requesting party a statement either (a) denying specifically the matters as to which an admission is requested, or (b) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

§4.826 Discovery.

(a) *Methods*. Parties may obtain discovery as provided in these rules by depositions, written interrogatories, production of documents, or other items; or by permission to enter property, for inspection and other purposes.

(b) *Scope*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the hearing.

(c) *Protective orders*. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to limit or condition discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

(d) *Sequence and timing*. Methods of discovery may be used in any sequence. The fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(e) *Time limit*. Discovery by all parties will be completed within such time as the administrative law judge directs, from the date the notice of hearing is served on the applicant or recipient.

§4.827 Depositions.

(a) A party may take the testimony of any person, including a party, by deposition upon oral examination. This may be done by stipulation or by notice, as set forth in paragraph (b) of this section. On motion of any party or other person upon whom the notice is served, the administrative law judge may for cause shown enlarge or shorten the time for the deposition, change the place of the deposition, limit the scope of the deposition or quash the notice. Depositions of persons other than parties or their representatives shall be upon consent of the deponent.

(b)(1) The party will give reasonable notice in writing to every other party of the time and place for taking depositions, the name and address of each person to be examined, if known, or a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The notice to a deponent may be accompanied by a request for the production of documents and tangible things at the taking of the deposition.

(3) A party may name as the deponent a corporation, partnership, association, or governmental agency and may designate a particular person within the organization whose testimony is desired and the matters on which examination is requested. If no particular person is named, the organization shall designate one or more agents to testify on its behalf, and may set forth the matters on which each will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(c) Examination and cross-examination of witnesses may proceed as permitted at the hearing. The witness

shall be placed under oath by a disinterested person qualified to administer oaths by the laws of the United States or of the place where the examination is held, and the testimony taken by such person shall be recorded verbatim.

(d) During the taking of a deposition a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, annoyance, embarrassment, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the administrative law judge for a ruling on his objections to the deposition conduct or proceedings. The administrative law judge may then limit the scope or manner of the taking of the deposition.

(e) The officer shall certify the deposition and promptly file it with the administrative law judge. Documents or true copies of documents and other items produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition.

(f) The party taking the deposition shall give prompt notice of its filing to all other parties.

§ 4.828 Use of depositions at hearing.

(a) Any part or all of a deposition so far as admissible under § 4.835 applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof as follows:

(1) Any deposition may be used for contradiction or impeachment of the deponent as a witness.

(2) The deposition of a party, or of an agent designated to testify on behalf of a party, may be used by an adverse party for any purpose.

(3) The deposition of any witness may be used for any purpose if the party offering the deposition has been unable to procure the attendance of the witness because he is dead; or if the witness is at a greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or if the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(b) If only part of a deposition is offered in evidence, the remainder becomes subject to introduction by any party.

(c) Objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

§ 4.829 Interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories after the notice of hearing has been filed. If the party served is a corporation, partnership, association, or governmental agency, an agent shall furnish such information as is available to the party.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney or other representative making them. Answers and objections shall be made within 30 days after the service of the interrogatories. The party submitting the interrogatories may move for an order under § 4.831 with respect to any objection to or other failure to answer an interrogatory.

(c) Interrogatories shall relate to any matter not privileged which is relevant to the subject matter of the hearing.

§ 4.830 Production of documents and things and entry upon land for inspection and other purposes.

(a) After the notice of hearing has been filed, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any designated documents, phonorecords, and

other data compilations from which information can be obtained and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After the notice of hearing has been filed, any party may serve on any other party a request to permit entry upon designated property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 15 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections in which case the reasons for each objection shall be stated. The party submitting the request may move for an order under §4.831 with respect to any objection to or other failure to respond.

§4.831 Sanctions.

(a) A party, upon reasonable notice to other parties and all persons affected thereby, may move for an order as follows:

(1) If a deponent fails to answer a question propounded or submitted under §4.827(c), or a corporation or other entity fails to make a designation under §4.827(b)(3), or a party fails to answer an interrogatory submitted under §4.829, or if a party, under §4.830 fails to respond that inspection will be permitted or fails to permit inspection, the discovering party may move for an order compelling an answer, a designation, or inspection.

(2) An evasive or incomplete answer is to be treated as a failure to answer.

(b) If a party or an agent designated to testify fails to obey an order to permit discovery, the administrative law judge may make such orders as are just, including:

(1) That the matters regarding which the order was made or any other designated facts shall be established in accordance with the claim of the party obtaining the order;

(2) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(c) If a party or an agent designated to testify fails after proper service (1) to appear for his deposition, (2) to serve answers or objections to interrogatories submitted under §4.829 or (3) to serve a written response to a request for inspection, submitted under §4.830, the administrative law judge on motion may make such orders as are just, including those authorized under paragraphs (b) (1) and (2) of this section.

§4.832 Consultation and advice.

(a) The administrative law judge shall not consult any person, or party, on any fact in issue or on the merits of the matter before him unless upon notice and opportunity for all parties to participate.

(b) No employee or agent of the Federal Government engaged in the investigation and prosecution of a proceeding governed by these rules shall participate or advise in the rendering of any recommended or final decision, except as witness or counsel in the proceeding.

[38 FR 21162, Aug. 6, 1973, as amended at 50 FR 43706, Oct. 29, 1985]

PREHEARING

§4.833 Prehearing conferences.

(a) Within 15 days after the answer has been filed, the administrative law judge will establish a prehearing conference date for all parties including persons or organizations whose petition requesting party status has not been ruled upon. Written notice of the prehearing conference shall be sent by the administrative law judge.

(b) At the prehearing conference the following matters, among others, shall be considered: (1) Simplification and delineation of the issues to be heard;

(2) stipulations; (3) limitation of number of witnesses; and exchange of witness lists; (4) procedure applicable to the proceeding; (5) offers of settlement; and (6) scheduling of the dates for exchange of exhibits. Additional prehearing conferences may be scheduled at the discretion of the administrative law judge, upon his own motion or the motion of a party.

HEARING

§ 4.834 Purpose.

(a) The hearing is directed primarily to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. A hearing will be held only in cases where issues of fact must be resolved in order to determine whether the applicant or recipient has failed to comply with one or more applicable requirements of title VI of the Civil Rights Act of 1964 (sec. 602, 42 U.S.C. 2000d–1) and part 17 of this title. However, this shall not prevent the parties from entering into a stipulation of the facts.

(b) If all facts are stipulated, the proceedings shall go to conclusion in accordance with part 17 of this title and the rules in this subpart.

(c) In any case where it appears from the answer of the applicant or recipient to the notice of hearing or notice of opportunity to request a hearing, from his failure timely to answer, or from his admissions or stipulations in the record that there are no matters of material fact in dispute, the administrative law judge may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for the submission of evidence by the Government for the record. Thereafter, the proceedings shall go to conclusion in accordance with part 17 of this title and the rules in this subpart. An appeal from such order may be allowed in accordance with the rules for interlocutory appeal in § 4.823.

§ 4.835 Evidence.

Formal rules of evidence will not apply to the proceeding. Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded from the record of a hearing. Hearsay evidence shall not be inadmissible as such.

§ 4.836 Official notice.

Whenever a party offers a public document, or part thereof, in evidence, and such document, or part thereof, has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice as a public document item by specifying the document or relevant part thereof. Official notice may also be taken of other matters, at the discretion of the administrative law judge.

§ 4.837 Testimony.

Testimony shall be given under oath by witnesses at the hearing. A witness shall be available for cross-examination, and, at the discretion of the administrative law judge, may be cross-examined without regard to the scope of direct examination as to any matter which is material to the proceeding.

§ 4.838 Objections.

Objections to evidence shall be timely, and the party making them shall briefly state the ground relied upon.

§ 4.839 Exceptions.

Exceptions to rulings of the administrative law judge are unnecessary. It is sufficient that a party, at the time the ruling of the administrative law judge is sought, makes known the action which he desires the administrative law judge to take, or his objection to an action taken, and his ground therefor.

§ 4.840 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the administrative law judge excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony. If the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 4.841 Official transcript.

An official reporter will be designated for all hearings. The official transcripts of testimony and argument taken, together with any exhibits, briefs, or memoranda of law filed therewith, shall be filed with the administrative law judge. Transcripts may be obtained by the parties and the public from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter. Upon notice to all parties, the administrative law judge may authorize such corrections to the transcript as are necessary to accurately reflect the testimony.

POSTHEARING PROCEDURES

§ 4.842 Proposed findings of fact and conclusions of law.

Within 30 days after the close of the hearing each party may file, or the administrative law judge may request, proposed findings of fact and conclusions of law together with supporting briefs. Such proposals and briefs shall be served on all parties and amici. Reply briefs may be submitted within 15 days after receipt of the initial proposals and briefs. Reply briefs should be filed and served on all parties and amici.

§ 4.843 Record for decision.

The administrative law judge will make his decision upon the basis of the record before him. The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, shall constitute the record for decision and may be inspected and copied.

§ 4.844 Notification of right to file exceptions.

The provisions of § 17.9 of this title govern the making of decisions by administrative law judges, the Director, Office of Hearings and Appeals, and the Secretary. An administrative law judge shall, in any initial decision made by him, specifically inform the applicant or recipient of his right under § 17.9 of this title to file exceptions with the Director, Office of Hearings and Appeals. In instances in which the record is certified to the Director, Office of Hearings and Appeals, or he reviews the decision of an administrative law judge, he shall give the applicant or recipient a notice of certification or notice of review which specifically informs the applicant or recipient that, within a stated period, which shall not be less than 30 days after service of the notice, he may file briefs or other written statements of his contentions.

§ 4.845 Final review by Secretary.

Paragraph (f) of § 17.9 of this title requires that any final decision of an administrative law judge or of the Director, Office of Hearings and Appeals, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under part 17 of this title or the Act, shall be transmitted to the Secretary. The applicant or recipient shall have 20 days following service upon him of such notice to submit to the Secretary exceptions to the decision and supporting briefs or memoranda suggesting remission or mitigation of the sanctions proposed. The Director shall have 10 days after the filing of the exceptions and briefs in which to reply.

Subpart J—Special Rules Applicable to Appeals Concerning Federal Oil and Gas Royalties and Related Matters

AUTHORITY: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

SOURCE: 64 FR 26259, May 13, 1999, unless otherwise noted.

§ 4.901 What is the purpose of this subpart?

This subpart tells you how the time limits of 30 U.S.C. 1724(h) apply to appeals subject to this subpart.

§ 4.902 What appeals are subject to this subpart?

(a) This subpart applies to appeals under 30 CFR part 290 in effect prior to May 13, 1999 and contained in the 30 CFR, parts 200 to 699, edition revised as of July 1, 1998, 30 CFR part 290 subpart

B, and 43 CFR part 4, subpart E, of Minerals Management Service (MMS) or delegated State orders or portions of orders concerning payment (or computation and payment) of royalties and other payments due, and delivery or taking of royalty in kind, under Federal oil and gas leases.

(b) This subpart does not apply to appeals of orders, or portions of orders, that

(1) Involve Indian leases or Federal leases for minerals other than oil and gas; or

(2) Relate to Federal oil and gas leases but do not involve a monetary or nonmonetary obligation.

§ 4.903 What definitions apply to this subpart?

For the purposes of this subpart only:

Assessment means any fee or charge levied or imposed by the Secretary or a delegated State other than:

(1) The principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale;

(2) Any interest; or

(3) Any civil or criminal penalty.

Delegated State means a State to which MMS has delegated authority to perform royalty management functions under an agreement or agreements under 30 CFR part 227.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

IBLA means the Interior Board of Land Appeals.

Lease means any agreement authorizing exploration for or extraction of any mineral, regardless of whether the instrument is expressly denominated as a ''lease,'' including any:

(1) Contract;

(2) Net profit share arrangement; or

(3) Joint venture.

Lessee means any person to whom the United States issues a Federal oil and gas lease, or any person to whom all or part of the lessee's interest or operating rights in a Federal oil and gas lease has been assigned.

Monetary obligation means a lessee's, designee's or payor's duty to pay, or to compute and pay, any obligation in any order, or the Secretary's duty to pay, refund, offset, or credit the amount of any obligation that is the subject of a decision by the MMS or a delegated State denying a lessee's, designee's, or payor's written request for the payment, refund, offset, or credit. To determine the amount of any monetary obligation, for purposes of the default rule of decision in § 4.906 and 30 U.S.C. 1724(h):

(1) If an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation;

(2) If an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1) of this definition, constitute separate monetary obligations; and

(3) If an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2) of this definition, together constitutes a single monetary obligation.

Nonmonetary obligation means any duty of a lessee or its designee to deliver oil or gas in kind, or any duty of the Secretary to take oil or gas royalty in kind.

Notice of Order means the notice that MMS or a delegated State issues to a lessee that informs the lessee that MMS or the delegated State has issued an order to the lessee's designee.

Obligation means:

(1) A lessee's, designee's or payor's duty to:

(i) Deliver oil or gas royalty in kind; or

(ii) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment; and

(2) The Secretary's duty to:

(i) Take oil or gas royalty in kind; or

(ii) Make a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest.

Order means any document or portion of a document issued by the MMS Director, MMS RMP, or a delegated State, that contains mandatory or ordering language regarding any monetary or nonmonetary obligation under any Federal oil and gas lease or leases.

(1) Order includes but is not limited to the following:

(i) An order to pay;

(ii) A MMS or delegated State decision to deny a lessee's, designee's, or payor's written request that asserts an obligation due the lessee, designee or payor.

(2) Order does not include:

(i) A non-binding request, information, or guidance, such as:

(A) Advice or guidance on how to report or pay, including valuation determination, unless it contains mandatory or ordering language; and

(B) A policy determination;

(ii) A subpoena;

(iii) An order to pay that MMS issues to a refiner or other person involved in disposition of royalty taken in kind; or

(iv) a Notice of Noncompliance or a Notice of Civil Penalty issued under 30 U.S.C. 1719 and 30 CFR part 241, or a decision of an administrative law judge or of the IBLA following a hearing on the record on a Notice of Noncompliance or Notice of Civil Penalty.

Party means MMS, any person who files a Notice of Appeal under 30 CFR part 290 in effect prior to May 13, 1999 and contained in the 30 CFR, parts 200 to 699, edition revised as of July 1, 1998, 30 CFR part 290 subpart B, or 43 CFR part 4, subpart E, and any person who files a Notice of Joinder in an appeal under 30 CFR part 290, subpart B.

Payor means any person responsible for reporting and paying royalties for Federal oil and gas leases for production before September 1, 1996.

§4.904 When does my appeal commence and end?

For purposes of the period in which the Department must issue a final decision in your appeal under §4.906:

(a) If you filed your Notice of Appeal and initial Statement of Reasons with MMS before August 13, 1996, your appeal commenced on August 13, 1996;

(b) If you filed your Notice of Appeal or initial Statement of Reasons with MMS after August 13, 1996, under 30 CFR part 290, in effect prior to May 13, 1999 and contained in the 30 CFR, parts 200 to 699, edition, revised as of July 1, 1998, your appeal commenced on the date MMS received your Notice of Appeal, or if later, the date MMS received your initial Statement of Reasons;

(c) If you filed your Notice of Appeal under 30 CFR part 290, subpart B, your appeal commenced on the date MMS received your Notice of Appeal.

(d) Your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under paragraph (a), (b), or (c) of this section, plus the number of days of any applicable time extensions under §4.909 or 30 CFR 290.109. If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month.

§4.905 What if a due date falls on a day the Department or relevant office is not open for business?

If a due date under this subpart falls on a day the relevant office is not open for business (such as a weekend, Federal holiday, or shutdown), the due date is the next day the relevant office is open for business.

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

(a) If the IBLA or an Assistant Secretary (or the Secretary or the Director of OHA) does not issue a final decision by the date an appeal ends under §4.904(d), then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal, or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more.

(b)(1) If your appeal ends before the MMS Director issues a decision in your appeal, then the provisions of paragraph (a) of this section apply to the monetary and nonmonetary obligations in the order that you contested in your appeal to the Director.

(2) If the MMS Director issues a decision in your appeal before your appeal ends, and if you appealed the Director's decision to IBLA under 43 CFR part 4, subpart E, then the provisions of paragraph (a) of this section apply to the monetary and nonmonetary obligations in the Director's decision that you contested in your appeal to IBLA.

(3) If the MMS Director issues a decision in your appeal, and if you did not appeal the Director's decision to IBLA within the time required under 30 CFR part 290 in effect prior to May 13, 1999 and contained in the 30 CFR, parts 200 to 699, edition revised as of July 1, 1998 (for appeals filed before May 13, 1999 or 30 CFR part 290 subpart B (for appeals filed on or after May 13, 1999 and 43 CFR part 4, subpart E, then the MMS Director's decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application.

(c) If the IBLA issues a decision before the date your appeal ends, that decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application. A petition for reconsideration does not extend or renew the 33-month period.

(d) If any part of the principal amount of any monetary obligation is not specifically stated in an order or MMS Director's decision and must be computed to comply with the order or MMS Director's decision, then the principal amount referred to in paragraph (a) of this section means the principal amount MMS estimates you would be required to pay as a result of the computation required under the order, plus any amount due stated in the order.

§ 4.907 What if an IBLA decision requires MMS or a delegated State to recalculate royalties or other payments?

(a) An IBLA decision modifying an order or an MMS Director's decision and requiring MMS or a delegated State to recalculate royalties or other payments is a final decision in the administrative proceeding for purposes of 30 U.S.C. 1724(h).

(b) MMS or the delegated State must provide to IBLA and all parties any recalculation IBLA requires under paragraph (a) of this section within 60 days of receiving IBLA's decision.

(c) There is no further appeal within the Department from MMS's or the State's recalculation under paragraph (b) of this section.

(d) The IBLA decision issued under paragraph (a) of this section together with recalculation under paragraph (b) of this section are the final action of the Department that is judicially reviewable under 5 U.S.C. 704.

§ 4.908 What is the administrative record for my appeal if it is deemed decided?

If your appeal is deemed decided under § 4.906, the record for your appeal consists of:

(a) The record established in an appeal before the MMS Director;

(b) Any additional correspondence or submissions to the MMS Director;

(c) The MMS Director's decision in an appeal;

(d) Any pleadings or submissions to the IBLA; and

(e) Any IBLA orders and decisions.

§ 4.909 How do I request an extension of time?

(a) If you are a party to an appeal subject to this subpart before the IBLA, and you need additional time after an appeal commences for any purpose, you may obtain an extension of time under this section.

(b) You must submit a written request for an extension of time before the required filing date.

(1) You must submit your request to the IBLA at Interior Board of Land Appeals, 801 North Quincy Street, Arlington, Virginia 22203, using the U.S. Postal Service, a private delivery or courier

service, hand delivery or telefax to (703) 235–8349;

(2) If you file a document by telefax, you must send an additional copy of your document to the IBLA using the U.S. Postal Service, a private delivery or courier service or hand delivery so that it is received within 5 business days of your telefax transmission.

(c) If you are an appellant, in addition to meeting the requirements of paragraph (b) of this section, you must agree in writing in your request to extend the period in which the Department must issue a final decision in your appeal under §4.906 by the amount of time for which you are requesting an extension.

(d) If you are any other party, the IBLA may require you to submit a written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under §4.906 by the amount of time for which you are requesting an extension.

(e) The IBLA has the discretion to decline any request for an extension of time.

(f) You must serve your request on all parties to the appeal.

[64 FR 26259, May 13, 1999, as amended at 67 FR 4368, Jan. 30, 2002]

Subpart K [Reserved]

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AUTHORITY: 30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.

SOURCE: 43 FR 34386, Aug. 3, 1978, unless otherwise noted.

GENERAL PROVISIONS

§4.1100 Definitions.

As used in the regulations in this subpart, the term—

(a) *Act* means the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445 *et seq.*, 30 U.S.C. 1201 *et seq.*

(b) *Administrative law judge* means an administrative law judge in the Hearings Division of the Office of Hearings and Appeals appointed under 5 U.S.C. 3105 (1970).

(c) *Board* means the Board of Land Appeals in the Office of Hearings and Appeals.

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

(e) *OSM* and *OSMRE* mean the Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 59 FR 1488, Jan. 11, 1994; 67 FR 61509, Oct. 1, 2002]

§4.1101 Jurisdiction of the Board.

(a) The jurisdiction of the Board, as set forth in §4.1(b)(3), and subject to §§4.21(d) and 4.5, includes the authority to exercise the final decisionmaking power of the Secretary under the act pertaining to—

(1) Applications for review of decisions by OSM regarding determinations concerning permits for surface coal mining operations pursuant to section 514 of the act;

(2) Petitions for review of proposed assessments of civil penalties issued by OSM pursuant to section 518 of the act;

(3) Applications for review of notices of violation and orders of cessation or modifications, vacations, or terminations thereof, issued pursuant to section 521(a)(2) or section 521(a)(3) of the act;

(4) Proceedings for suspension or revocation of permits pursuant to section 521(a)(4) of the act;

(5) Applications for review of alleged discriminatory acts filed pursuant to section 703 of the act;

(6) Applications for temporary relief;

(7) Petitions for award of costs and expenses under section 525(e) of the act;

(8) Preliminary findings concerning a demonstrated pattern of willful violations under section 510(c) of the act;

(9) Suspension or rescission of improvidently-issued permits;

(10) Challenges to ownership or control listings or findings;

(11) Determinations under 30 CFR part 761;

(12) Appeals from orders or decisions of administrative law judges; and

(13) All other appeals and review procedures under the act which are permitted by these regulations.

(b) In performing its functions under paragraph (a) of this section, the Board is authorized to—

(1) Order hearings; and

(2) Issue orders to secure the just and prompt determination of all proceedings.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61509, Oct. 1, 2002]

§ 4.1102 Construction.

These rules shall be construed to achieve the just, timely, and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved.

§ 4.1103 Eligibility to practice.

(a) An administrative law judge or the Board may determine the eligibility of persons to practice before OHA in any proceeding under the act pursuant to 43 CFR part 1.

(b) If an administrative law judge or the Board determines that any person is not qualified to practice before OHA, the administrative law judge or the Board shall disqualify the person and report the disqualification to the Director of OHA.

(c) Upon receipt of a report under paragraph (b) of this section, the Director of OHA may request the Solicitor to initiate a disciplinary proceeding under 43 CFR 1.6.

§ 4.1104 General rules relating to procedure and practice.

Proceedings in OHA under the act are subject to the general rules relating to procedures and practice in subpart B of this part.

§ 4.1105 Parties.

(a) All persons indicated in the act as parties to administrative review proceedings under the act shall be considered statutory parties. Such statutory parties include—

(1) In a civil penalty proceeding under § 4.1150, OSM, as represented by the Office of the Solicitor, Department of the Interior, and any person against whom a proposed assessment is made who files a petition;

(2) In a review proceeding under §§ 4.1160 through 4.1171, 4.1180 through 4.1187, 4.1300 through 4.1309, 4.1350 through 4.1356, 4.1360 through 4.1369, 4.1370 through 4.1377, 4.1380 through 4.1387 or 4.1390 through 4.1394 of this part, OSM, as represented by the Office of the Solicitor, Department of the Interior, and—

(i) If an applicant, operator, or permittee files an application or request for review, the applicant, operator, or permittee; and

(ii) If any other person having an interest which is or may be adversely affected files an application or request for review, the applicant, operator, or permittee and the person filing such application or request;

(3) In a proceeding to suspend or revoke a permit under § 4.1190 *et seq.* OSM, as represented by the Office of the Solicitor, Department of the Interior, and the permittee who is ordered to show cause why the permit should not be suspended or revoked; and

(4) In a discriminatory discharge proceeding under § 4.1200 *et seq.* OSM, as represented by the Office of the Solicitor, Department of the Interior, any employee or any authorized representative of employees who files an application for review, and the alleged discriminating party, except where the applicant files a request for the scheduling of a hearing under § 4.1201(c) only such applicant and the alleged discriminating party.

(5) In an appeal to the Board in accordance with 43 CFR 4.1280 through 4.1286 from a determination of the Director of OSM or his or her designee under 30 CFR 842.15(d) or a determination of an authorized representative under 30 CFR 843.12(i), the permittee of the operation that is the subject of the determination and any person whose interests may be adversely affected by the outcome on appeal and who participated before OSM. A person who wishes his or her identity kept confidential under 30 CFR 842.12(b) is responsible for maintaining that confidentiality when serving documents in accordance with § 4.1109.

(b) Any other person claiming a right to participate as a party may seek leave to intervene in a proceeding by filing a petition to do so pursuant to § 4.1110.

(c) If any person has a right to participate as a full party in a proceeding under the act and fails to exercise that

right by participating in each stage of the proceeding, that person may become a participant with the rights of a party by order of an administrative law judge or the Board.

[43 FR 34386, Aug. 3, 1978, as amended at 56 FR 2142, Jan. 22, 1991; 59 FR 1488, Jan. 11, 1994; 59 FR 54362, Oct. 28, 1994]

§ 4.1106 Hearing sites.

Unless the act requires otherwise, hearings shall be held in a location established by the administrative law judge; however, the administrative law judge shall give due regard to the convenience of the parties or their representatives and witnesses.

§ 4.1107 Filing of documents.

(a) Any initial pleadings in a proceeding to be conducted or being conducted by an administrative law judge under these rules shall be filed, by hand or by mail, with the Hearings Division, Office of Hearings and Appeals, Department of the Interior, 801 North Quincy Street, Arlington, Va. 22203.

(b) Where a proceeding has been assigned to an administrative law judge, the parties will be notified by the Chief Administrative Law Judge of the name and address of the administrative law judge assigned to the case and thereafter all further documents shall be filed with the Administrative Law Judge, Office of Hearings and Appeals, at the address designated in the notice.

(c) Any notice of appeal, petition for review or other documents in a proceeding to be conducted or being conducted by the Board shall be filed, by hand or by mail, with the Board of Land Appeals, Office of Hearings and Appeals, 801 North Quincy Street, Arlington, Va. 22203.

(d) Any person filing initial pleadings with the Hearings Division or a notice of appeal with the Board shall furnish an original and one copy. Any person filing other documents with OHA shall furnish only an original.

(e) Any person who has initiated a proceeding under these rules before the Hearings Division or filed a notice of appeal with the Board shall file proof of service with the same in the form of a return receipt where service is by registered or certified mail, or an acknowledgement by the party served or a verified return where service is made personally. A certificate of service shall accompany all other documents filed by a party in any proceeding.

(f) The effective filing date for documents initiating proceedings before the Hearings Division, OHA, Arlington, VA, shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

(g) The effective filing date for a notice of appeal or a petition for discretionary review filed with the Board shall be the date of mailing or the date of personal delivery, except the effective filing date for a notice of appeal from a decision in an expedited review of a cessation order proceeding or from a decision in a suspension or revocation proceeding shall be the date of receipt of the document by the Board. The burden of establishing the date of mailing shall be on the person filing the document.

(h) The effective filing date for all other documents filed with an administrative law judge or with the Board shall be the date of mailing or personal delivery. The burden of establishing the date of mailing shall be on the person filing the document.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980; 46 FR 6942, Jan. 22, 1981; 49 FR 7565, Mar. 1, 1984; 67 FR 4368, Jan. 30, 2002]

§ 4.1108 Form of documents.

(a) Any document filed with OHA in any proceeding brought under the act shall be captioned with—

(1) The names of the parties;

(2) The name of the mine to which the document relates; and

(3) If review is being sought under section 525 of the act, identification by number of any notice or order sought to be reviewed.

(b) After a docket number has been assigned to the proceeding by OHA, the caption shall contain such docket number.

(c) The caption may include other information appropriate for identification of the proceeding, including the permit number or OSM identification number.

(d) Each document shall contain a title that identifies the contents of the document following the caption.

(e) The original of any document filed with OHA shall be signed by the person submitting the document or by that person's attorney.

(f) The address and telephone number of the person filing the document or that person's attorney shall appear beneath the signature.

(g) Documents filed under this subpart must conform to the requirements of § 4.401(d).

[43 FR 34386, Aug. 3, 1978, as amended at 75 FR 64669, Oct. 20, 2010]

§ 4.1109 Service.

(a)(1) Any party initiating a proceeding in OHA under the Act shall, on the date of filing, simultaneously serve copies of the initiating documents on the officer in the Office of the Solicitor, U.S. Department of the Interior, representing OSMRE in the state in which the mining operation at issue is located, and on any other statutory parties specified under § 4.1105 of this part.

(2) The jurisdictions, addresses, and telephone numbers of the applicable officers of the Office of the Solicitor to be served under paragraph (a)(1) of this section are:

(i) For mining operations in Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Virginia: Field Solicitor, U.S. Department of the Interior, 800 S. Gay Street, Suite 800, Knoxville, Tennessee 37929; Telephone: (865) 545–4294; FAX: (865) 545–4314.

(ii) For mining operations in Maryland, Massachusetts, Michigan, Ohio, Pennsylvania, Rhode Island, and West Virginia: Field Solicitor, U.S. Department of the Interior, Three Parkway Center, Suite 385, Pittsburgh, Pennsylvania 15220; Telephone: (412) 937–4000; FAX: (412) 937–4003.

(iii) For mining operations in Alaska, Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, including mining operations located on Indian lands within those states: Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215; Telephone: (303) 231–5353; FAX: (303) 231–5363 or 231–5360.

(iv) For mining operations in Arizona, California, and New Mexico, including mining operations located on Indian lands within those states except for the challenge of permitting decisions affecting mining operations located on Indian lands in those states: Regional Solicitor, Southwest Region, U.S. Department of the Interior, 505 Marquette Avenue, NW., Suite 1800, Albuquerque, NM 87102; Telephone: (505) 248–5600; FAX: (505) 248–5623.

(v) For the challenge of permitting decisions affecting mining operations located on Indian lands within Arizona, California, and New Mexico: Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215; Telephone: (303) 231–5353; FAX: (303) 231–5363 or 231–5360.

(3) Any party or other person who subsequently files any other document with OHA in the proceeding shall simultaneously serve copies of that document on all other parties and persons participating in the proceeding.

(b) Copies of documents by which any proceeding is initiated shall be served on all statutory parties personally or by registered or certified mail, return receipt requested. All subsequent documents shall be served personally or by first class mail.

(c) Service of copies of all documents is complete at the time of personal service or, if service is made by mail, upon receipt.

(d) Whenever an attorney has entered an appearance for a party in a proceeding before an administrative law judge or the Board, service thereafter shall be made upon the attorney.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980; 52 FR 39526, Oct. 22, 1987; 56 FR 2142, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991; 59 FR 1488, Jan. 11, 1994; 59 FR 42774, Aug. 19, 1994; 60 FR 58243, Nov. 27, 1995; 61 FR 40348, Aug. 2, 1996; 67 FR 61510, Oct. 1, 2002; 75 FR 64669, Oct. 20, 2010]

§4.1110 Intervention.

(a) Any person, including a State, or OSM may petition for leave to intervene at any stage of a proceeding in OHA under the act.

(b) A petitioner for leave to intervene shall incorporate in the petition a statement setting forth the interest of the petitioner and, where required, a showing of why his interest is or may be adversely affected.

(c) The administrative law judge or the Board shall grant intervention where the petitioner—

(1) Had a statutory right to initiate the proceeding in which he wishes to intervene; or

(2) Has an interest which is or may be adversely affected by the outcome of the proceeding.

(d) If neither paragraph (c)(1) nor (c)(2) of this section apply, the administrative law judge or the Board shall consider the following in determining whether intervention is appropriate—

(1) The nature of the issues;

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

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

(4) The effect of intervention on the agency's implementation of its statutory mandate.

(e) Any person, including a State, or OSM granted leave to intervene in a proceeding may participate in such proceeding as a full party or, if desired, in a capacity less than that of a full party. If an intervenor wishes to participate in a limited capacity, the extent and the terms of the participation shall be in the discretion of the administrative law judge or the Board.

§4.1111 Voluntary dismissal.

Any party who initiated a proceeding before OHA may seek to withdraw by moving to dismiss at any stage of a proceeding and the administrative law judge or the Board may grant such a motion.

§4.1112 Motions.

(a) Except for oral motions made in proceedings on the record, or where the administrative law judge otherwise directs, each motion shall—

(1) Be in writing; and

(2) Contain a concise statement of supporting grounds.

(b) Unless the administrative law judge or the Board orders otherwise, any party to a proceeding in which a motion is filed under paragraph (a) of this section shall have 15 days from service of the motion to file a statement in response.

(c) Failure to make a timely motion or to file a statement in response may be construed as a waiver of objection.

(d) An administrative law judge or the Board shall rule on all motions as expeditiously as possible.

§4.1113 Consolidation of proceedings.

When proceedings involving a common question of law or fact are pending before an administrative law judge or the Board, such proceedings are subject to consolidation pursuant to a motion by a party or at the initiative of an administrative law judge or the Board.

§4.1114 Advancement of proceedings.

(a) Except in expedited review proceedings under §4.1180, or in temporary relief proceedings under §4.1266, at any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding.

(b) Except as otherwise directed by the administrative law judge or the Board, any party filing a motion under this section shall—

(1) Make the motion in writing;

(2) Describe the exigent circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery or by telephonic or telegraphic communication followed by mail. Service is complete upon mailing.

(d) Unless otherwise directed by the administrative law judge or the Board, all parties to the proceeding in which the motion is filed shall have 10 days from the date of service of the motion

to file a statement in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may schedule a hearing regarding the motion. If the motion is granted, the administrative law judge may advance pleading schedules, prehearing conferences, and the hearing, as deemed appropriate: *Provided*, A hearing on the merits shall not be scheduled with less than 5 working days notice to the parties, unless all parties consent to an earlier hearing.

(f) If the motion is granted, the Board may, if it deems such action to be appropriate, advance the appeal on its calendar and order such other advancement as may be appropriate, including an abbreviated schedule for briefing or oral argument.

§ 4.1115 Waiver of right to hearing.

Any person entitled to a hearing before an administrative law judge under the act may waive such right in writing. Where parties are directed by any rule in these regulations to file a responsive pleading on or before a specified time, any party who fails to file such responsive pleading by the time specified, may be deemed to have waived his right to a hearing. Unless all parties to a proceeding who are entitled to a hearing waive, or are deemed to have waived such right, a hearing will be held.

§ 4.1116 Status of notices of violation and orders of cessation pending review by the Office of Hearings and Appeals.

Except where temporary relief is granted pursuant to section 525(c) or section 526(c) of the act, notices of violation and orders of cessation issued under the act shall remain in effect during the pendency of review before an administrative law judge or the Board.

§ 4.1117 Reconsideration.

A party may file a motion for reconsideration of any decision of the Board under this subpart within 60 days after the date of the decision. The provisions of § 4.403 apply to a motion filed under this paragraph.

[75 FR 64669, Oct. 20, 2010]

EVIDENTIARY HEARINGS

§ 4.1120 Presiding officers.

An administrative law judge in the Office of Hearings and Appeals shall preside over any hearing required by the act to be conducted pursuant to 5 U.S.C. 554 (1970).

§ 4.1121 Powers of administrative law judges.

(a) Under the regulations of this part, an administrative law judge may—

(1) Administer oaths and affirmations;

(2) Issue subpoenas;

(3) Issue appropriate orders relating to discovery;

(4) Rule on procedural requests or similar matters;

(5) Hold conferences for settlement or simplification of the issues;

(6) Regulate the course of the hearing;

(7) Rule on offers of proof and receive relevant evidence;

(8) Take other actions authorized by this part, by 5 U.S.C. 556 (1970), or by the act; and

(9) Make or recommend decisions in accordance with 5 U.S.C. 557 (1970).

(b) An administrative law judge may order a prehearing conference—

(1) To simplify and clarify issues;

(2) To receive stipulations and admissions;

(3) To explore the possibility of agreement disposing of any or all of the issues in dispute; and

(4) For such other purposes as may be appropriate.

(c) Except as otherwise provided in these regulations, the jurisdiction of an administrative law judge shall terminate upon—

(1) The filing of a notice of appeal from an initial decision or other order dispositive of the proceeding;

(2) The issuance of an order of the Board granting a petition for review; or

(3) The expiration of the time period within which a petition for review or an appeal to the Board may be filed.

§ 4.1122 Conduct of administrative law judges.

Administrative law judges shall adhere to the ''Code of Judicial Conduct.''

§ 4.1123 Notice of hearing.

(a) An administrative law judge shall give notice to the parties of the time, place and nature of any hearing.

(b) Except for expedited review proceedings and temporary relief proceedings where time is of the essence, notice given under this section shall be in writing.

(c) In an expedited proceeding when there is only opportunity to give oral notice, the administrative law judge shall enter that fact contemporaneously on the record by a signed and dated memorandum describing the notice given.

§ 4.1124 Certification of interlocutory ruling.

Upon motion or upon the initiative of an administrative law judge, the judge may certify to the Board a ruling which does not finally dispose of the case if the ruling presents a controlling question of law and an immediate appeal would materially advance ultimate disposition by the judge.

§ 4.1125 Summary decision.

(a) At any time after a proceeding has begun, a party may move for summary decision of the whole or part of a case.

(b) The moving party under this section shall verify any allegations of fact with supporting affidavits, unless the moving party is relying upon depositions, answers to interrogatories, admissions, or documents produced upon request to verify such allegations.

(c) An administrative law judge may grant a motion under this section if the record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that—

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

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

(d) If a motion for summary decision is not granted for the entire case or for all the relief requested and an evidentiary hearing is necessary, the administrative law judge shall, if practicable, and upon examination of all relevant documents and evidence before him, ascertain what material facts are actually and in good faith controverted. He shall thereupon, issue an order specifying the facts that appear without substantial controversy and direct such further proceedings as deemed appropriate.

§ 4.1126 Proposed findings of fact and conclusions of law.

The administrative law judge shall allow the parties to a proceeding an opportunity to submit proposed findings of fact and conclusions of law together with a supporting brief at a time designated by the administrative law judge.

§ 4.1127 Initial orders and decisions.

An initial order or decision disposing of a case shall incorporate—

(a) Findings of fact and conclusions of law and the basis and reasons therefore on all the material issues of fact, law, and discretion presented on the record; and

(b) An order granting or denying relief.

§ 4.1128 Effect of initial order or decision.

An initial order or decision shall become final if that order or decision is not timely appealed to the Board under § 4.1270 or § 4.1271.

§ 4.1129 Certification of record.

Except in expedited review proceedings under § 4.1180, within 5 days after an initial decision has been rendered, the administrative law judge shall certify the official record of the proceedings, including all exhibits, and transmit the official record for filing in the Hearings Division, Office of Hearings and Appeals, Arlington, Va.

DISCOVERY

§ 4.1130 Discovery methods.

Parties may obtain discovery by one or more of the following methods—

(a) Depositions upon oral examination or upon written interrogatories;

(b) Written interrogatories;

(c) Production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and

(d) Requests for admission.

§ 4.1131 Time for discovery.

Following the initiation of a proceeding, the parties may initiate discovery at any time as long as it does not interfere with the conduct of the hearing.

§ 4.1132 Scope of discovery.

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(d) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following—

(1) The discovery not be had;

(2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;

(5) Discovery be conducted with no one present except persons designated by the administrative law judge; or

(6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

§ 4.1133 Sequence and timing of discovery.

Unless the administrative law judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

§ 4.1134 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows—

(a) A party is under a duty to supplement timely his response with respect to any question directly addressed to—

(1) The identity and location of persons having knowledge of discoverable matters; and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify and the substance of his testimony.

(b) A party is under a duty to amend timely a prior response if he later obtains information upon the basis of which—

(1) He knows the response was incorrect when made; or

(2) He knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the administrative law judge or agreement of the parties.

§ 4.1135 Motion to compel discovery.

(a) If a deponent fails to answer a question propounded, or a party upon whom a request is made pursuant to § 4.1140, or a party upon whom answers to interrogatories are served fails to adequately respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the discovering party may move the administrative law judge for an order compelling a response or inspection in accordance with the request.

(b) The motion shall set forth—

(1) The nature of the questions or request;

(2) The response or objection of the party upon whom the request was served; and

(3) Arguments in support of the motion.

(c) For purposes of this section, an evasive answer or incomplete answer or response shall be treated as a failure to answer or respond.

(d) In ruling on a motion made pursuant to this section, the administrative law judge may make such a protective order as he is authorized to make on a motion made pursuant to § 4.1132(d).

§ 4.1136 Failure to comply with orders compelling discovery.

If a party or an officer, director, or other agent of a party fails to obey an order to provide or permit discovery, the administrative law judge before whom the action is pending may make such orders in regard to the failure as are just, including but not limited to the following—

(a) An order that the matters sought to be discovered or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence; or

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

§ 4.1137 Depositions upon oral examination or upon written questions.

(a) Any party desiring to take the testimony of any other party or other person by deposition upon oral examination or written questions shall, without leave of the administrative law judge, give reasonable notice in writing to every other party, to the person to be examined and to the administrative law judge of—

(1) The proposed time and place of taking the deposition;

(2) The name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or the particular group or class to which he belongs;

(3) The matter upon which each person will be examined; and

(4) The name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) A deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(c) The actual taking of the deposition shall proceed as follows—

(1) The deposition shall be on the record;

(2) The officer before whom the deposition is to be taken shall put the witness on oath or affirmation;

(3) Examination and cross-examination shall proceed as at a hearing;

(4) All objections made at the time of the examination shall be noted by the officer upon the deposition;

(5) The officer shall not rule on objections to the evidence, but evidence objected to shall be taken subject to the objections.

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature, unless examination and signature is waived by the deponent. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign.

(e) Where the deposition is to be taken upon written questions, the party taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within 30 days after service, any other party may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

§ 4.1138 Use of depositions.

At the hearing, any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition, or who had reasonable notice thereof, in accordance with any of the following provisions—

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated to testify on behalf of a public or private corporation, partnership, or association or governmental agency which is a party may be used by an adverse party for any purpose; or

(c) The deposition of a witness, whether or not a party, may be used by a party for any purpose if the administrative law judge finds that—

(1) The witness is dead;

(2) The witness is at a distance greater than 100 miles from the place of hearing, or is outside the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;

(3) The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(4) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(5) Such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be used.

§ 4.1139 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on the administrative law judge and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answer and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 30 days after service of the interrogatories, or within such shorter or longer period as the administrative law judge may allow.

(c) Interrogatories may relate to any matters which can be inquired into under §4.1132. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

§4.1140 Production of documents and things and entry upon land for inspection and other purposes.

(a) Any party may serve on any other party a request to—

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things within the scope of §4.1132 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property (including the air, water, and soil) or any designated object or operation thereon, within the scope of §4.1132.

(b) The request may be served on any party without leave of the administrative law judge.

(c) The request shall—

(1) Set forth the items to be inspected either by individual item or by category;

(2) Describe each item or category with reasonable particularity; and

(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall serve on the party submitting the request a written response within 30 days after service of the request.

(e) The response shall state, with respect to each item or category—

(1) That inspection and related activities will be permitted as requested; or

(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.

§4.1141 Admissions.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within 30 days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party—

(1) A sworn statement denying specifically the relevant matters of which an admission is requested;

(2) A sworn statement setting forth in detail the reasons why he can neither truthfully admit nor deny them; or

(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

(d) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the administrative law judge determines that an objection is justified, he shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a

prehearing conference or at a designated time prior to hearing.

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

(f) Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

PETITIONS FOR REVIEW OF PROPOSED ASSESSMENTS OF CIVIL PENALTIES

§ 4.1150 Who may file.

Any person charged with a civil penalty may file a petition for review of a proposed assessment of that penalty with the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1151 Time for filing.

(a) A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment; or

(b) If a timely request for a conference has been made pursuant to 30 CFR 723.18 or 845.18, a petition for review must be filed within 30 days from service of notice by the conference officer that the conference is deemed completed.

(c) No extension of time will be granted for filing a petition for review of a proposed assessment of a civil penalty as required by paragraph (a) or (b) of this section. If a petition for review is not filed within the time period provided in paragraph (a) or (b) of this section, the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act to review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

§ 4.1152 Contents of petition; payment required.

(a) The petition shall include—

(1) A short and plain statement indicating the reasons why either the amount of the penalty or the fact of the violation is being contested;

(2) If the amount of penalty is being contested based upon a misapplication of the civil penalty formula, a statement indicating how the civil penalty formula contained in 30 CFR part 723 or 845 was misapplied, along with a proposed civil penalty utilizing the civil penalty formula;

(3) Identification by number of all violations being contested;

(4) The identifying number of the cashier's check, certified check, bank draft, personal check, or bank money order accompanying the petition; and

(5) A request for a hearing site.

(b) The petition shall be accompanied by—

(1) Full payment of the proposed assessment in the form of a cashier's check, certified check, bank draft, personal check or bank money order made payable to—Assessment Office, OSM—to be placed in an escrow account pending final determination of the assessment; and

(2) On the face of the payment an identification by number of the violations for which payment is being tendered.

(c) As required by section 518(c) of the act, failure to make timely payment of the proposed assessment in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) No extension of time will be granted for full payment of the proposed assessment. If payment is not made within the time period provided in § 4.1151 (a) or (b), the appropriateness of the amount of the penalty, and the fact of the violation if there is no proceeding pending under section 525 of the Act of review the notice of violation or cessation order involved, shall be deemed admitted, the petition shall be dismissed, and the civil penalty assessed shall become a final order of the Secretary.

[43 FR 34386, Aug. 3, 1978, as amended at 51 FR 16321, May 2, 1986; 59 FR 1488, Jan. 11, 1994]

§4.1153 Answer.

OSM shall have 30 days from receipt of a copy of the petition within which to file an answer to the petition with the Hearings Division, OHA.

§4.1154 Review of waiver determination.

(a) Within 10 days of the filing of a petition under this part, petitioner may move the administrative law judge to review the granting or denial of a waiver of the civil penalty formula pursuant to 30 CFR 723.16 or 845.16.

(b) The motion shall contain a statement indicating all alleged facts relevant to the granting or denial of the waiver;

(c) Review shall be limited to the written determination of the Director of OSM granting or denying the waiver, the motion and responses to the motion. The standard of review shall be abuse of discretion.

(d) If the administrative law judge finds that the Director of OSM abused his discretion in granting or denying the waiver, the administrative law judge shall hold the hearing on the petition for review of the proposed assessment required by section 518(b) of the act and make a determination pursuant to §4.1157.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

§4.1155 Burdens of proof in civil penalty proceedings.

In civil penalty proceedings, OSM shall have the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty. The person who petitioned for review shall have the ultimate burden of persuasion as to the fact of the violation.

[53 FR 47694, Nov. 25, 1988]

§4.1156 Summary disposition.

(a) In a civil penalty proceeding where the person against whom the proposed civil penalty is assessed fails to comply on time with any prehearing order of an administrative law judge, the administrative law judge shall issue an order to show cause why—

(1) That person should not be deemed to have waived his right to a hearing; and

(2) The proceedings should not be dismissed and referred to the assessment officer.

(b) If the order to show cause is not satisfied as required, the administrative law judge shall order the proceedings summarily dismissed and shall refer the case to the assessment officer who shall enter the assessment as the final order of the Department.

(c) Where the person against whom the proposed civil penalty is assessed fails to appear at a hearing, that person will be deemed to have waived his right to a hearing and the administration law judge may assume for purposes of the assessment—

(1) That each violation listed in the notice of violation or order occurred; and

(2) The truth of any facts alleged in such notice or order.

(d) In order to issue an initial decision assessing the appropriate penalty when the person against whom the proposed civil penalty is assessed fails to appear at the hearing, an administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

(e) Nothing in this section shall be construed to deprive the person against whom the penalty is assessed of his opportunity to have OSM prove the violations charged in open hearing with confrontation and cross-examination of witnesses, except where that person fails to comply with a prehearing order or fails to appear at the scheduled hearing.

§4.1157 Determination by administrative law judge.

(a) The administrative law judge shall incorporate in his decision concerning the civil penalty, findings of fact on each of the four criteria set forth in 30 CFR 723.13 or 845.13, and conclusions of law.

(b) If the administrative law judge finds that—

(1) A violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere to

the point system and conversion table contained in 30 CFR 723.13 and 723.14 or 845.13 and 845.14, except that the administrative law judge may waive the use of such point system where he determines that a waiver would further abatement of violations of the Act. However, the administrative law judge shall not waive the use of the point system and reduce the proposed assessment on the basis of an argument that a reduction in the proposed assessment could be used to abate other violations of the Act; or

(2) No violation occurred, he shall issue an order that the proposed assessment be returned to the petitioner.

(c) If the administrative law judge makes a finding that no violation occurred or if the administrative law judge reduces the amount of the civil penalty below that of the proposed assessment and a timely petition for review of his decision is not filed with the Board or the Board refuses to grant such a petition, the Department of the Interior shall have 30 days from the expiration of the date for filing a petition with the Board if no petition is filed, or 30 days from the date the Board refuses to grant such a petition, within which to remit the appropriate amount to the person who made the payment, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater.

(d) If the administrative law judge increases the amount of the civil penalty above that of the proposed assessment, the administrative law judge shall order payment of the appropriate amount within 30 days of receipt of the decision.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1488, Jan. 11, 1994]

§ 4.1158 Appeals.

Any party may petition the Board to review the decision of an administrative law judge concerning an assessment according to the procedures set forth in § 4.1270.

REVIEW OF SECTION 521 NOTICES OF VIOLATION AND ORDERS OF CESSATION

§ 4.1160 Scope.

These regulations govern applications for review of—

(a) Notices of violation or the modification, vacation, or termination of a notice of violation under section 521(a)(3) of the Act; and

(b) Orders of cessation which are not subject to expedited review under § 4.1180 or the modification, vacation, or termination of such an order of cessation under section 521(a)(2) or section 521(a)(3).

§ 4.1161 Who may file.

A permittee issued a notice or order by the Secretary pursuant to the provisions of section 521(a)(2) or section 521(a)(3) of the Act or any person having an interest which is or may be adversely affected by a notice or order subject to review under § 4.1160 may file an application for review with the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1162 Time for filing.

(a) Any person filing an application for review under § 4.1160 *et seq.* shall file that application within 30 days of the receipt of a notice or order or within 30 days of receipt of notice of modification, vacation, or termination of such a notice or order. Any person not served with a copy of the document shall file the application for review within 40 days of the date of issuance of the document.

(b) No extension of time will be granted for filing an application for review as provided by paragraph (a) of this section. If an application for review is not filed within the time period provided in paragraph (a) of this section, the application shall be dismissed.

[51 FR 16321, May 2, 1986]

§ 4.1163 Effect of failure to file.

Failure to file an application for review of a notice of violation or order of cessation shall not preclude challenging the fact of violation during a civil penalty proceeding.

§ 4.1164 Contents of application.

Any person filing an application for review shall incorporate in that application regarding each claim for relief—

(a) A statement of facts entitling that person to administrative relief;
(b) A request for specific relief;
(c) A copy of any notice or order sought to be reviewed;
(d) A statement as to whether the person requests or waives the opportunity for an evidentiary hearing; and
(e) Any other relevant information.

§ 4.1165 Answer.

(a) Where an application for review is filed by a permittee, OSM as well as any other person granted leave to intervene pursuant to § 4.1110 shall file an answer within 20 days of service of a copy of such application.
(b) Where an application for review is filed by a person other than a permittee, the following shall file an answer within 20 days of service of a copy of such application—
(1) OSM;
(2) The permittee; or
(3) Any other person granted leave to intervene pursuant to § 4.1110.

§ 4.1166 Contents of answer.

An answer to an application for review shall incorporate—
(a) A statement specifically admitting or denying the alleged facts stated by the applicant;
(b) A statement of any other relevant facts;
(c) A statement whether an evidentiary hearing is requested or waived; and
(d) Any other relevant information.

§ 4.1167 Notice of hearing.

Pursuant to section 525(a)(2) of the act, the applicant and other interested persons shall be given written notice of the time and place of the hearing at least 5 working days prior thereto.

§ 4.1168 Amendments to pleadings.

(a) An application for review may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the administrative law judge upon proper motion.
(b) Upon receipt of an initial or amended application for review or subsequent to granting leave to amend, the administrative law judge shall issue an order setting a time for filing an amended answer if the judge determines that such an answer is appropriate.

§ 4.1169 Failure to state a claim.

Upon proper motion or after the issuance of an order to show cause by the administrative law judge, an administrative law judge may dismiss at any time an application for review which fails to state a claim upon which administrative relief may be granted.

§ 4.1170 Related notices or orders.

(a) An applicant for review shall file a copy of any subsequent notice or order which modifies, vacates, or terminates the notice or order sought to be reviewed within 10 days of receipt.
(b) An applicant for review of a notice shall file a copy of an order of cessation for failure timely to abate the violation which is the subject of the notice under review within 10 days of receipt of such order.
(c) If an applicant for review desires to challenge any subsequent notice or order, the applicant must file a separate application for review.
(d) Applications for review of related notices or orders are subject to consolidation.

§ 4.1171 Burden of proof in review of section 521 notices or orders.

(a) In review of section 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, order, or modification, vacation, or termination thereof.
(b) The ultimate burden of persuasion shall rest with the applicant for review.

EXPEDITED REVIEW OF SECTION 521(a)(2) OR 521(a)(3) ORDERS OF CESSATION

§ 4.1180 Purpose.

The purpose of §§ 4.1180–4.1187 is to govern applications filed under section 525(b) of the act for expedited review of orders of cessation for which temporary relief has not been granted under section 525(c) or section 526(c) of

the act. If a person is qualified to receive a 30-day decision under these regulations, he may waive that right and file an application under § 4.1164, and the procedures in § 4.1160 *et seq.* shall apply. If there is a waiver as set forth in § 4.1186, the final administrative decision shall be issued within 120 days of the filing of the application.

§ 4.1181 Who may file.

(a) An application for review of an order of cessation may be filed under this section, whenever temporary relief has not been granted under section 525(c) or section 526(c) of the act, by—

(1) A permittee who has been issued an order of cessation under section 521(a)(2) or section 521(a)(3) of the act; or

(2) Any person having an interest which is or may be adversely affected by the issuance of an order of cessation under section 521(a)(2) or section 521(a)(3) of the act.

(b) A permittee or any person having an interest which is or may be adversely affected by a section 521(a)(2) or section 521(a)(3) order of cessation waives his right to expedited review upon being granted temporary relief pursuant to section 525(c) or section 526(c) of the act.

§ 4.1182 Where to file.

The application shall be filed in the Hearings Division, 801 North Quincy Street, OHA, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1183 Time for filing.

(a) Any person intending to file an application for expedited review under section 525(b) of the act shall notify the field solicitor, Department of the Interior, for the region in which the mine site is located, within 15 days of receipt of the order. Any person not served with a copy of the order shall file notice of intention to file an application for review within 20 days of the date of issuance of the order.

(b) Any person filing an application for review under § 4.1184 shall file the application within 30 days of receipt of the order. Any person not served with a copy of the order shall file an application for review within 40 days of the date of issuance of the order.

§ 4.1184 Contents of application.

(a) Any person filing an application for expedited review under section 525(b) of the act shall incorporate in that application regarding each claim for relief—

(1) A statement of facts entitling that person to administrative relief;

(2) A request for specific relief;

(3) A specific statement which delineates each issue to be addressed by the applicant during the expedited proceeding;

(4) A copy of the order sought to be reviewed;

(5) A list identifying each of applicant's witnesses by name, address, and place of employment, including expert witnesses and the area of expertise to which they will address themselves at the hearing, and a detailed summary of their testimony;

(6) Copies of all exhibits and other documentary evidence that the applicant intends to introduce as evidence at the hearing and descriptions of all physical exhibits and evidence which is not capable of being copied or attached; and

(7) Any other relevant information.

(b) If any applicant fails to comply with all the requirements of § 4.1184(a), the administrative law judge may find that the applicant has waived the 30-day decision requirement or the administrative law judge shall order that the application be perfected and the application shall not be considered filed for purposes of the 30-day decision until perfected. Failure to timely comply with the administrative law judge's order shall constitute a waiver of the 30-day decision.

§ 4.1185 Computation of time for decision.

In computing the 30-day time period for administrative decision, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days shall be excluded in the computation.

§ 4.1186 Waiver of the 30-day decision requirement.

(a) Any person qualified to receive a 30-day decision may waive that right—

(1) By filing an application pursuant to § 4.1160–71;

(2) By failing to comply with all the requirements of § 4.1184(a); or

(3) In accordance with § 4.1187(j).

(b) Any person qualified to receive a 30-day decision shall waive that right—

(1) By obtaining temporary relief pursuant to section 525(c) or section 526(c) of the act;

(2) By failing to perfect an application pursuant to § 4.1184(b); or

(3) In accordance with § 4.1187(i).

§ 4.1187 Procedure if 30-day decision requirement is not waived.

If the applicant does not waive the 30-day decision requirement of section 525(b) of the act, the following special rules shall apply—

(a) The applicant shall serve all known parties with a copy of the application simultaneously with the filing of the application with OHA. If service is accomplished by mail, the applicant shall inform all known parties by telephone at the time of mailing that an application is being filed and shall inform the administrative law judge by telephone that such notice has been given. However, no ex parte communication as to the merits of the proceeding may be conducted with the administrative law judge.

(b) Any party desiring to file a response to the application for review shall file a written response within 5 working days of service of the application.

(c) If the applicant has requested a hearing, the administrative law judge shall act immediately upon receipt of the application to notify the parties of the time and place of the hearing at least 5 working days prior to the hearing date.

(d) The administrative law judge may require the parties to submit proposed findings of fact and conclusions of law at the hearing which may be orally supplemented on the record at the hearing or, where proposed findings of fact and conclusions of law have not been submitted at the hearing, they may be orally presented for the record at the hearing.

(e) The administrative law judge shall make an initial decision. He shall either rule from the bench on the application, orally stating the reasons for his decision or he shall issue a written decision. If the administrative law judge makes an oral ruling, his approval of the record of the hearing shall constitute his written decision. The decision of the administrative law judge must be issued within 15 days of the filing of the perfected application under § 4.1184.

(f) If any party desires to appeal to the Board, such party shall—

(1) If the administrative law judge makes an oral ruling, make an oral statement, within a time period as directed by the administrative law judge, that the decision is being appealed and request that the administrative law judge certify the record to the Board; or

(2) If the administrative law judge issues a written decision after the close of the hearing, file a notice of appeal with the administrative law judge and with the Board within 2 working days of receipt of the administrative law judge's decision.

(g) If the decision of the administrative law judge is appealed, the Board shall act immediately to issue an expedited briefing schedule, and the Board shall act expeditiously to review the record and issue its decision. The decision of the Board must be issued within 30 days of the date the perfected application is filed with OHA pursuant to § 4.1184.

(h) If all parties waive the opportunity for a hearing and the administrative law judge determines that a hearing is not necessary, but the applicant does not waive the 30-day decision requirement, the administrative law judge shall issue an initial decision on the application within 15 days of receipt of the application. The decision shall contain findings of fact and an order disposing of the application. The decision shall be served upon all the parties and the parties shall have 2 working days from receipt of such decision within which to appeal to the

Board. The Board shall issue its decision within 30 days of the date the perfected application is filed with OHA pursuant to § 4.1184.

(i) If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to comply with any requirement of § 4.1187(a), such action shall constitute a waiver of the 30-day requirement of section 525(b) of the act.

(j) If the applicant seeks to offer witnesses, exhibits, or testimony at the hearing in addition to those identified, submitted, described, or summarized in the application for expedited review perfected in accordance with the requirements of § 4.1184, upon objection by an opposing party to such offer, the administrative law judge may allow such objecting party additional time in order to prepare for cross-examination of unidentified witnesses or to identify and prepare rebuttal evidence or otherwise uncover any additional prejudice which may result to such party. The administrative law judge may rule that the running of the 30-day time for decision is stayed for the period of any additional time allowed pursuant to this subsection or may determine that the applicant has waived his right to the 30-day decision.

PROCEEDINGS FOR SUSPENSION OR REVOCATION OF PERMITS UNDER SECTION 521(a)(4) OF THE ACT

§ 4.1190 Initiation of proceedings.

(a) A proceeding on a show cause order issued by the Director of OSM pursuant to section 521(a)(4) of the Act shall be initiated by the Director of OSM filing a copy of such an order with the Hearings Division, OHA, 801 N. Quincy Street, Suite 300, Arlington, VA 22203, promptly after the order is issued to the permittee.

(b) A show cause order filed with OHA shall set forth—

(1) A list of the unwarranted or willful violations which contribute to a pattern of violations;

(2) A copy of each order or notice which contains one or more of the violations listed as contributing to a pattern of violations;

(3) The basis for determining the existence of a pattern or violations; and

(4) Recommendations whether the permit should be suspended or revoked, including the length and terms of a suspension.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61510, Oct. 1, 2002]

§ 4.1191 Answer.

The permittee shall have 30 days from receipt of the order within which to file an answer with the Hearings Division, OHA, Arlington, Va.

§ 4.1192 Contents of answer.

The permittee's answer to a show cause order shall contain a statement setting forth—

(a) The reasons in detail why a pattern of violations does not exist or has not existed, including all reasons for contesting—

(1) The fact of any of the violations alleged by OSM as constituting a pattern of violations;

(2) The willfulness of such violations; or

(3) Whether such violations were caused by the unwarranted failure of the permittee;

(b) All mitigating factors the permittee believes exist in determining the terms of the revocation or the length and terms of the suspension;

(c) Any other alleged relevant facts; and

(d) Whether a hearing on the show cause order is desired.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1193 Notice of hearing.

If a hearing on the show cause order is requested, or if no hearing is requested but the administrative law judge determines that a hearing is necessary, the administrative law judge shall give thirty days written notice of the date, time, and place of the hearing to the Director, the permittee, the State regulatory authority, if any, and any intervenor.

[67 FR 61510, Oct. 1, 2002]

§ 4.1194 Burden of proof in suspension or revocation proceedings.

In proceedings to suspend or revoke a permit, OSM shall have the burden of going forward to establish a prima facie case for suspension or revocation of the permit. The ultimate burden of persuasion that the permit should not be suspended or revoked shall rest with the permittee.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

§ 4.1195 Determination by the administrative law judge.

(a) Upon a determination by the administrative law judge that a pattern of violations exists or has existed, the administrative law judge shall order the permit either suspended or revoked. In making such a determination, the administrative law judge need not find that all the violations listed in the show cause order occurred, but only that sufficient violations occurred to establish a pattern.

(b) If the permit is suspended, the minimum suspension period shall be 3 working days unless the administrative law judge finds that imposition of the minimum suspension period would result in manifest injustice and would not further the purposes of the act. Also, the administrative law judge may impose preconditions to be satisfied prior to the suspension being lifted.

(c) The decision of the administrative law judge shall be issued within 20 days following the date the hearing record is closed by the administrative law judge or within 20 days of receipt of the answer, if no hearing is requested by any party and the administrative law judge determines that no hearing is necessary.

(d) At any stage of a suspension or revocation proceeding being conducted by an administrative law judge, the parties may enter into a settlement, subject to the approval of the administrative law judge.

[43 FR 34386, Aug. 3, 1978. Redesignated and amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1196 Summary disposition.

(a) In a proceeding under this section where the permittee fails to appear at a hearing, the permittee shall be deemed to have waived his right to a hearing and the administrative law judge may assume for purposes of the proceeding that—

(1) Each violation listed in the order occurred;

(2) Such violations were caused by the permittee's unwarranted failure or were willfully caused; and

(3) A pattern of violations exists.

(b) In order to issue an initial decision concerning suspension or revocation of the permit when the permittee fails to appear at the hearing, the administrative law judge shall either conduct an ex parte hearing or require OSM to furnish proposed findings of fact and conclusions of law.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

§ 4.1197 Appeals.

Any party desiring to appeal the decision of the administrative law judge shall have 5 days from receipt of the administrative law judge's decision within which to file a notice of appeal with the Board. The Board shall act immediately to issue an expedited briefing schedule. The decision of the Board shall be issued within 60 days of the date the hearing record is closed by the administrative law judge or, if no hearing is held, within 60 days of the date the answer is filed.

[43 FR 34386, Aug. 3, 1978. Redesignated at 67 FR 61510, Oct. 1, 2002]

APPLICATIONS FOR REVIEW OF ALLEGED DISCRIMINATORY ACTS UNDER SECTION 703 OF THE ACT

§ 4.1200 Filing of the application for review with the Office of Hearings and Appeals.

(a) Pursuant to 30 CFR 865.13, within 7 days of receipt of an application for review of alleged discriminatory acts, OSM shall file a copy of the application in the Hearings Division, OHA, 801 N. Quincy Street, Suite 300, Arlington, VA 22203. OSM shall also file in the Hearings Division, OHA, Arlington, VA, a copy of any answer submitted in response to the application for review.

(b) The application for review, as filed in the Hearings Division, OHA, shall be held in suspense until one of the following takes place—

(1) A request for temporary relief is filed pursuant to § 4.1203;

(2) A request is made by OSM for the scheduling of a hearing pursuant to 30 CFR 865.14(a);

(3) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 865.14(a);

(4) A request is made by the applicant for the scheduling of a hearing pursuant to 30 CFR 865.14(b);

(5) A request is made by OSM that OHA close the case because OSM, the applicant, and the alleged discriminating person have entered into an agreement in resolution of the discriminatory acts and there has been compliance with such agreement.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61510, Oct. 1, 2002]

§ 4.1201 Request for scheduling of a hearing.

(a) If OSM determines that a violation of section 703(a) of the act has probably occurred and was not resolved at the informal conference, it shall file with the Hearings Division, OHA, a request on behalf of the applicant that a hearing be scheduled. The request shall be filed within 10 days of the completion of the informal conference, or where no conference is held, within 10 days following the scheduled conference. Where OSM makes such a request, it shall represent the applicant in the administrative proceedings, unless the applicant desires to be represented by private counsel.

(b) If OSM declines to request that a hearing be scheduled and to represent the applicant, it shall within 10 days of the completion of the informal conference, or where no conference is held, within 10 days following the scheduled conference, notify the applicant of his right to request the scheduling of a hearing on his own behalf. An applicant shall file a request for the scheduling of a hearing in the Hearings Division, OHA, within 30 days of service of such notice from OSM.

(c) If no request for the scheduling of a hearing has been made pursuant to paragraph (a) or (b) of this section and 60 days have elapsed from the filing of the application for review with OSM, the applicant may file on his own behalf a request for the scheduling of a hearing with the main office of OHA. Where such a request is made, the applicant shall proceed on his own behalf, but OSM may intervene pursuant to § 4.1110.

§ 4.1202 Response to request for the scheduling of a hearing.

(a) Any person served with a copy of the request for the scheduling of a hearing shall file a response with the Hearings Division, OHA, Arlington, Va., within 20 days of service of such request.

(b) If the alleged discriminating person has not filed an answer to the application, such person shall include with the response to the request for the scheduling of a hearing, a statement specifically admitting or denying the alleged facts set forth in the application.

§ 4.1203 Application for temporary relief from alleged discriminatory acts.

(a) On or after 10 days from the filing of an application for review under this part, any party may file an application for temporary relief from alleged discriminatory acts.

(b) The application shall be filed in the Hearings Division, OHA, Arlington, Va.

(c) The application shall include—

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A showing that the complaint of discrimination was not frivolously brought;

(3) A description of any exigent circumstances justifying temporary relief; and

(4) A statement of the specific relief requested.

(d) All parties to the proceeding to which the application relates shall have 5 days from receipt of the application to file a written response.

(e) The administrative law judge may convene a hearing on any issue raised by the application if he deems it appropriate.

(f) The administrative law judge shall expeditiously issue an order or decision granting or denying such relief.

(g) If all parties consent, before or after the commencement of any hearing on the application for temporary relief, the administrative law judge may order the hearing on the application for review of alleged discriminatory - acts to be advanced and consolidated with the hearing on the application for temporary relief.

§ 4.1204 Determination by administrative law judge.

Upon a finding of a violation of section 703 of the act or 30 CFR 865.11, the administrative law judge shall order the appropriate affirmative relief, including but not limited to—

(a) The rehiring or reinstatement of the applicant to his former position with full rights and privileges, full backpay, and any special damages sustained as a result of the discrimination; and

(b) All other relief which the administrative law judge deems appropriate to abate the violation or to prevent recurrence of discrimination.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61510, Oct. 1, 2002]

§ 4.1205 Appeals.

Any party aggrieved by a decision of an administrative law judge concerning an application for review of alleged discriminatory acts may appeal to the Board under procedures set forth in § 4.1271 *et seq*.

APPLICATIONS FOR TEMPORARY RELIEF

§ 4.1260 Scope.

These regulations contain the procedures for seeking temporary relief in section 525 review proceedings under the act. The special procedures for seeking temporary relief from an order of cessation are set forth in § 4.1266. Procedures for seeking temporary relief from alleged discrimina- tory acts are covered in § 4.1203.

§ 4.1261 When to file.

An application for temporary relief may be filed by any party to a proceeding at any time prior to decision by an administrative law judge.

§ 4.1262 Where to file.

The application shall be filed with the administrative law judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, OHA, 801 North Quincy Street, Arlington, Va. 22203.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1263 Contents of application.

The application shall include—

(a) A detailed written statement setting forth the reasons why relief should be granted;

(b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;

(c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources;

(d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the act, a statement of whether the requirement of section 525(c) of the act for decision on the application within 5 days is waived; and

(e) A statement of the specific relief requested.

§ 4.1264 Response to application.

(a) Except as provided in § 4.1266(b), all parties to the proceeding to which the application relates shall have 5 days from the date of receipt of the application to file a written response.

(b) Except as provided in § 4.1266(b), the administrative law judge may hold a hearing on any issue raised by the application if he deems it appropriate.

§ 4.1265 Determination on application concerning a notice of violation issued pursuant to section 521(a)(3) of the act.

Where an application has been filed requesting temporary relief from a notice of violation issued under section 521(a)(3) of the act, the administrative law judge shall expeditiously issue an

order or decision granting or denying such relief.

§ 4.1266 Determination on application concerning an order of cessation.

(a) If the 5-day requirement of section 525(c) of the act is waived, the administrative law judge shall expeditiously conduct a hearing and render a decision on the application.

(b) If there is no waiver of the 5-day requirement of section 525(c) of the act, the following special rules shall apply—

(1) The 5-day time for decision shall not begin to run until the application is filed pursuant to § 4.1262 or a copy of the application is received by the field solicitor for the region in which the mine site subject to the order is located, whichever occurs at a later date (see § 4.1109 for addresses);

(2) The application shall include an affidavit stating that telephone notice has been given to the field office of OSM serving the state in which the minesite subject to the order is located. The telephone notice shall identify the mine, the mine operator, the date and number of the order from which relief is requested, the name of the OSM inspector involved, and the name and telephone number of the applicant. OSM's field offices and their numbers follow:

Albuquerque Field Office (serving Arizona, California, and New Mexico) (505) 248–5070.
Big Stone Gap Field Office (serving Virginia) (276) 523–4303.
Birmingham Field Office (serving Alabama and Mississippi) (205) 290–7282 (ext. 16).
Casper Field Office (serving Idaho, Montana, North Dakota, South Dakota, and Wyoming) (307) 261–6550.
Charleston Field Office (serving West Virginia) (304) 347–7158.
Columbus Team Office (serving Maryland, Michigan, and Ohio) (412) 937–2153.
Harrisburg Field Office (serving Massachusetts, Pennsylvania, and Rhode Island) (717) 782–4036.
Knoxville Field Office (serving Georgia, Tennessee, and North Carolina) (865) 545–4103 (ext. 186).
Lexington Field Office (serving Kentucky) (859) 260–8402.
Mid-Continent Regional Coordinating Center (serving Iowa, Kansas, and Missouri) (618) 463–6460.
Olympia Office (serving Washington) (360) 753–9538.
Tulsa Field Office (serving Arkansas, Louisiana, Oklahoma, and Texas) (918) 581–6431 (ext. 23).
Western Regional Coordinating Center (serving Alaska, Colorado, Oregon, and Utah) (303) 844–1400 (ext. 1424).

(3) Prior to or at the hearing, the applicant shall file with OHA an affidavit stating the date upon which the copy of the application was delivered to the office of the field solicitor or the applicant may make an oral statement at the hearing setting forth that information. For purposes of the affidavit or statement the applicant may rely upon telephone confirmation by the office of the field solicitor that the application was received.

(4) In addition to the service requirements of § 4.1266(b) (1) and (2), the applicant shall serve any other parties with a copy of the application simultaneously with the filing of the application. If service is accomplished by mail, the applicant shall inform such other parties by telephone at the time of mailing that an application is being filed, the contents of the application, and with whom the application was filed.

(5) The field solicitor and all other parties may indicate their objection to the application by communicating such objection to the administrative law judge and the applicant by telephone. However, no ex parte communication as to the merits of the proceeding may be conducted with the administrative law judge. The field solicitor and all other parties shall simultaneously reduce their objections to writing. The written objections must be immediately filed with the administrative law judge and immediately served upon the applicant.

(6) Upon receipt of communication that there is an objection to the request, the administrative law judge shall immediately order a location, time, and date for the hearing by communicating such information to the field solicitor, all other parties, and the applicant by telephone. The administrative law judge shall reduce such communications to writing in the form of a memorandum to the file.

(7) If a hearing is held—

(i) The administrative law judge may require the parties to submit proposed

findings of fact and conclusions of law at the hearing which may be orally supplemented on the record at the hearing or where written proposed findings of fact and conclusions of law have not been submitted at the hearing, they may be orally presented for the record at the hearing.

(ii) The administrative law judge shall either rule from the bench on the application, orally stating the reasons for his decision or he shall within 24 hours of completion of the hearing issue a written decision. If the administrative law judge makes an oral ruling, his approval of the record of the hearing shall constitute his written decision.

(8) The order or decision of the administrative law judge shall be issued within 5 working days of the receipt of the application for temporary relief.

(9) If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to supply the information required by § 4.1263 such action shall constitute a waiver of the 5-day requirement of section 525(c) of the act.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 59 FR 1489, Jan. 11, 1994; 67 FR 61510, Oct. 1, 2002]

§ 4.1267 Appeals.

(a) Any party desiring to appeal a decision of an administrative law judge granting temporary relief may appeal to the Board.

(b) Any party desiring to appeal a decision of an administrative law judge denying temporary relief may appeal to the Board or, in the alternative, may seek judicial review pursuant to section 526(a) of the act.

(c) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

[43 FR 34386, Aug. 3, 1978, as amended at 45 FR 50753, July 31, 1980]

APPEALS TO THE BOARD FROM DECISIONS OR ORDERS OF ADMINISTRATIVE LAW JUDGES

§ 4.1270 Petition for discretionary review of a proposed civil penalty.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of a civil penalty proceeding under § 4.1150.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed and the time for filing may not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition is granted, the rules in §§ 4.1273 through 4.1275 are applicable, and the Board must use the point system and conversion table contained in 30 CFR part 723 or 845 in recalculating assessments. However, the Board has the same authority to waive the civil penalty formula as that granted to administrative law judges in § 4.1157(b)(1). If the petition is denied, the decision of the administrative law judge is final for the Department, subject to § 4.5.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 61511, Oct. 1, 2002; 75 FR 64669, Oct. 20, 2010]

§ 4.1271 Notice of appeal.

(a) Any aggrieved party may file a notice of appeal from an order or decision of an administrative law judge disposing of a proceeding under §§ 4.1160 through 4.1171, 4.1200 through 4.1205, 4.1260 through 4.1267, 4.1290 through 4.1296, and 4.1350 through 4.1356.

(b) Except in an expedited review proceeding under § 4.1180, or in a suspension or revocation proceeding under § 4.1190, a notice of appeal shall be filed with the Board on or before 30 days from the date of receipt of the order or

decision sought to be reviewed and the time for filing may not be extended.

[43 FR 34386, Aug. 3, 1978, as amended at 59 FR 1489, Jan. 11, 1994]

§ 4.1272 Interlocutory appeals.

(a) If a party has sought certification under § 4.1124, that party may petition the Board for permission to appeal from an interlocutory ruling by an administrative law judge.

(b) A petition under this section shall be in writing and not exceed 10 pages in length.

(c) If the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case, the Board may grant the petition.

(d) Upon granting a petition under this section, the Board may dispense with briefing or issue a briefing schedule.

(e) Unless the Board or the administrative law judge orders otherwise, an interlocutory appeal shall not operate as a stay of further proceedings before the judge.

(f) In deciding an interlocutory appeal, the Board shall confine itself to the issue presented on appeal.

(g) The Board shall promptly decide appeals under this section.

(h) Upon affirmance, reversal or modification of the administrative law judge's interlocutory ruling or order, the jurisdiction of the Board shall terminate, and the case shall be remanded promptly to the administrative law judge for further proceedings.

§ 4.1273 Briefs.

(a) Unless the Board orders otherwise, an appellant's brief is due on or before 30 days from the date of receipt of notice by the appellant that the Board has agreed to exercise discretionary review authority pursuant to § 4.1270 or a notice of appeal is filed.

(b) If any appellant fails to file a timely brief, an appeal under this part may be subject to summary dismissal.

(c) An appellant shall state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested. The failure to specify a ruling as objectionable may be deemed by the Board as a waiver of objection.

(d) Unless the Board orders otherwise, within 20 days after service of appellant's brief, any other party to the proceeding may file a brief.

(e) If any argument is based upon the evidence of record and there is a failure to include specific record citations, when available, the Board need not consider the arguments.

(f) Further briefing may take place by permission of the Board.

(g) Unless the Board provides otherwise, appellant's brief shall not exceed 50 typed pages and an appellee's brief shall not exceed 25 typed pages.

§ 4.1274 Remand.

The Board may remand cases if further proceedings are required.

§ 4.1275 Final decisions.

The Board may adopt, affirm, modify, set aside, or reverse any finding of fact, conclusion of law, or order of the administrative law judge.

APPEALS TO THE BOARD FROM DECISIONS OF THE OFFICE OF SURFACE MINING

§ 4.1280 Scope.

This section is applicable to appeals from decisions of the Director of OSM concerning small operator exemptions under 30 CFR 710.12(h) and to other appeals which are not required by the Act to be determined by formal adjudication under the procedures set forth in 5 U.S.C. 554.

§ 4.1281 Who may appeal.

Any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board where the decision specifically grants such right of appeal.

§ 4.1282 Appeals; how taken.

(a) A person appealing under this section shall file a written notice of appeal with the office of the OSM official whose decision is being appealed and at the same time shall send a copy of the notice to the Board of Land Appeals, 801 North Quincy Street, Arlington, Va. 22203.

(b) The notice of appeal shall be filed within 20 days from the date of receipt of the decision. If the person appealing has not been served with a copy of the decision, such appeal must be filed within 30 days of the date of the decision.

(c) The notice of appeal shall indicate that an appeal is intended and must identify the decision being appealed. The notice should include the serial number or other identification of the case and the date of the decision. The notice of appeal may include a statement of reasons for the appeal and any arguments the appellant desires to make.

(d) If the notice of appeal did not include a statement of reasons for the appeal, such a statement shall be filed with the Board within 20 days after the notice of appeal was filed. In any case, the appellant shall be permitted to file with the Board additional statements of reasons and written arguments or briefs within the 20-day period after filing the notice of appeal.

[43 FR 34386, Aug. 3, 1978, as amended at 49 FR 7565, Mar. 1, 1984; 67 FR 4368, Jan. 30, 2002]

§ 4.1283 Service.

(a) The appellant shall serve personally or by certified mail, return receipt requested, a copy of the notice of appeal and a copy of any statement of reasons, written arguments, or other documents on each party within 15 days after filing the document. Proof of service shall be filed with the Board within 15 days after service.

(b) Failure to serve may subject the appeal to summary dismissal pursuant to § 4.1285.

§ 4.1284 Answer.

(a) Any party served with a notice of appeal who wishes to participate in the proceedings on appeal shall file an answer with the Board within 20 days after service of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal.

(b) If additional reasons, written arguments or other documents are filed by the appellant, a party shall have 20 days after service thereof within which to answer. The answer shall state the reasons the party opposes or supports the appeal.

§ 4.1285 Summary dismissal.

An appeal shall be subject to summary dismissal, in the discretion of the Board, for failure to file or serve, upon all persons required to be served, a notice of appeal or a statement of reasons for appeal.

§ 4.1286 Motion for a hearing on an appeal involving issues of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§ 4.1100, 4.1102 through 4.1115, 4.1121 through 4.1127, and 4.1130 through 4.1141. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

[75 FR 64669, Oct. 20, 2010]

§ 4.1287 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of the recommended decision to file exceptions with the Board.

[75 FR 64669, Oct. 20, 2010]

PETITIONS FOR AWARD OF COSTS AND EXPENSES UNDER SECTION 525(e) OF THE ACT

§ 4.1290 Who may file.

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in—

(1) A final order being issued by an administrative law judge; or

(2) A final order being issued by the Board.

(b) [Reserved]

§ 4.1291 Where to file; time for filing.

The petition for an award of costs and expenses including attorneys' fees must be filed with the administrative law judge who issued the final order, or if the final order was issued by the Board, with the Board, within 45 days of receipt of such order. Failure to make a timely filing of the petition may constitute a waiver of the right to such an award.

§ 4.1292 Contents of petition.

(a) A petition filed under this section shall include the name of the person from whom costs and expenses are sought and the following shall be submitted in support of the petition—

(1) An affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with, the person's participation in the proceeding;

(2) Receipts or other evidence of such costs and expenses; and

(3) Where attorneys' fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services.

(b) [Reserved]

§ 4.1293 Answer.

Any person served with a copy of the petition shall have 30 days from service of the petition within which to file an answer to such petition.

§ 4.1294 Who may receive an award.

Appropriate costs and expenses including attorneys' fees may be awarded—

(a) To any person from the permittee, if—

(1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board

determines that the person made a substantial contribution to the full and fair determination of the issues, except that a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding; or

(2) The person initiates an application for review of alleged discriminatory acts, pursuant to 30 CFR part 830, upon a finding of discriminatory discharge or other acts of discrimination.

(b) From OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

(c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; or

(d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 525 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

(e) To OSM where it demonstrates that any person applied for review pursuant to section 525 of the Act or that any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the Government.

[43 FR 34386, Aug. 3, 1978, as amended at 50 FR 47224, Nov. 15, 1985]

§ 4.1295 Awards.

An award under these sections may include—

(a) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act; and

(b) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award in OHA.

§ 4.1296 Appeals.

Any person aggrieved by a decision concerning the award of costs and expenses in an administrative proceeding under this Act may appeal such award to the Board under procedures set forth in § 4.1271 *et seq.*, unless the Board has made the initial decision concerning such an award.

PETITIONS FOR REVIEW OF PROPOSED INDIVIDUAL CIVIL PENALTY ASSESSMENTS UNDER SECTION 518(f) OF THE ACT

SOURCE: 53 FR 8754, Mar. 17, 1988, unless otherwise noted.

§ 4.1300 Scope.

These regulations govern administrative review of proposed individual civil penalty assessments under section 518(f) of the Act against a director, officer, or agent of a corporation.

§ 4.1301 Who may file.

Any individual served a notice of proposed individual civil penalty assessment may file a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. Phone: 703–235–3800.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1302 Time for filing.

(a) A petition for review of a notice of proposed individual civil penalty assessment must be filed within 30 days of its service on the individual.

(b) No extension of time will be granted for filing a petition for review of a notice of proposed individual civil penalty assessment. Failure to file a petition for review within the time period provided in paragraph (a) shall be deemed an admission of liability by the individual, whereupon the notice of proposed assessment shall become a final order of the Secretary and any tardy petition shall be dismissed.

§ 4.1303 Contents and service of petition.

(a) An individual filing a petition for review of a notice of proposed individual civil penalty assessment shall provide—

(1) A concise statement of the facts entitling the individual to relief;

(2) A copy of the notice of proposed assessment;

(3) A copy of the notice(s) of violation, order(s) or final decision(s) the corporate permittee is charged with failing or refusing to comply with that have been served on the individual by OSM; and

(4) A statement whether the individual requests or waives the opportunity for an evidentiary hearing.

(b) Copies of the petition shall be served in accordance with § 4.1109 (a) and (b) of this part.

[53 FR 8754, Mar. 17, 1988; 53 FR 10036, Mar. 28, 1988]

§ 4.1304 Answer, motion, or statement of OSM.

Within 30 days from receipt of a copy of a petition, OSM shall file with the Hearings Division an answer or motion, or a statement that it will not file an answer or motion, in response to the petition.

§ 4.1305 Amendment of petition.

(a) An individual filing a petition may amend it once as a matter of right before receipt by the individual of an answer, motion, or statement of OSM made in accordance with § 4.1304 of this part. Thereafter, a motion for leave to amend the petition shall be filed with the administrative law judge.

(b) OSM shall have 30 days from receipt of a petition amended as a matter of right to file an answer, motion, or statement in accordance with § 4.1304 of this part. If the administrative law judge grants a motion to amend a petition, the time for OSM to file an answer, motion, or statement shall be set forth in the order granting the motion to amend.

§ 4.1306 Notice of hearing.

The administrative law judge shall give notice of the time and place of the hearing to all interested parties. The hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1307 Elements; burdens of proof.

(a) OSM shall have the burden of going forward with evidence to establish a prima facie case that:

(1) A corporate permittee either violated a condition of a permit or failed or refused to comply with an order issued under section 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under sections 518(b) or 703 of the Act or implementing regulations), unless the fact of violation or failure or refusal to comply with an order has been upheld in a final decision in a proceeding under § 4.1150 through 4.1158, § 4.1160 through 4.1171, or § 4.1180 through 4.1187, and § 4.1270 or § 4.1271 of this part, and the individual is one against whom the doctrine of collateral estoppel may be applied to preclude relitigation of fact issues;

(2) The individual, at the time of the violation, failure or refusal, was a director, officer, or agent of the corporation; and

(3) The individual willfully and knowingly authorized, ordered, or carried out the corporate permittee's violation or failure or refusal to comply.

(b) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraph (a)(1) of this section.

(c) OSM shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraphs (a)(2) and (a)(3) of this section and as to the amount of the individual civil penalty.

[53 FR 8754, Mar. 17, 1988, as amended at 68 FR 66728, Nov. 28, 2003]

§ 4.1308 Decision by administrative law judge.

(a) The administrative law judge shall issue a written decision containing findings of fact and conclusions of law on each of the elements set forth in § 4.1307 of this part.

(b) If the administrative law judge concludes that the individual is liable for an individual civil penalty, he shall order that it be paid in accordance

with 30 CFR 724.18 or 846.18, absent the filing of a petition for discretionary review in accordance with § 4.1309 of this part.

§ 4.1309 Petition for discretionary review.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of an individual civil penalty proceeding under § 4.1308 of this part.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed, and the time for filing shall not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition for review under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition for review is granted the rules in §§ 4.1273–4.1276 of this part are applicable. If the petition is denied, the decision of the administrative law judge is final for the Department, subject to § 4.5 of this part.

(g) Payment of a penalty is due in accordance with 30 CFR 724.18 or 846.18.

REQUEST FOR HEARING ON A PRELIMINARY FINDING CONCERNING A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS UNDER SECTION 510(c) OF THE ACT, 30 U.S.C. 1260(c) (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

SOURCE: 52 FR 39526, Oct. 22, 1987, unless otherwise noted.

§ 4.1350 Scope.

These rules set forth the procedures for obtaining review of a preliminary finding by OSM under section 510(c) of the Act and 30 CFR 774.11(c) of an applicant's or operator's permanent permit ineligibility.

[67 FR 61511, Oct. 1, 2002]

§ 4.1351 Preliminary finding by OSM.

(a) If OSM determines that an applicant or operator controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations and the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit, OSM must serve a preliminary finding of permanent permit ineligibility on the applicant or operator.

(b) OSM must serve the preliminary finding by certified mail, or by overnight delivery service if the applicant or operator has agreed to bear the expense for this service. The preliminary finding must specifically state the violations upon which it is based.

[67 FR 61511, Oct. 1, 2002]

§ 4.1352 Who may file; where to file; when to file.

(a) The applicant or operator may file a request for hearing on OSM's preliminary finding of permanent permit ineligibility.

(b) The request for hearing must be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203 (telephone 703–235–3800), within 30 days of receipt of the preliminary finding by the applicant or operator.

(c) Failure to file a timely request constitutes a waiver of the opportunity for a hearing before OSM makes its final finding concerning permanent permit ineligibility. Any untimely request will be denied.

[67 FR 61511, Oct. 1, 2002]

§ 4.1353 Contents of request.

The request for hearing shall include—

(a) A clear statement of the facts entitling the one requesting the hearing to administrative relief;

(b) An explanation of the alleged errors in OSM's preliminary finding; and

(c) Any other relevant information.

§ 4.1354 Determination by the administrative law judge.

The administrative law judge shall promptly set a time and place for and give notice of the hearing to the applicant or operator and shall issue a decision within 60 days of the filing of a request for hearing. The hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1355 Burden of proof.

OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit.

[67 FR 61511, Oct. 1, 2002]

§ 4.1356 Appeals.

(a) Any party aggrieved by the decision of the administrative law judge may appeal to the Board under procedures set forth in § 4.1271 *et seq.* of this subpart, except that the notice of appeal must be filed within 20 days of receipt of the administrative law judge's decision.

(b) The Board shall order an expedited briefing schedule and shall issue a decision within 45 days of the filing of the appeal.

REQUEST FOR REVIEW OF APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR NEW PERMITS, PERMIT REVISIONS, PERMIT RENEWALS, THE TRANSFER, ASSIGNMENT OR SALE OF RIGHTS GRANTED UNDER PERMIT (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS) AND FOR COAL EXPLORATION PERMITS (FEDERAL PROGRAM)

SOURCE: 56 FR 2143, Jan. 22, 1991, unless otherwise noted.

§ 4.1360 Scope.

These rules set forth the exclusive procedures for administrative review of decisions by OSMRE concerning—

(a) Applications for new permits, including applications under 30 CFR part 785, and the terms and conditions imposed or not imposed in permits by those decisions. They do not apply to decisions on applications to mine on Federal lands in states where the terms of a cooperative agreement provide for the applicability of alternative administrative procedures (see 30 CFR 775.11(c)), but they do apply to OSMRE decisions on applications for Federal lands in states with cooperative agreements where OSMRE as well as the state issue Federal lands permits;

(b) Applications for permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permit;

(c) Permit revisions ordered by OSMRE;

(d) Applications for coal exploration permits; and

(e) Ineligibility for a permit under section 510(c) of the Act and 30 CFR 773.12.

[56 FR 2143, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991, as amended at 67 FR 61511, Oct. 1, 2002]

§ 4.1361 Who may file.

The applicant, permittee, or any person having an interest which is or may be adversely affected by a decision of OSMRE set forth in § 4.1360 may file a request for review of that decision.

§ 4.1362 Where to file; when to file.

(a) The request for review shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (phone 703–235–3800), within 30 days after the applicant or permittee is notified by OSMRE of the written decision by certified mail or by overnight delivery service if the applicant or permittee has agreed to bear the expense for this service.

(b) Failure to file a request for review within the time specified in paragraph (a) of this section shall constitute a waiver of a hearing and the request shall be dismissed.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1363 Contents of request; amendment of request; responses.

(a) The request for review shall include—

(1) A clear statement of the facts entitling the one requesting review to administrative relief;

(2) An explanation of each specific alleged error in OSMRE's decision, including reference to the statutory and regulatory provisions allegedly violated;

(3) A request for specific relief;

(4) A statement whether the person requests or waives the opportunity for an evidentiary hearing; and

(5) Any other relevant information.

(b) All interested parties shall file an answer or motion in response to a request for review, or a statement that no answer or motion will be filed, within 15 days of receipt of the request specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to filing of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Administrative Law Judge. An Administrative Law Judge may not grant a motion for leave to amend unless all parties agree to an extension of the date of commencement of the hearing under § 4.1364. A request for review may not be amended after a hearing commences.

(d) An interested party shall have 10 days from filing of a request for review that is amended as a matter of right or the time remaining for response to the original request, whichever is longer, to file an answer, motion, or statement in accordance with paragraph (b) of this section. If the Administrative Law Judge grants a motion to amend a request for review, the time for an interested party to file an answer, motion, or statement shall be set forth in the order granting it.

(e) Failure of any party to comply with the requirements of paragraph (a) or (b) of this section may be regarded by an Administrative Law Judge as a waiver by that party of the right to commencement of a hearing within 30 days of the filing of a request for review if the Administrative Law Judge concludes that the failure was substantial and that another party was prejudiced as a result.

[56 FR 2143, Jan. 22, 1991; 56 FR 5061, Feb. 7, 1991]

§ 4.1364 Time for hearing; notice of hearing; extension of time for hearing.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall commence a hearing within 30 days of the date of the filing of the request for review or amended request for review and shall simultaneously notify the applicant or permittee and all interested parties of the time and place of such hearing before the hearing commences. The hearing shall be of record and governed by 5 U.S.C. 554. An agreement to waive the time limit for commencement of a hearing may specify the length of the extension agreed to.

§ 4.1365 Status of decision pending administrative review.

The filing of a request for review shall not stay the effectiveness of the OSMRE decision pending completion of administrative review.

§ 4.1366 Burdens of proof.

(a) In a proceeding to review a decision on an application for a new permit—

(1) If the permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the permit application fails in some manner to comply with the applicable requirements of the Act or the regulations, or that OSMRE

should have imposed certain terms and conditions that were not imposed.

(b) In a proceeding to review a permit revision ordered by OSMRE, OSMRE shall have the burden of going forward to establish a prima facie case that the permit should be revised and the permittee shall have the ultimate burden of persuasion.

(c) In a proceeding to review the approval or disapproval of an application for a permit renewal, those parties opposing renewal shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the renewal application should be disapproved.

(d) In a proceeding to review the approval or disapproval of an application for a permit revision or an application for the transfer, assignment, or sale of rights granted under a permit—

(1) If the applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with applicable requirements of the Act or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application; and

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

(e) In a proceeding to review a decision on an application for a coal exploration permit—

(1) If the coal exploration permit applicant is seeking review, OSMRE shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the approval.

(2) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act or the regulations.

§ 4.1367 Request for temporary relief.

(a) Where review is requested pursuant to § 4.1362, any party may file a request for temporary relief at any time prior to a decision by an Administrative Law Judge, so long as the relief sought is not the issuance of a permit where a permit application has been disapproved in whole or in part.

(b) The request shall be filed with the Administrative Law Judge to whom the case has been assigned. If no assignment has been made, the application shall be filed in the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (phone 703–235–3800).

(c) The application shall include—

(1) A detailed written statement setting forth the reasons why relief should be granted;

(2) A statement of the specific relief requested;

(3) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceeding; and

(4) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(d) The Administrative Law Judge may hold a hearing on any issue raised by the application.

(e) The Administrative Law Judge shall issue expeditiously an order or decision granting or denying such temporary relief. Temporary relief may be granted only if—

(1) All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(2) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding; and

(3) Such relief will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources.

(f) Appeals of temporary relief decisions.

(1) Any party desiring to appeal the decision of the Administrative Law

Judge granting or denying temporary relief may appeal to the Board, or, in the alternative, may seek judicial review pursuant to section 526(a), 30 U.S.C. 1276(a), of the Act.

(2) The Board shall issue an expedited briefing schedule and shall issue a decision on the appeal expeditiously.

[43 FR 34386, Aug. 3, 1978, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1368 Determination by the Administrative Law Judge.

Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge shall issue a written decision in accordance with § 4.1127 within 30 days of the date the hearing record is closed by the Administrative Law Judge. An agreement to waive the time limit for issuing a decision may specify the length of the extension agreed to.

§ 4.1369 Petition for discretionary review; judicial review.

(a) Any party aggrieved by a decision of an Administrative Law Judge may file a petition for discretionary review with the Board within 30 days of receipt of the decision or, in the alternative, may seek judicial review in accordance with 30 U.S.C. 1276(a)(2) (1982). A copy of the petition shall be served simultaneously on the Administrative Law Judge who issued the decision, who shall forthwith forward the record to the Board, and on all other parties to the proceeding.

(b) The petition shall set forth specifically the alleged errors in the decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to a petition for discretionary review within 20 days of receipt of the petition.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REVIEW OF OSM DECISIONS PROPOSING TO SUSPEND OR RESCIND OR SUSPENDING OR RESCINDING IMPROVIDENTLY ISSUED PERMITS

SOURCE: 59 FR 54326, Oct. 28, 1994, unless otherwise noted.

§ 4.1370 Scope.

Sections 4.1370 through 4.1377 govern the procedures for review of a written notice of proposed suspension or rescission of an improvidently issued permit issued by OSM under 30 CFR 773.22 and of a written notice of suspension or rescission of an improvidently issued permit issued by OSM under 30 CFR 773.23.

[67 FR 61511, Oct. 1, 2002]

§ 4.1371 Who may file, where to file, when to file.

(a) A permittee that is served with a notice of proposed suspension or rescission under 30 CFR 773.22 or a notice of suspension or rescission under 30 CFR 773.23 may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203 (telephone 703–235–3800) within 30 days of service of the notice.

(b) Failure to file a request for review within 30 days of service of the notice shall constitute a waiver of review of the notice. An untimely request for review shall be dismissed.

(c) Where appropriate under the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583, the Hearings Division may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in §§ 4.1373 through 4.1377.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61511, Oct. 1, 2002]

§ 4.1372 Contents of request for review, response to request, amendment of request.

(a) The request for review shall include:

(1) A copy of the notice of proposed suspension or rescission or the notice of suspension or rescission;

(2) Documentary proof, or, where appropriate, offers of proof, concerning the matters in 30 CFR 773.21(a) and (b)

or 30 CFR 773.14(c) for a notice of proposed suspension or rescission, or 30 CFR 773.23(a)(1) through (a)(6) for a notice of suspension or rescission, showing that the person requesting review is entitled to administrative relief;

(3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;

(4) A request for specific relief; and

(5) Any other relevant information.

(b) Within 20 days of service of the request for review by the permittee in accordance with 43 CFR 4.1109, OSM and all interested parties shall file an answer to the request for review or a motion in response to the request or a statement that no answer or motion will be filed. OSM or any interested party may request an evidentiary hearing even if the person requesting review has waived the opportunity for such a hearing.

(c) The permittee may amend the request for review once as a matter of right before a response in accordance with paragraph (b) of this section is required to be filed. After the period for filing such a response, the permittee may file a motion for leave to amend the request for review with the administrative law judge. If the administrative law judge grants a motion for leave to amend, he shall provide OSM and any other party that filed a response in accordance with paragraph (b) not less than 10 days to file an amended response.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 61511, Oct. 1, 2002]

§ 4.1373 Hearing.

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of the responses under § 4.1372(b). The 90-day deadline for convening the hearing may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

(b) The administrative law judge shall give notice of the hearing at least 10 days in advance of the date of the hearing.

[59 FR 54362, Oct. 28, 1994; 59 FR 56573, Nov. 14, 1994]

§ 4.1374 Burdens of proof.

(a) OSM shall have the burden of going forward to present a prima facie case of the validity of the notice of proposed suspension or rescission or the notice of suspension or rescission.

(b) The permittee shall have the ultimate burden of persuasion by a preponderance of the evidence that the notice is invalid.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 61512, Oct. 1, 2002]

§ 4.1375 Time for initial decision.

The administrative law judge shall issue an initial decision within 30 days of the date the record of the hearing is closed, or, if no hearing is held, within 30 days of the deadline for filing responses under § 4.1372(b).

§ 4.1376 Petition for temporary relief from notice of proposed suspension or rescission or notice of suspension or rescission; appeals from decisions granting or denying temporary relief.

(a) Any party may file a petition for temporary relief from the notice of proposed suspension or rescission or the notice of suspension or rescission in conjunction with the filing of the request for review or at any time before an initial decision is issued by the administrative law judge.

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (Telephone 703–235–3800).

(c) The petition for temporary relief shall include:

(1) A statement of the specific relief requested;

(2) A detailed statement of why temporary relief should be granted, including—

(i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and

(ii) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources;

(3) A statement whether the petitioner requests an evidentiary hearing.

(d) Any party may file a response to the petition no later than 5 days after it was served and may request a hearing even if the petitioner has not done so.

(e) The administrative law judge may hold a hearing on any issue raised by the petition within 10 days of the filing of responses to the petition, and shall do so if a hearing is requested by any party.

(f) The administrative law judge shall issue an order or decision granting or denying the petition for temporary relief within 5 days of the date of a hearing on the petition or, if no hearing is held, of service of the responses to the petition on all parties.

(g) The administrative law judge may only grant temporary relief if:

(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent harm to land, air or water resources.

(h) Any party may file an appeal of an order or decision granting or denying temporary relief with the Board within 30 days of receipt of the order or decision or, in the alternative, may seek judicial review within 30 days in accordance with section 526(a) of the Act, 30 U.S.C. 1276(a). If an appeal is filed with the Board, the Board shall issue an expedited briefing schedule and shall decide the appeal expeditiously.

[59 FR 54326, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61512, Oct. 1, 2002]

§ 4.1377 Petition for discretionary review of initial decision.

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under § 4.1375 with the Board within 30 days of receipt of the decision. An untimely petition shall be dismissed.

(b) The petition for discretionary review shall set forth specifically the alleged errors in the initial decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to the petition for discretionary review within 30 days of its service.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REVIEW OF OFFICE OF SURFACE MINING WRITTEN DECISIONS CONCERNING OWNERSHIP OR CONTROL CHALLENGES

SOURCE: 59 FR 54363, Oct. 28, 1994, unless otherwise noted.

§ 4.1380 Scope.

Sections 4.1380 through 4.1387 govern the procedures for review of a written decision issued by OSM under 30 CFR 773.28 on a challenge to a listing or finding of ownership or control.

[67 FR 61512, Oct. 1, 2002]

§ 4.1381 Who may file; when to file; where to file.

(a) Any person who receives a written decision issued by OSM under 30 CFR 773.28 on a challenge to an ownership or control listing or finding may file a request for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203 (telephone 703–235–3800) within 30 days of service of the decision.

(b) Failure to file a request for review within 30 days of service of the decision constitutes a waiver of review of the decision. An untimely request for review shall be dismissed.

(c) Where appropriate under the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583, the Hearings Division

may use a dispute resolution proceeding, if the parties agree to such proceeding, before the procedures set forth in §§ 4.1383 through 4.1387.

[59 FR 54363, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1382 Contents of request for review; response to request; amendment of request.

(a) The request for review shall include:

(1) A copy of the decision of OSM;

(2) A statement of the alleged errors in the decision and the facts that entitle the person requesting review to administrative relief;

(3) A statement whether the person requesting review wishes an evidentiary hearing or waives the opportunity for such a hearing;

(4) A request for specific relief; and

(5) Any other relevant information.

(b) Within 20 days of service of the request for review in accordance with 43 CFR 4.1109, OSM and all interested parties shall file an answer to the request for review or a motion in response to the request or a statement that no answer or motion will be filed. OSM or any interested party may request an evidentiary hearing even if the person requesting review has waived the opportunity for a hearing.

(c) The person filing the request for review may amend it once as a matter of right before the response in accordance with paragraph (b) of this section is required to be filed. After the period for filing such a response, the person may file a motion for leave to amend the request with the administrative law judge. If the administrative law judge grants a motion for leave to amend, he shall provide OSM and any other party that filed a response in accordance with paragraph (b) not less than 10 days to file an amended response.

§ 4.1383 Hearing.

(a) If a hearing is requested, the administrative law judge shall convene the hearing within 90 days of receipt of responses under § 4.1382(b). The 90-day deadline for convening the hearing may be waived for a definite time by the written agreement of all parties, filed with the administrative law judge, or may be extended by the administrative law judge, in response to a motion setting forth good cause to do so, if no other party is prejudiced by the extension.

(b) The administrative law judge shall give notice of the hearing at least 10 days in advance of the date of the hearing.

§ 4.1384 Burdens of proof.

(a) OSM shall have the burden of going forward to present a prima facie case of the validity of the decision.

(b) The person filing the request for review shall have the ultimate burden of persuasion by a preponderance of the evidence that the decision is in error.

§ 4.1385 Time for initial decision.

The administrative law judge shall issue an initial decision within 30 days of the date the record of the hearing is closed, or, if no hearing is held, within 30 days of the deadline for filing responses under § 4.1382(b).

§ 4.1386 Petition for temporary relief from decision; appeals from decisions granting or denying temporary relief.

(a) Any party may file a petition for temporary relief from the decision of OSM in conjunction with the filing of the request for review or at any time before an initial decision is issued by the administrative law judge.

(b) The petition for temporary relief shall be filed with the administrative law judge to whom the request for review has been assigned. If none has been assigned, the petition shall be filed with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203 (Telephone 703–235–3800).

(c) The petition for temporary relief shall include:

(1) A statement of the specific relief requested:

(2) A detailed statement of why temporary relief should be granted, including:

(i) A showing that there is a substantial likelihood that petitioner will prevail on the merits, and

(ii) A showing that granting the relief requested will not adversely affect

the public health or safety or cause significant, imminent environmental harm to land, air or water resources;

(3) A statement whether the petitioner requests an evidentiary hearing.

(d) Any party may file a response to the petition no later than 5 days after it was served and may request a hearing even if the petitioner has not done so.

(e) The administrative law judge may hold a hearing on any issue raised by the petition within 10 days of the filing of responses to the petition, and shall do so if a hearing is requested by any party.

(f) The administrative law judge shall issue an order or decision granting or denying the petition for temporary relief within 5 days of the date of a hearing on the petition or, if no hearing is held, of service of the responses to the petition on all parties.

(g) The administrative law judge may only grant temporary relief if:

(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm to land, air or water resources.

(h) Any party may file an appeal of an order or decision granting or denying temporary relief with the Board within 30 days of receipt of the order or decision or, in the alternative, may seek judicial review within 30 days in accordance with section 526(a) of the Act, 30 U.S.C. 1276(a). If an appeal is filed with the Board, the Board shall issue an expedited briefing schedule and shall decide the appeal expeditiously.

[59 FR 54363, Oct. 28, 1994, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1387 Petition for discretionary review of initial decisions.

(a) Any party may file a petition for discretionary review of an initial decision of an administrative law judge issued under § 4.1385 with the Board within 30 days of receipt of the decision. An untimely petition shall be dismissed.

(b) The petition for discretionary review shall set forth specifically the alleged errors in the initial decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to the petition for discretionary review within 30 days of its service.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

REQUEST FOR REVIEW OF OSM DETERMINATIONS OF ISSUES UNDER 30 CFR PART 761 (FEDERAL PROGRAM; FEDERAL LANDS PROGRAM; FEDERAL PROGRAM FOR INDIAN LANDS)

SOURCE: 52 FR 39530, Oct. 22, 1987, unless otherwise noted.

§ 4.1390 Scope.

Sections 4.1391 through 4.1394 set forth the procedures for obtaining review of an OSM determination under 30 CFR 761.16 that a person does or does not have valid existing rights.

[67 FR 61512, Oct. 1, 2002]

§ 4.1391 Who may file; where to file; when to file; filing of administrative record.

(a) The person who requested a determination under 30 CFR 761.16 or any person with an interest that is or may be adversely affected by a determination that a person does or does not have valid existing rights may file a request for review of the determination with the office of the OSM official whose determination is being reviewed and at the same time shall send a copy of the request to the Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, VA 22203 (telephone 703–235–3750). OSM shall file the complete administrative record of the determination under review with the Board as soon as practicable.

(b) OSM must provide notice of the valid existing rights determination to the person who requested that determination by certified mail, or by overnight delivery service if the person has

agreed to bear the expense of this service.

(1) When the determination is made independently of a decision on an application for a permit or for a permit boundary revision, a request for review shall be filed within 30 days of receipt of the determination by a person who has received a copy of it by certified mail or overnight delivery service. The request for review shall be filed within 30 days of the date of publication of the determination in a newspaper of general circulation or in the FEDERAL REGISTER, whichever is later, by any person who has not received a copy of it by certified mail or overnight delivery service.

(2) When the determination is made in conjunction with a decision on an application for a permit or for a permit boundary revision, the request for review must be filed in accordance with § 4.1362.

(c) Failure to file a request for review within the time specified in paragraph (b) of this section shall constitute a waiver of the right to review and the request shall be dismissed.

[56 FR 2145, Jan. 22, 1991, as amended at 67 FR 4368, Jan. 30, 2002; 67 FR 61512, Oct. 1, 2002]

§ 4.1392 Contents of request; amendment of request; responses.

(a) The request for review:

(1) Must include:

(i) A clear statement of the reasons for appeal;

(ii) A request for specific relief;

(iii) A copy of the decision appealed from; and

(iv) Any other relevant information; and

(2) May not exceed 30 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown.

(b) All interested parties shall file an answer or motion in response to a request for review or a statement that no answer or motion will be filed within 15 days of receipt specifically admitting or denying facts or alleged errors stated in the request and setting forth any other matters to be considered on review.

(c) A request for review may be amended once as a matter of right prior to receipt of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter, a motion for leave to amend the request shall be filed with the Board.

(d) An interested party may file an answer, motion, or statement as described in paragraph (b) of this section in response to an amended request for review as follows:

(1) If the request for review is amended as a matter of right, the answer, motion, or statement must be filed within the longer of the following periods:

(i) The time remaining for response to the original request for review; or

(ii) Ten days after receipt of the amended request for review; and

(2) If the Board grants a motion to amend a request for review, the answer, motion, or statement must be filed within the time set by the Board in its order granting the motion.

(e) The filing of a reply is discouraged. However, a person who filed a request for review may file a reply that:

(1) Is limited to the issues raised in an answer or motion;

(2) Does not exceed 20 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown; and

(3) Is filed within:

(i) Fifteen days after service of the answer or motion under paragraph (b) or (d)(1) of this section; or

(ii) The time set by the Board in its order under paragraph (d)(2) of this section.

[52 FR 39530, Oct. 22, 1987, as amended at 75 FR 64670, Oct. 20, 2010]

§ 4.1393 Status of decision pending administrative review.

43 CFR 4.21(a) applies to determinations of the Office of Surface Mining under 30 U.S.C. 1272(e).

§ 4.1394 Burden of proof.

(a) If the person who requested the determination is seeking review, OSM shall have the burden of going forward to establish a prima facie case and the

person who requested the determination shall have the ultimate burden of persuasion.

(b) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the person who requested the determination does or does not have valid existing rights.

[67 FR 61512, Oct. 1, 2002]

Subpart M—Special Procedural Rules Applicable to Appeals of Decisions Made Under OMB Circular A–76

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 75213, Nov. 14, 1980, unless otherwise noted. Redesignated at 52 FR 39525, Oct. 22, 1987.

§ 4.1600 Purpose and nature of the appeal process.

(a) This appeals procedure embodies an informal administrative review of agency decisions made under OMB Circular A–76, and is intended to assure that such decisions are fair, equitable, and in compliance with the provisions of the Circular. This procedure provides affected parties an opportunity to request that such decisions be objectively reviewed by a party independent of the A–76 decision process.

(b) This appeals procedure is administrative rather than judicial in nature, and does not provide for a judicial review or for further levels of appeal. The decisions of the appeals official are final.

(c) This procedure is intended to protect the rights of all affected parties and, therefore, neither the procedure nor agency determinations may be subject to negotiation, arbitration, or agreements with any one of the parties.

§ 4.1601 Basis for appeal.

(a) An appeal may be based only on a specific alleged material deviation (or deviations) by the agency from the provisions of OMB Circular A–76 or Supplement No. 1 thereto, the ''Cost Comparison Handbook.'' Appeals may not be based on other factors, such as the economic impact of the agency's decision on a community, or other socioeconomic issues.

(b) This appeals procedure shall be used only to resolve questions of the determination between contract and in-house performance of a commercial or industrial type requirement, and shall not apply to questions concerning award to one contractor in preference to another.

§ 4.1602 Who may appeal under this procedure.

An appeal may be filed by any affected party, viz, employees of the Federal activity under review, authorized employee representative organizations, contractors, and potential contractors.

§ 4.1603 Appeal period.

An appeal may be submitted at any time within 45 calendar days after announcement of an agency decision regarding the method of performance of a commercial or industrial type requirement.

§ 4.1604 Method of filing an appeal.

An appeal must be in writing, and must be submitted to: Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

[45 FR 75213, Nov. 14, 1980. Redesignated at 52 FR 39525, Oct. 22, 1987. And amended at 67 FR 4368, Jan. 30, 2002]

§ 4.1605 Action by the Office of Hearings and Appeals.

(a) Upon receipt of an appeal, the Director, Office of Hearings and Appeals shall designate an appeals official, who shall process the appeal.

(b) The appeals official shall promptly docket the appeal and send copies of the docketing notice to the appellant, the director or other appropriate official of the bureau or office involved, and the Solicitor of the Department.

§ 4.1606 Department representation.

(a) Upon receipt of the docketing notice, the Solicitor shall appoint counsel to represent the Department in the appeal action, and so notify the appellant and the appeals official.

(b) Within seven calendar days of his designation the Department Counsel

shall assemble and transmit to the appeals official a file containing the appealed agency decision and all documents relevant thereto, including the detailed analysis upon which the agency decision was based. At the same time, the Department Counsel shall send to the appellant a copy of the transmittal document, containing a table of contents of the file.

§ 4.1607 Processing the appeal.

(a) The appeals official shall arrange such conferences with the concerned parties as are necessary, including (if requested by the appellant) an oral presentation.

(b) The appeals official may require either party to submit any additional documents, oral or written testimony, or other items of evidence which he considers necessary for a complete review of the agency decision.

(c) All documentary evidence submitted by one party to the appeal action shall be made available to the other party (or parties), except that availability of proprietary information may be restricted by the party holding the proprietary interest in such information.

§ 4.1608 Oral presentations.

(a) Upon request of the appellant, an opportunity for an oral presentation to the appeals official shall be granted. The purpose of an oral presentation shall be to permit the appellant to discuss or explain factual evidence supporting his allegations, and/or to obtain oral explanations of pertinent evidence. The time and place of each oral presentation shall be determined by the appeals official, after consultation with the appropriate parties.

(b) The appellant may, but is not required to, be represented by legal counsel at an oral presentation.

(c) The Department Counsel and the bureau/office involved shall be invited to attend any oral presentation. The appeals official may require the attendance and participation of an official or employee of the Department, whether or not requested by the appellant, if, in the appeals official's judgment, such official or employee may possess knowledge or information pertinent to the agency decision being appealed, and if this knowledge or information is unobtainable elsewhere.

(d) An oral presentation shall not constitute a judicial proceeding, and no such judicial proceeding or hearing shall be provided for in this appeals process. There shall be no requirement for legal briefs, sworn statements, interrogation under oath, official transcripts of testimony, etc., unless the appeals official determines such are necessary for effective disposition of the appeal.

§ 4.1609 Multiple appeals.

If two or more appellants submit appeals of the same agency decision, which are based on the same or similar allegations, the appeals official may, at his discretion, consider all such appeals concurrently and issue a single written decision resolving all of the several appeals.

§ 4.1610 Decision of the appeals official.

(a) Within 30 calendar days after receipt of an appeal by the Office of Hearings and Appeals, the appeals official shall issue a written decision, either affirming or denying the appeal. This decision shall be final, with no judicial review or further avenue of appeal.

(b) If the appeals official affirms the appeal, his decision regarding further action by the agency shall be binding upon the agency.

(c) If it proves impracticable to issue a decision within the prescribed 30 calendar days, the appeals official may extend this period, notifying all concerned parties of the anticipated decision date.

PART 5—COMMERCIAL FILMING AND SIMILAR PROJECTS AND STILL PHOTOGRAPHY ON CERTAIN AREAS UNDER DEPARTMENT JURISDICTION

Subpart A—Areas Administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service

Sec.

5.1 What does this subpart cover?

5.2 When do I need a permit for commercial filming or still photography?
5.3 How do I apply for a permit?
5.4 When is a permit required for news-gathering activities?
5.5 When will an agency deny a permit for commercial filming or still photography?
5.6 What type of permit conditions may the agency impose?
5.7 What are my liability and bonding requirements as a permit holder?
5.8 What expenses will I incur?
5.9 How long will it take to process my request?
5.10 Can I appeal a decision not to issue a permit?
5.11 Information collection.
5.12 How are terms defined in this subpart?

Subpart B—Areas Administered by the Bureau of Indian Affairs

5.15 When must I ask permission from individual Indians to conduct filming and photography?
5.16 When must I ask permission from Indian groups and communities?
5.17 When must I get a lease or permit?
5.18 What wages must I pay to Indian employees?

AUTHORITY: 5 U.S.C. 301; 16 U.S.C. 1–3, 3a, 668dd–ee, 715i, 460*l*–6d; 25 U.S.C. 2; 31 U.S.C. 9701; 43 U.S.C. 1701, 1732–1734, 1740.

SOURCE: 78 FR 52095, Aug. 22, 2013, unless otherwise noted.

Subpart A—Areas Administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service

§5.1 What does this subpart cover?

This subpart covers commercial filming and still photography activities on lands and waters administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service.

§5.2 When do I need a permit for commercial filming or still photography?

(a) All commercial filming requires a permit.

(b) Still photography does not require a permit unless:

(1) It uses a model, set, or prop as defined in §5.12; or

(2) The agency determines a permit is necessary because:

(i) It takes place at a location where or when members of the public are not allowed; or

(ii) The agency would incur costs for providing on-site management and oversight to protect agency resources or minimize visitor use conflicts.

(c) Visitors do not require a permit for filming or still photography activities unless the filming is commercial filming as defined in §5.12 or the still photography activity involves one of the criteria listed in §5.2 (b).

§5.3 How do I apply for a permit?

For information on application procedures and to obtain a permit application, contact the site manager at the location at which you seek to conduct commercial filming or still photography activities.

§5.4 When is a permit required for news-gathering activities?

(a) *Permit requirements.* News-gathering activities involving filming, videography, or still photography do not require a permit unless:

(1) We determine a permit is necessary to protect natural and cultural resources, to avoid visitor use conflicts, to ensure public safety or authorize entrance into a closed area; and

(2) Obtaining a permit will not interfere with the ability to gather the news.

(b) *Terms and conditions.* All permits issued under this section will include only terms and conditions necessary to maintain order, ensure the safety of the public and the media, and protect natural and cultural resources.

(c) *Exemptions.* A permit issued for news-gathering activities is not subject to location fees or cost recovery charges.

§5.5 When will an agency deny a permit for commercial filming or still photography?

We will deny a permit authorizing commercial filming or still photography if we determine that it is likely that the activity would:

(a) Cause resource damage;

(b) Unreasonably disrupt or conflict with the public's use and enjoyment of the site;

(c) Pose health or safety risks to the public;

(d) Result in unacceptable impacts or impairment to National Park Service resources or values;

(e) Be inappropriate or incompatible with the purpose of the Fish and Wildlife Service refuge;

(f) Cause unnecessary or undue degradation of Bureau of Land Management lands; or

(g) Violate the Wilderness Act (16 U.S.C. 1131–1136) or any other applicable Federal, State, or local law or regulation.

§ 5.6 What type of permit conditions may the agency impose?

(a) We may impose permit conditions including, but not limited to, conditions intended to:

(1) Protect the site's values, purposes, and resources, and public health and safety; and

(2) Prevent unreasonable disruption of the public's use and enjoyment.

(b) We may revoke your permit if you violate a permit condition.

§ 5.7 What are my liability and bonding requirements as a permit holder?

(a) *Liability*. In accepting a permit, you agree to be fully liable for any damage or injury incurred in connection with the permitted activity, and to indemnify and hold harmless the United States of America as a result of your actions. We may require you to obtain property damage, personal injury, commercial liability or public liability insurance in an amount sufficient to protect the United States from liability or other claims arising from activities under the permit. The insurance policy must name the United States of America as an additional insured.

(b) *Bond*. You are responsible for all response, repair and restoration if your activity causes damage to an area. We may also require you to provide a bond or other security sufficient to secure any obligations you may have under the permit and applicable laws and regulations, including the cost of repair, reclamation, or restoration of the area. The amount of the bond or security must be in an amount sufficient to provide full payment for the costs of response and restoration, reclamation, or rehabilitation of the lands in the event that you fail to adequately repair, reclaim, or restore the area as directed by the agency. If the amount of the bond or other security is inadequate to cover cost of the repair, reclamation, or restoration of the damaged lands or resources you will also be responsible for the additional amount.

§ 5.8 What expenses will I incur?

You must pay us a location fee and reimburse us for expenses that we incur, as required in this section.

(a) *Location fee*. (1) For commercial filming and still photography permits, we will require a reasonable location fee that provides a fair return to the United States.

(2) The location fee charged is in lieu of any entrance or other special use fees. However, the location fee is in addition to any cost recovery amount assessed in paragraph (b) of this section and represents a fee for the use of Federal lands and facilities and does not include any cost recovery.

(3) We will assess location fees in accordance with a fee schedule, which we will publish in the FEDERAL REGISTER and also make available on the internet and at agency field offices. The location fee does not include any cost recovery.

(b) *Cost recovery*. You must reimburse us for actual costs incurred in processing your request and administering your permit. We will base cost recovery charges upon our direct and indirect expenses including, but not limited to, administrative costs for application processing, preproduction meetings and other activities, on-site monitoring of permitted activities, and any site restoration.

§ 5.9 How long will it take to process my request?

We will process applications for commercial filming and still photography permits in a timely manner. Processing times will vary depending on the complexity of the proposed activity. A preapplication meeting with agency personnel is encouraged and may assist us in processing your request for a permit

more quickly. For information on application procedures contact the appropriate agency field office.

§5.10 Can I appeal a decision not to issue a permit?

Yes. If your request for a permit is denied, the site manager issuing the denial will inform you of how and where to appeal.

§5.11 Information collection.

The information collection requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.*, and assigned the following OMB clearance numbers: 1024–0026 for the National Park Service, 1004–0009 for the Bureau of Land Management and 1018–0102 for the Fish and Wildlife Service. This information is being collected to provide land managers data necessary to issue permits for commercial filming or still photography permits on Federal lands. This information will be used to grant administrative benefits. The obligation to respond is required in order to obtain a benefit. You may send comments on this information collection requirement to the Departmental Information Collection Clearance Officer, U.S. Department of the Interior, 1849 C Street NW., MS3530, Washington, DC 20240.

§5.12 How are terms defined in this subpart?

The following definitions apply to this subpart:

Agency, we, our, or us means the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service, as appropriate.

Commercial filming means the film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income. Examples include, but are not limited to, feature film, videography, television broadcast, or documentary, or other similar projects. Commercial filming activities may include the advertisement of a product or service, or the use of actors, models, sets, or props.

Cost recovery means the money that an agency collects as reimbursement for actual costs it incurred to permit a particular activity, including but not limited to, accepting and processing a permit application and monitoring the permitted commercial filming or still photography activity.

Location fee means a land or facility use fee similar to rent that provides a fair return to the United States for the use of Federal lands or facilities when used for:

(1) Commercial filming activities or similar projects; and

(2) Still photography activities where a permit is required.

Model means a person or object that serves as the subject for commercial filming or still photography for the purpose of promoting the sale or use of a product or service. Models include, but are not limited to, individuals, animals, or inanimate objects, such as vehicles, boats, articles of clothing, and food and beverage products, placed on agency lands so that they may be filmed or photographed to promote the sale or use of a product or service. For the purposes of this part, portrait subjects such as wedding parties and high school graduates are not considered models, if the image will not be used to promote or sell a product or service.

News means information that is about current events or that would be of current interest to the public, gathered by news-media entities for dissemination to the public. Examples of news-media entities include, but are not limited to, television or radio stations broadcasting to the general public and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public.

(1) As methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), these alternative media will be considered to be news-media entities.

(2) A freelance journalist is regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, even if the journalist is not actually employed by the entity. A

contract would present a solid basis for such an expectation; we may also consider the past publication record of the requester in making such a determination.

News-gathering activities means filming, videography, and still photography activities carried out by a representative of the news media.

Permit means a written authorization to engage in uses or activities that are otherwise prohibited or restricted.

Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Resource damage means harm to the land or its natural or cultural resources that cannot reasonably be mitigated or reclaimed.

Sets and props means items constructed or placed on agency lands to facilitate commercial filming or still photography including, but not limited to, backdrops, generators, microphones, stages, lighting banks, camera tracks, vehicles specifically designed to accommodate camera or recording equipment, rope and pulley systems, and rigging for climbers and structures. Sets and props also include trained animals and inanimate objects, such as camping equipment, campfires, wagons, and so forth, when used to stage a specific scene. The use of a camera on a tripod, without the use of any other equipment, is not considered a prop.

Still photography means the capturing of a still image on film or in a digital format.

Videography means the process of capturing moving images on electronic media, e.g., video tape, hard disk or solid state storage.

Subpart B—Areas Administered by the Bureau of Indian Affairs

§ 5.15 When must I ask permission from individual Indians to conduct filming and photography?

Anyone who desires to go on to the land of an Indian to make pictures, television productions, or soundtracks is expected to observe the ordinary courtesy of first obtaining permission from the Indian and of observing any conditions attached to this permission.

§ 5.16 When must I ask permission from Indian groups and communities?

Anyone who desires to take pictures, including motion pictures, or to make a television production or a soundtrack of Indian communities, churches, kivas, plazas, or ceremonies performed in these places, must:

(a) Obtain prior permission from the proper officials of the place or community; and

(b) Scrupulously observe any limitations imposed by the officials who grant the permission.

§ 5.17 When must I get a lease or permit?

If filming pictures or making a television production or a soundtrack requires the actual use of Indian lands, you must obtain a lease or permit under 25 CFR part 162.

§ 5.18 What wages must I pay to Indian employees?

Any motion picture or television producer who obtains a lease or permit for the use of Indian land under 25 CFR part 162 must pay a fair and reasonable wage to any Indian employed in connection with the production.

PART 6—PATENT REGULATIONS

Subpart A—Inventions by Employees

Sec.
6.1 Definitions.
6.2 Report of invention.
6.3 Action by supervisory officials.
6.4 Action by Solicitor.
6.5 Rights in inventions.
6.6 Appeals by employees.
6.7 Domestic patent protection.
6.8 Foreign filing.
6.9 Publication and public use of invention before patent application is filed.
6.10 Publicity concerning the invention after patent application is filed.
6.11 Condition of employment.

Subpart B—Licenses

6.51 Purpose.
6.52 Patents.
6.53 Unpatented inventions.

6.54 Use or manufacture by or for the Government.
6.55 Terms of licenses or sublicenses.
6.56 Issuance of licenses.
6.57 Evaluation Committee.

AUTHORITY: 5 U.S.C. 301; sec. 2, Reorganization Plan No. 3 of 1950, 15 FR 3174; E.O. 10096, 15 FR 389; and E.O. 10930, 26 FR 2583.

SOURCE: 29 FR 260, Jan. 10, 1964; 29 FR 6498, May 19, 1964, unless otherwise noted.

Subpart A—Inventions by Employees

§6.1 Definitions.

As used in this subpart:

(a) The term *Department* means the Department of the Interior.

(b) The term *Secretary* means the Secretary of the Interior.

(c) The term *Solicitor* means the Solicitor of the Department of the Interior, or anyone authorized to act for him.

(d) The term *Commissioner* means the Commissioner of Patents, or any Assistant Commissioner who may act for the Commissioner of Patents.

(e) The term *invention* means any new and useful art, process, method, machine, manufacture, or composition of matter, or any new and useful improvement thereof, or any new variety of plant, or any new, original and ornamental design for an article of manufacture, which is or may be patentable under the laws of the United States.

(f) The term *employee* as used in this part includes a part time consultant, a part time employee or a special employee (as defined in 18 U.S.C. 202) of the Department insofar as inventions made during periods of official duty are concerned, except when special circumstances in a specific case require an exemption in order to meet the needs of the Department, each such exemption to be subject to the approval of the Commissioner.

(g) The term *governmental purpose* means the right of the Government of the United States (including any agency thereof, state, or domestic municipal government) to practice and have practiced (made or have made, used or have used, sold or have sold) throughout the world by or on behalf of the Government of the United States.

(h) The *making of the invention* means the conception or first actual reduction to practice of such invention.

§6.2 Report of invention.

(a) Every invention made by an employee of the Department shall be reported by such employee through his supervisor and the head of the bureau or office to the Solicitor, unless the invention obviously is unpatentable. If the invention is the result of group work, the report shall be made by the supervisor and shall be signed by all employees participating in the making of the invention. The original and two copies of the invention report shall be furnished to the Solicitor. The Solicitor may prescribe the form of the report.

(b) The report shall be made as promptly as possible, taking into consideration such factors as possible publication or public use, reduction to practice, and the necessity for protecting any rights of the Government in the invention. Although it is not necessary to withhold the report until the process or device is completely reduced to practice, reduction to practice assists in the preparation of a patent application and, if diligently pursued, protects the interests of the Government and of the inventor. If an invention is reduced to practice after the invention report is filed, the Solicitor must be notified forthwith.

(c) For the protection of the rights of the Government and of the inventor, invention reports and memoranda or correspondence concerning them are to be considered as confidential documents.

(d) An invention report shall include the following:

(1) A brief but pertinently descriptive title of the invention;

(2) The full name, residence, office address, bureau or office and division, position or title, and official working place of the inventor or inventors;

(3) A statement of the evidence that is available as to the making of the invention, including information relative to conception, disclosures to others, and reduction to practice. Examples of such information are references to signed, witnessed and dated laboratory notebooks, or other authenticated

records pertaining to the conception of the invention, operational data sheets, analysis and operation evaluation reports pertaining to a reduction to practice, and visitor log books, letters and other documents pertaining to disclosures to others. These need not be submitted with the report, only the identifying data is required, e.g., volume and page number in a laboratory notebook;

(4) Information concerning any past or prospective publication, oral presentation or public use of the invention;

(5) The problem which led to the making of the invention;

(6) The objects, advantages, and uses of the invention;

(7) A detailed description of the invention;

(8) Experimental data;

(9) The prior art known to the inventor(s) and the manner in which the invention distinguishes thereover;

(10) A statement that the employee:

(i) Is willing to and does hereby assign to the Government:

(*a*) The entire rights (foreign and domestic) in the invention;

(*b*) The domestic rights only, but grants to the Government an option to file for patent protection in any foreign country, said option to expire as to any country when it is decided not to file thereon in the United States, or within six months after such filing;

(ii) Requests, pursuant to §6.2(e), a determination of the respective rights of the Government and of the inventor.

(e) If the inventor believes that he is not required by the regulations in this subpart to assign to the Government the entire domestic right, title, and interest in and to the invention, and if he is unwilling to make such an assignment to the Government, he shall, in his invention report, request that the Solicitor determine the respective rights of the Government and of the inventor in the invention, and he shall include in his invention report information on the following points, in addition to the data called for in paragraph (d) of this section:

(1) The circumstances under which the invention was made (conceived, actually reduced to practice or constructed and tested);

(2) The employee's official duties, as given on his job sheet or otherwise assigned, at the time of the making of the invention;

(3) The extent to which the invention was made during the inventor's official working hours, the extent use was made of government facilities, equipment, funds, material or information, and the time or services of other government employees on official duty;

(4) Whether the employee wishes a patent application to be prosecuted under the Act of March 3, 1883, as amended (35 U.S.C. 266), if it should be determined that he is not required to assign all domestic rights to the invention to the Government; and

(5) Whether the employee would be willing, upon request, to voluntarily assign foreign rights in the invention to the Government if it should be determined that an assignment of the domestic rights to the Government is not required.

§ 6.3 Action by supervisory officials.

(a) The preparation of an invention report and other official correspondence on patent matters is one of the regular duties of an employee who has made an invention and the supervisor of such employee shall see that he is allowed sufficient time from his other duties to prepare such documents. The supervisor shall ascertain that the invention report and other papers are prepared in conformity with the regulations of this part; and, before transmitting the invention report to the head of the bureau or office, shall check its accuracy and completeness, especially with respect to the circumstances in which the invention was developed, and shall add whatever comments he may deem to be necessary or desirable. The supervisor shall add to the file whatever information he may have concerning the governmental and commercial value of the invention.

(b) The head of the bureau or office shall make certain that the invention report is as complete as circumstances permit. He shall report whatever information may be available in his agency concerning the governmental and commercial value of the invention, and the foreign countries in which it is likely that the invention would be most useful and would have the greatest commercial value.

(c) If the employee inventor requests that the Solicitor determine his rights in the invention, the head of the bureau or office shall state his conclusions with respect to such rights.

(d) The head of the bureau or office shall indicate whether, in his judgment, the invention is liable to be used in the public interest, and he shall set out the facts supporting his conclusion whenever the employee's invention report does not contain sufficient information on this point.

§6.4 Action by Solicitor.

(a) If an employee inventor requests pursuant to §6.2(e), that such determination be made, the Solicitor shall determine the respective rights of the employee and of the Government in and to the invention. His determination shall be subject to review by the Commissioner in proper cases under Executive Orders 10096 and 10930 and the rules and regulations issued by the Commissioner with the approval of the President.

(b) If the Government is entitled to obtain the entire domestic right, title and interest in and to an invention made by an employee of the Department, the Solicitor, subject to review by the Commissioner in proper cases, may take such action respecting the invention as he deems necessary or advisable to protect the interests of the United States.

§6.5 Rights in inventions.

(a) The rules prescribed in this section shall be applied in determining the respective rights of the Government and of an employee of the Department in and to any invention made by the employee.

(b)(1) Except as indicated in the succeeding paragraphs, (b) (1) through (4), of this section, the Government shall obtain the entire domestic right, title, and interest in and to any invention made by an employee of the Department

(i) During working hours, or

(ii) With a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other government employees on official duty, or

(iii) Which bears a direct relation to or is made in consequence of the official duties of the inventor.

(2) In any case where the contribution of the Government, as measured by any one or more of the criteria set forth in paragraph (b)(1) of this section, to the invention is insufficient equitably to justify a requirement of assignment to the Government of the entire domestic right, title, and interest in and to such invention, or in any case where the Government has insufficient interest in an invention to obtain the entire domestic right, title, and interest therein (although the Government could obtain same under paragraph (b)(1) of this section), the Solicitor, subject to the approval of the Commissioner, shall leave title to such invention in the employee, subject, however, to the reservation to the Government of a nonexclusive, irrevocable, royalty-free license in the invention with power to grant sublicenses for all governmental purposes, such reservation, in the terms thereof, to appear, where practicable, in any patent, domestic or foreign, which may issue on such invention.

(3) In applying the provisions of paragraphs (b) (1) and (2) of this section to the facts and circumstances relating to the making of any particular invention, it shall be presumed that any invention made by an employee who is employed or assigned (i) to invent or improve or perfect any art, machine, manufacture, or composition of matter, or (ii) to conduct or perform research, development work, or both, or (iii) to supervise, direct, coordinate, or review Government financed or conducted research, development work, or both, or (iv) to act in a liaison capacity among governmental or nongovernmental agencies or individuals engaged in such work, falls within the provisions of paragraph (b)(1) of this section, and it shall be presumed that any invention made by any other employee falls within the provisions of paragraph (b)(2) of this section. Either presumption may be rebutted by a showing of the facts and circumstances in the case and shall not preclude a determination that these facts and circumstances justify leaving the entire right, title and

interest in and to the invention in the government employee, subject to law.

(4) In any case wherein the Government neither (i) obtains the entire domestic right, title, and interest in and to an invention pursuant to the provisions of paragraph (b)(1) of this section, nor (ii) reserves a nonexclusive, irrevocable, royalty-free license in the invention, with power to grant sublicenses for all governmental purposes, pursuant to the provisions of paragraph (b)(2) of this section, the Solicitor, subject to the approval of the Commissioner, shall leave the entire right, title, and interest in and to the invention in the employee, subject to law.

(c) In the event that the Solicitor determines, pursuant to paragraph (b) (2) or (4) of this section, that title to an invention will be left with an employee, the Solicitor shall notify the employee of this determination and promptly prepare, and preserve in appropriate files, accessible to the Commissioner, a written signed, and dated statement concerning the invention including the following:

(1) A description of the invention in sufficient detail to identify the invention and show the relationship to the employee's duties and work assignment;

(2) The name of the employee and his employment status, including a detailed statement of his official duties and responsibilities at the time the invention was made; and

(3) A statement of the Solicitor's determination and reasons therefor. The Solicitor shall, subject to considerations of national security, or public health, safety, or welfare, submit to the Commissioner a copy of this written statement. This submittal in a case falling within the provisions of paragraph (b) (2) of this section shall be made after the expiration of the period prescribed in § 6.6 for the taking of an appeal, or it may be made prior to the expiration of such period if the employees acquiesces in the Solicitor's determination. The Commissioner thereupon shall review the determination of the Solicitor and the Commissioner's decision respecting the matter shall be final, subject to the right of the employee or the Solicitor to submit to the Commissioner within 30 days (or such longer period as the Commissioner may, for good cause, shown in writing, fix in any case) after receiving notice of such decision, a petition for the reconsideration of the decision. A copy of such petition must also be filed by the inventor with the Solicitor within the prescribed period.

§ 6.6 Appeals by employees.

(a) Any employee who is aggrieved by a determination of the Solicitor pursuant to § 6.5(b) (1) or (2) may obtain a review of the determination by filing, within 30 days (or such longer period as the Commissioner may for good cause shown in writing, fix in any case) after receiving notice of such determination, two copies of an appeal with the Commissioner. The Commissioner then shall forward one copy of the appeal to the Solicitor.

(b) On receipt of a copy of an appeal filed pursuant to paragraph (a) of this section, the Solicitor shall, subject to considerations of national security, or public health, safety, or welfare, promptly furnish both the Commissioner and the inventor with a copy of a report containing the following information about the invention involved in the appeal:

(1) A copy of a statement containing the information specified in § 6.5(c), and

(2) A detailed statement of the points of dispute or controversy, together with copies of any statements or written arguments that may have been filed, and of any other relevant evidence that the Solicitor considered in making his determination of Government interest. Within 25 days (or such longer period as the Commissioner may, for good cause shown, fix in any case) after the transmission of a copy of the Solicitor's report to the employee, the employee may file a reply thereto with the Commissioner and file one copy thereof with the Solicitor.

(c) After the time for the employee's reply to the Solicitor's report has expired and if the employee has so requested in his appeal, a date will be set for the hearing of oral arguments by the employee (or by an attorney whom he designates by written power of attorney filed before, or at the hearing) and the Solicitor. Unless it shall be

otherwise ordered before the hearing begins, oral arguments will be limited to thirty minutes for each side. The employee need not retain an attorney or request an oral hearing to secure full consideration of the facts and his arguments. He may expedite such consideration by notifying the Commissioner when he does not intend to file a reply to the Solicitor's report.

(d) After a hearing on the appeal, if a hearing was requested, or after expiration of the period for the inventor's reply to the Solicitor's report, if no hearing is set, the Commissioner shall issue a decision on the matter, which decision shall be final after the period for asking reconsideration expires or on the date that a decision on a petition for reconsideration is finally disposed of. Any request for reconsideration or modification of the decision must be filed within 30 days from the date of the original decision (or within such an extension thereof as may be set by the Commissioner before the original period expires). The Com- missioner's decision shall be made after consideration of the statements of fact in the employee's appeal, the Solicitor's report, and the employee's reply, but the Commissioner, at his discretion and with due respect to the rights and convenience of the inventor and the Solicitor, may call for further statements on specific questions of fact or may request additional evidence in the form of affidavits or depositions on specific facts in dispute.

§6.7 Domestic patent protection.

(a) The Solicitor, upon determining that an invention coming within the scope of §6.5(b) (1) or (2) has been made, shall thereupon determine whether patent protection will be sought in the United States by the Department for such invention. A controversy over the respective rights of the Government and of the inventor in any case shall not delay the taking of the actions provided for in this section. In cases coming within the scope of §6.5(b)(2), action by the Department looking toward such patent protection shall be contingent upon the consent of the inventor.

(b) Where there is a dispute as to whether paragraph (b) (1) or (2) of §6.5 applies in determining the respective rights of the Government and of an employee in and to any invention, the Solicitor will determine whether patent protection will be sought in the United States pending the Commissioner's decision on the dispute, and, if he determines that an application for patent should be filed, he will take such rights as are specified in §6.5(b)(2), but this shall be without prejudice to acquiring the rights specified in §6.5(b)(1) should the Commissioner so decide.

(c) Where the Solicitor has determined to leave title to an invention with an employee under §6.5(b)(2), the Solicitor will, upon the filing of an application for patent and pending review of the determination by the Commissioner, take the rights specified in that paragraph, without prejudice to the subsequent acquisition by the Government of the rights specified in §6.5(b)(1) should the Commissioner so decide.

(d) In the event that the Solicitor determines that an application for patent will not be filed on an invention made under the circumstances specified in §6.5(b)(1) giving the United States the right to title thereto, the Solicitor shall subject to considerations of national security, or public health, safety, or welfare, report to the Commissioner promptly upon making such determination, the following information concerning the invention:

(1) Description of the invention in sufficient detail to permit a satisfactory review;

(2) Name of the inventor and his employment status;

(3) Statement of the Solicitor's determination and reasons therefor.

The Commissioner, may, if he determines that the interest of the Government so requires and subject to considerations of national security, or public health safety, or welfare, bring the invention to the attention of any Government agency to whose activities the invention may be pertinent, or cause the invention to be fully disclosed by publication thereof.

§6.8 Foreign filing.

(a) *By Government*. (1) In every case where the employee has indicated pursuant to §6.2(d)(10), his willingness to assign the domestic patent rights in the invention to the Government, or

where it has been determined pursuant to §6.5 that the Government shall obtain the entire domestic patent rights, the Government shall reserve an option to acquire assignment of all foreign rights including the rights to file foreign patent applications or otherwise to seek protection abroad on the invention.

(2) The Government's option shall lapse as regards any foreign country:

(i) When the Solicitor determines after consultation with the agency most directly concerned, not to cause an application to be filed in said foreign country or otherwise to seek protection of the invention, as by publication;

(ii) When the Solicitor fails to take action to seek protection of the invention in said foreign country (*a*) within six months of the filing of an application for a United States patent on the invention, or (*b*) within six months of declassification of an invention previously under a security classification, whichever is later.

(b) *By Employee.* (1) No Department employee shall file or cause to be filed an application for patent in any foreign country on any invention in which the Government has acquired the entire (foreign and domestic) patent rights, or holds an unexpired option to acquire the patent rights in said foreign country, or take any steps which would preclude the filing of an application by or on behalf of the Government.

(2) An employee may file in any foreign country where the Government has not exercised its option acquired pursuant to §6.2(d)(10), to do so, or determines not to do so.

(3) The determination or failure to act as set forth in §6.8(a)(2) shall constitute a decision by the Government to leave the foreign patent rights to the invention in the employee, subject to a nonexclusive, irrevocable, royalty-free license to the Government in any patent which may issue thereon in any foreign country, including the power to issue sublicenses for governmental purposes or in furtherance of the foreign policies of the Government or both.

§ 6.9 Publication and public use of invention before patent application is filed.

(a) Publication or public use of an invention constitutes a statutory bar to the granting of a patent for the invention unless a patent application is filed within one year of the date of such publication or public use. In order to preserve rights in unpatented inventions, it shall be the duty of the inventor, or of his supervisor if the inventor is not available to make such report, to report forthwith to the Solicitor any publication or use (other than experimental) of an invention, irrespective of whether an invention report has previously been filed. If an invention report has not been filed, such a report, including information concerning the public use or publication, shall be filed at once. If an invention is disclosed to any person who is not employed by the Department or working in cooperation with the Department upon that invention, a record shall be kept of the date and extent of the disclosure, the name and address of the person to whom the disclosure was made, and the purpose of the disclosure.

(b) No description, specification, plan, or drawing of any unpatented invention upon which a patent application is likely to be filed shall be published, nor shall any written description, specification, plan, or drawing of such invention be furnished to anyone other than an employee of the Department or a person working in cooperation with the Department upon that invention, unless the Solicitor is of the opinion that the interests of the Government will not be prejudiced by such action. If any publication disclosing the invention, not previously approved by the Solicitor, comes to the attention of the inventor or his supervisor, it shall be the duty of such person to report such publication to the Solicitor.

§ 6.10 Publicity concerning the invention after patent application is filed.

In order that the public may obtain the greatest possible benefit from inventions in which the Secretary has transferable interests, inventions assigned to the Secretary upon which

patent applications have been filed shall be publicized as widely as possible, within limitations of authority, by the Department, by the originating agency, by the division in which the inventor is employed, and by the inventor himself in his contacts with industries in which the invention is or may be useful. Regular organs of publication shall be utilized to the greatest extent possible. In addition, it shall be the duty of the Solicitor, upon being advised of the issuance of any patent assigned to the Secretary, to take steps towards listing the patent as available for licensing, where feasible.

§ 6.11 Condition of employment.

(a) The regulations in this subpart shall be a condition of employment of all employees of the Department and shall be effective as to all their inventions. These regulations shall be effective without regard to any existing or future contracts to the contrary entered into by any employee of the Department with any person other than the Government.

(b) If a patent application is filed upon an invention which has been made by an employee of the Department under circumstances that entitle the Government to the entire domestic right, title and interest in and to the invention, but which has not been reported to the Solicitor pursuant to the regulations in this subpart, title to such invention shall immediately vest in the Government, as represented by the Secretary, and the contract of employment shall be considered an assignment of such rights.

Subpart B—Licenses

§ 6.51 Purpose.

It is the purpose of the regulations in this subpart to secure for the people of the United States the full benefits of Government research and investigation in the Department of the Interior (a) by providing a simple procedure under which the public may obtain licenses to use patents and inventions in which the Secretary of the Interior has transferable interests and which are available for licensing; and (b) by providing adequate protection for the inventions until such time as they may be made available for licensing without undue risk of losing patent protection to which the public is entitled.

[31 FR 10796, Aug. 13, 1966]

§ 6.52 Patents.

Patents in which the Secretary of the interior has transferable interests, and under which he may issue licenses or sublicenses, are classified as follows:

(a) *Class A*. Patents, other than those referred to in paragraph (c) of this section, which are owned by the United States, as represented by the Secretary of the Interior, free from restrictions on licensing except such as are inherent in Government ownership;

(b) *Class B*. Patents in which the interest of the United States, as represented by the Secretary of the Interior, is less than full ownership, or is subject to some express restriction upon licensing or sublicensing (including patents upon which the Secretary of the Interior holds a license, patents assigned to the Secretary of the Interior as trustee for the people of the United States, and patents assigned to the Secretary of the Interior upon such terms as to effect a dedication to the public);

(c) *Class C*. Patents and patent rights acquired by the Secretary of the Interior pursuant to the Act of April 5, 1944 (58 Stat. 190; 30 U.S.C. 321–325), and any amendments thereof.

[29 FR 260, Jan. 10, 1964, as amended at 31 FR 10796, Aug. 13, 1966]

§ 6.53 Unpatented inventions.

The Secretary of the Interior may also have transferable interests in inventions which are not yet patented. In order to protect the patent rights of the Department, for the eventual benefit of the public, a license may be granted with respect to such an invention only if (a) a patent application has been filed thereon; (b) the invention has been assigned to the United States, as represented by the Secretary of the Interior, and the assignment has been recorded in the Patent Office; and (c) the Solicitor of the Department is of the opinion that the issuance of a license will not prejudice the interests of the Government in the invention. Such licenses shall be upon the same terms

as licenses relating to patents of the same class, as described in § 6.52.

§ 6.54 Use or manufacture by or for the Government.

A license is not required with respect to the manufacture or use of any invention assigned or required to be assigned without restrictions or qualifications to the United States when such manufacture or use is by or for the Government for governmental purposes. A license or sublicense may be required, however, for such manufacture or use in the case of Class B patents or patent rights when the terms under which the Secretary of the Interior acquires interests therein necessitate the issuance of a license or sublicense in such circumstances.

[31 FR 10796, Aug. 13, 1966]

§ 6.55 Terms of licenses or sublicenses.

(a) No license or sublicense shall be granted under any patent in which the Secretary of the Interior has transferable interests, except as set forth under these regulations, the terms and conditions of which shall be expressly stated in such license and sublicense. The terms of licenses and sublicenses issued under this subpart shall not be unreasonably restrictive.

(b) To the extent that they do not conflict with any restrictions to which the licensing or sublicensing of Class B patents and unpatented inventions may be subject, all licenses and sublicenses relating to Class A and Class B patents and unpatented inventions shall be subject to the following terms and provisions, and to such other terms and conditions as the Solicitor may prescribe:

(1) The acceptance of a license or sublicense shall not be construed as a waiver of the right to contest the validity of the patent. A license or sublicense shall be revocable only upon a finding by the Solicitor of the Department that the terms of the license or sublicense have been violated and that the revocation of the license or sublicense is in the public interest. Such finding shall be made only after reasonable notice and an opportunity to be heard.

(2) Licenses and sublicenses shall be nontransferable. Upon a satisfactory showing that the Government or public will be benefited thereby, they may be granted to properly qualified applicants royalty-free. If no such showing is made, they shall be granted only upon a reasonable royalty or other consideration, the amount or character of which is to be determined by the Solicitor. A cross-licensing agreement may be considered adequate consideration.

(3) Licensees and sublicensees may be required to submit annual or more frequent technical or statistical reports concerning practical experience acquired through the exercise of the license or sublicense, the extent of the production under the license or sublicense, and other related subjects.

(4) A licensee or sublicensee manufacturing a patented article pursuant to a license or sublicense shall give notice to the public that the article is patented by affixing thereon the word ''patent'', together with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package in which it is enclosed, a label containing such notice.

(c) Licenses and sublicenses relating to Class C patents and patent rights shall be granted upon such terms and conditions as may be prescribed pursuant to sections 3 and 5 of the Act of April 5 1944, and any amendments thereof.

[29 FR 260, Jan. 10, 1964, as amended at 31 FR 10796, Aug. 13, 1966]

§ 6.56 Issuance of licenses.

(a) Any person desiring a license relating to an invention upon which the Secretary of the Interior holds a patent or patent rights may file with the Solicitor of the Department of the Interior an application for a license, stating:

(1) The name, address, and citizenship of the applicant;

(2) The nature of his business;

(3) The patent or invention upon which he desires a license;

(4) The purpose for which he desires a license;

(5) His experience in the field of the desired license;

(6) Any patents, licenses, or other patent rights which he may have in the field of the desired license; and

(7) The benefits, if any, which the applicant expects the public to derive from his proposed use of the invention

(b) It shall be the duty of the Solicitor, after consultation with the bureau most directly interested in the patent or invention involved in an application for a license, and with the Evaluation Committee if royalties are to be charged, to determine whether the license shall be granted. If he determines that a license is to be granted, he shall execute on behalf of the Secretary, an appropriate license.

§6.57 Evaluation Committee.

At the request of the Solicitor, an Evaluation Committee will be appointed by the Secretary to recommend royalty rates with respect to any patents or inventions for which royalties may be charged.

PART 7—PROTECTION OF ARCHAEOLOGICAL RESOURCES

Subpart A—Uniform Regulations

Sec.
7.1 Purpose.
7.2 Authority.
7.3 Definitions.
7.4 Prohibited acts and criminal penalties.
7.5 Permit requirements and exceptions.
7.6 Application for permits and information collection.
7.7 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.
7.8 Issuance of permits.
7.9 Terms and conditions of permits.
7.10 Suspension and revocation of permits.
7.11 Appeals relating to permits.
7.12 Relationship to section 106 of the National Historic Preservation Act.
7.13 Custody of archaeological resources.
7.14 Determination of archaeological or commercial value and cost of restoration and repair.
7.15 Assessment of civil penalties.
7.16 Civil penalty amounts.
7.17 Other penalties and rewards.
7.18 Confidentiality of archaeological resource information.
7.19 Report.
7.20 Public awareness programs.
7.21 Surveys and schedules.

Subpart B—Department of the Interior Supplemental Regulations

7.31 Scope and authority.
7.32 Supplemental definitions.
7.33 Determination of loss or absence of archaeological interest.
7.34 Procedural information for securing permits.
7.35 Permitting procedures for Indian lands.
7.36 Permit reviews and disputes.
7.37 Civil penalty hearings procedures.

AUTHORITY: Pub. L. 96–95, 93 Stat. 721, as amended; 102 Stat. 2983 (16 U.S.C. 470aa-mm) (Sec. 10(a). Related authority: Pub. L. 59–209, 34 Stat. 225 (16 U.S.C. 432,433); Pub. L. 86–523; 74 Stat. 220, 221 (16 U.S.C. 469), as amended; 88 Stat. 174 (1974); Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470a-t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95–341, 92 Stat. 469 (42 U.S.C. 1996).

Subpart A—Uniform Regulations

SOURCE: 49 FR 1027, Jan. 6, 1984, unless otherwise noted.

§7.1 Purpose.

(a) The regulations in this part implement provisions of the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa-mm) by establishing the uniform definitions, standards, and procedures to be followed by all Federal land managers in providing protection for archaeological resources, located on public lands and Indian lands of the United States. These regulations enable Federal land managers to protect archaeological resources, taking into consideration provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996), through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and data, and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the archaeological resources.

(b) The regulations in this part do not impose any new restrictions on activities permitted under other laws, authorities, and regulations relating to mining, mineral leasing, reclamation,

and other multiple uses of the public lands.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, Jan. 26, 1995]

§ 7.2 Authority.

(a) The regulations in this part are promulgated pursuant to section 10(a) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ii), which requires that the Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority jointly develop uniform rules and regulations for carrying out the purposes of the Act.

(b) In addition to the regulations in this part, section 10(b) of the Act (16 U.S.C. 470ii) provides that each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations in this part, as may be necessary for carrying out the purposes of the Act.

§ 7.3 Definitions.

As used for purposes of this part:

(a) *Archaeological resource* means any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.

(1) *Of archaeological interest* means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

(2) *Material remains* means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated.

(3) The following classes of material remains (and illustrative examples), if they are at least 100 years of age, are of archaeological interest and shall be considered archaeological resources unless determined otherwise pursuant to paragraph (a)(4) or (a)(5) of this section:

(i) Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, middens);

(ii) Surface or subsurface artifact concentrations or scatters;

(iii) Whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments (including, but not limited to, pottery and other ceramics, cordage, basketry and other weaving, bottles and other glassware, bone, ivory, shell, metal, wood, hide, feathers, pigments, and flaked, ground, or pecked stone);

(iv) By-products, waste products, or debris resulting from manufacture or use of human-made or natural materials;

(v) Organic waste (including, but not limited to, vegetal and animal remains, coprolites);

(vi) Human remains (including, but not limited to, bone, teeth, mummified flesh, burials, cremations);

(vii) Rock carvings, rock paintings, intaglios and other works of artistic or symbolic representation;

(viii) Rockshelters and caves or portions thereof containing any of the above material remains;

(ix) All portions of shipwrecks (including, but not limited to, armaments, apparel, tackle, cargo);

(x) Any portion or piece of any of the foregoing.

(4) The following material remains shall not be considered of archaeological interest, and shall not be considered to be archaeological resources for purposes of the Act and this part, unless found in a direct physical relationship with archaeological resources as defined in this section:

(i) Paleontological remains;

(ii) Coins, bullets, and unworked minerals and rocks.

(5) The Federal land manager may determine that certain material remains, in specified areas under the Federal land manager's jurisdiction, and under specified circumstances, are not or are no longer of archaeological interest and are not to be considered

archaeological resources under this part. Any determination made pursuant to this subparagraph shall be documented. Such determination shall in no way affect the Federal land manager's obligations under other applicable laws or regulations.

(6) For the disposition following lawful removal or excavations of Native American human remains and ''cultural items'', as defined by the Native American Graves Protection and Repatriation Act (NAGPRA; Pub. L. 101–601; 104 Stat. 3050; 25 U.S.C. 3001–13), the Federal land manager is referred to NAGPRA and its implementing regulations.

(b) *Arrowhead* means any projectile point which appears to have been designed for use with an arrow.

(c) *Federal land manager* means:

(1) With respect to any public lands, the secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands, including persons to whom such management authority has been officially delegated;

(2) In the case of Indian lands, or any public lands with respect to which no department, agency or instrumentality has primary management authority, such term means the Secretary of the Interior;

(3) The Secretary of the Interior, when the head of any other agency or instrumentality has, pursuant to section 3(2) of the Act and with the consent of the Secretary of the Interior, delegated to the Secretary of the Interior the responsibilities (in whole or in part) in this part.

(d) *Public lands* means:

(1) Lands which are owned and administered by the United States as part of the national park system, the national wildlife refuge system, or the national forest system; and

(2) All other lands the fee title to which is held by the United States, except lands on the Outer Continental Shelf, lands under the jurisdiction of the Smithsonian Institution, and Indian lands.

(e) *Indian lands* means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian tribe or Indian individual.

(f) *Indian tribe* as defined in the Act means any Indian tribe, band, nation, or other organized group or community, including any Alaska village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688). In order to clarify this statutory definition for purposes of this part, ''Indian tribe'' means:

(1) Any tribal entity which is included in the annual list of recognized tribes published in the FEDERAL REGISTER by the Secretary of the Interior pursuant to 25 CFR part 54;

(2) Any other tribal entity acknowledged by the Secretary of the Interior pursuant to 25 CFR part 54 since the most recent publication of the annual list; and

(3) Any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and any Alaska Native village or tribe which is recognized by the Secretary of the Interior as eligible for services provided by the Bureau of Indian Affairs.

(g) *Person* means an individual, corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the United States, or of any Indian tribe, or of any State or political subdivision thereof.

(h) *State* means any of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(i) *Act* means the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm).

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984, as amended at 60 FR 5260, Jan. 26, 1995]

§ 7.4 Prohibited acts and criminal penalties.

(a) Under section 6(a) of the Act, no person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological

resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under § 7.8 or exempted by § 7.5(b) of this part.

(b) No person may sell, purchase, exchange, transport, or receive any archaeological resource, if such resource was excavated or removed in violation of:

(1) The prohibitions contained in paragraph (a) of this section; or

(2) Any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

(c) Under section (d) of the Act, any person who knowingly violates or counsels, procures, solicits, or employs any other person to violate any prohibition contained in section 6 (a), (b), or (c) of the Act will, upon conviction, be fined not more than $10,000.00 or imprisoned not more than one year, or both: provided, however, that if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500.00, such person will be fined not more than $20,000.00 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person will be fined not more than $100,000.00, or imprisoned not more than five years, or both.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, Jan. 26, 1995]

§ 7.5 Permit requirements and exceptions.

(a) Any person proposing to excavate and/or remove archaeological resources from public lands or Indian lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Federal land manager for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Federal land manager may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in § 7.8(a) of this part.

(b) Exceptions:

(1) No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Federal land manager's responsibility to comply with other authorities which protect archaeological resources prior to approving permits, leases, licenses, or entitlements for use; any excavation and/or removal of archaeological resources required for compliance with those authorities shall be conducted in accordance with the permit requirements of this part.

(2) No permit shall be required under this part for any person collecting for private purposes any rock, coin, bullet, or mineral which is not an archaeological resource as defined in this part, provided that such collecting does not result in disturbance of any archaelogical resource.

(3) No permit shall be required under this part or under section 3 of the Act of June 8, 1906 (16 U.S.C. 432), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal or archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this part;

(4) No permit shall be required under this part for any person to carry out any archaeological activity authorized by a permit issued under section 3 of the Act of June 8, 1906 (16 U.S.C. 432), before the enactment of the Archaeological Resources Protection Act of 1979. Such permit shall remain in effect according to its terms and conditions until expiration.

(5) No permit shall be required under section 3 of the Act of June 8, 1906 (16 U.S.C. 432) for any archaeological work for which a permit is issued under this part.

(c) Persons carrying out official agency duties under the Federal land manager's direction, associated with the management of archaeological resources, need not follow the permit application procedures of §7.6. However, the Federal land manager shall insure that provisions of §§7.8 and 7.9 have been met by other documented means, and that any official duties which might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Federal land manager, have been the subject of consideration under §7.7.

(d) Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Federal land manager shall issue a permit, subject to the provisions of §§7.5(b)(5), 7.7, 7.8(a) (3), (4), (5), (6), and (7), 7.9, 7.10, 7.12, and 7.13(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Federal land manager.

(e) Under other statutory, regulatory, or administrative authorities governing the use of public lands and Indian lands, authorizations may be required for activities which do not require a permit under this part. Any person wishing to conduct on public lands or Indian lands any activities related to but believed to fall outside the scope of this part should consult with the Federal land manager, for the purpose of determining whether any authorization is required, prior to beginning such activities.

§7.6 Application for permits and information collection.

(a) Any person may apply to the appropriate Federal land manager for a permit to excavate and/or remove archaeological resources from public lands or Indian lands and to carry out activities associated with such excavation and/or removal.

(b) Each application for a permit shall include:

(1) The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed time of performance, locational maps, and proposed outlet for public written dissemination of the results.

(2) The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in §7.8(a).

(3) The name and address of the individual(s), if different from the individual(s) named in paragraph (b)(2) of this section, proposed to be responsible for carrying out the terms and conditions of the permit.

(4) Evidence of the applicant's ability to initiate, conduct, and complete the proposed work, including evidence of logistical support and laboratory facilities.

(5) Where the application is for the excavation and/or removal of archaeological resources on public lands, the names of the university, museum, or other scientific or educational institution in which the applicant proposes to store all collections, and copies of records, data, photographs, and other documents derived from the proposed work. Applicants shall submit written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility for the collections, records, data, photographs and other documents and to safeguard and preserve these materials as property of the United States.

(6) Where the application is for the excavation and/or removal of archaeological resources on Indian lands, the name of the university, museum, or other scientific or educational institution in which the applicant proposes to store copies of records, data, photographs, and other documents derived from the proposed work, and all collections in the event the Indian owners do not wish to take custody or otherwise dispose of the archaeological resources. Applicants shall submit written certification, signed by an authorized official of the institution, or willingness to assume curatorial responsibility for the collections, if applicable, and/or the records, data, photographs, and other

documents derived from the proposed work.

(c) The Federal land manager may require additional information, pertinent to land management responsibilities, to be included in the application for permit and shall so inform the applicant.

(d) *Paperwork Reduction Act.* The information collection requirement contained in § 7.6 of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024–0037. The purpose of the information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist Federal land managers in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

§ 7.7 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.

(a) If the issuance of a permit under this part may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands, as determined by the Federal land manager, at least 30 days before issuing such a permit the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 of the Act.

(1) Notice by the Federal land manager to any Indian tribe shall be sent to the chief executive officer or other designated official of the tribe. Indian tribes are encouraged to designate a tribal official to be the focal point for any notification and discussion between the tribe and the Federal land manager.

(2) The Federal land manager may provide notice to any other Native American group that is known by the Federal land manager to consider sites potentially affected as being of religious or cultural importance.

(3) Upon request during the 30-day period, the Federal land manager may meet with official representatives of any Indian tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under § 7.9.

(4) When the Federal land manager determines that a permit applied for under this part must be issued immediately because of an imminent threat of loss or destruction of an archaeological resource, the Federal land manager shall so notify the appropriate tribe.

(b)(1) In order to identify sites of religious or cultural importance, the Federal land manager shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Federal land manager's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on sites eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w–3).

(2) If the Federal land manager becomes aware of a Native American group that is not an Indian tribe as defined in this part but has aboriginal or historic ties to public lands under the Federal land manager's jurisdiction, the Federal land manager may seek to communicate with official representatives of that group to obtain information on sites they may consider to be of religious or cultural importance.

(3) The Federal land manager may enter into agreement with any Indian tribe or other Native American group for determining locations for which such tribe or group wishes to receive notice under this section.

(4) The Federal land manager should also seek to determine, in consultation with official representatives of Indian tribes or other Native American groups, what circumstances should be the subject of special notification to the tribe or group after a permit has been issued. Circumstances calling for notification might include the discovery of human remains. When circumstances for special notification have been determined by the Federal land manager, the Federal land manager will include a requirement in the terms and conditions of permits, under § 7.9(c), for permittees to notify the Federal land manger immediately upon the occurrence of such circumstances. Following the permittee's notification, the Federal land manager will notify and consult with the tribe or group as appropriate. In cases involving Native American human remains and other ''cultural items'', as defined by NAGPRA, the Federal land manager is referred to NAGPRA and its implementing regulations.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, 5261, Jan. 26, 1995]

§ 7.8 Issuance of permits.

(a) The Federal land manager may issue a permit, for a specified period of time appropriate to the work to be conducted, upon determining that:

(1) The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

(i) A graduate degree in anthropology or archaeology, or equivalent training and experience;

(ii) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

(iii) The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;

(iv) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and

(v) Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the historic period. Applicants proposing to engage in prehistoric archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data;

(3) The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned;

(4) Where the proposed work consists of archaeological survey and/or data recovery undertaken in accordance with other approved uses of the public lands or Indian lands, and the proposed work has been agreed to in writing by the Federal land manager pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f), paragraphs (a)(2) and (a)(3) shall be deemed satisfied by the prior approval.

(5) Written consent has been obtained, for work proposed on Indian lands, from the Indian landowner and the Indian tribe having jurisdiction over such lands;

(6) Evidence is submitted to the Federal land manager that any university, museum, or other scientific or educational institution proposed in the application as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records; and

(7) The applicant has certified that, not later than 90 days after the date the final report is submitted to the Federal land manager, the following

will be delivered to the appropriate official of the approved university, museum, or other scientific or educational institution, which shall be named in the permit:

(i) All artifacts, samples, collections, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit where the permit is for the excavation and/or removal of archaeological resources from public lands.

(ii) All artifacts, samples and collections resulting from work under the requested permit for which the custody or disposition is not undertaken by the Indian owners, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit, where the permit is for the excavation and/or removal of archaeological resources from Indian lands.

(b) When the area of the proposed work would cross jurisdictional boundaries, so that permit applications must be submitted to more than one Federal land manager, the Federal land managers shall coordinate the review and evaluation of applications and the issuance of permits.

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984]

§ 7.9 Terms and conditions of permits.

(a) In all permits issued, the Federal land manager shall specify:

(1) The nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work;

(2) The name of the individual(s) responsible for conducting the work and, if different, the name of the individual(s) responsible for carrying out the terms and conditions of the permit;

(3) The name of any university, museum, or other scientific or educational institutions in which any collected materials and data shall be deposited; and

(4) Reporting requirements.

(b) The Federal land manager may specify such terms and conditions as deemed necessary, consistent with this part, to protect public safety and other values and/or resources, to secure work areas, to safeguard other legitimate land uses, and to limit activities incidental to work authorized under a permit.

(c) The Federal land manager shall include in permits issued for archaeological work on Indian lands such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands, and for archaeological work on public lands shall include such terms and conditions as may have been developed pursuant to § 7.7.

(d) Initiation of work or other activities under the authority of a permit signifies the permittee's acceptance of the terms and conditions of the permit.

(e) The permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired.

(f) The permittee may request that the Federal land manager extend or modify a permit.

(g) The permittee's performance under any permit issued for a period greater than 1 year shall be subject to review by the Federal land manager, at least annually.

§ 7.10 Suspension and revocation of permits.

(a) *Suspension or revocation for cause.* (1) The Federal land manager may suspend a permit issued pursuant to this part upon determining that the permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or § 7.4. The Federal land manager shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

(2) The Federal land manager may revoke a permit upon assessment of a civil penalty under § 7.15 upon the permittee's conviction under section 6 of the Act, or upon determining that the permittee has failed after notice under this section to correct the situation which led to suspension of the permit.

(b) *Suspension or revocation for management purposes.* The Federal land manager may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit

would be in conflict with management requirements not in effect when the permit was issued. The Federal land manager shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984]

§7.11 Appeals relating to permits.

Any affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit through existing administrative appeal procedures, or through procedures which may be established by the Federal land manager pursuant to section 10(b) of the Act and this part.

§7.12 Relationship to section 106 of the National Historic Preservation Act.

Issuance of a permit in accordance with the Act and this part does not constitute an undertaking requiring compliance with section 106 of the Act of October 15, 1966 (16 U.S.C. 470f). However, the mere issuance of such a permit does not excuse the Federal land manager from compliance with section 106 where otherwise required.

§7.13 Custody of archaeological resources.

(a) Archaeological resources excavated or removed from the public lands remain the property of the United States.

(b) Archaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources.

(c) The Secretary of the Interior may promulgate regulations providing for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, for the ultimate disposition of archaeological resources, and for standards by which archaeological resources shall be preserved and maintained, when such resources have been excavated or removed from public lands and Indian lands.

(d) In the absence of regulations referenced in paragraph (c) of this section, the Federal land manager may provide for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, when such resources have been excavated or removed from public lands under the authority of a permit issued by the Federal land manager.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, the Federal land manager will follow the procedures required by NAGPRA and its implementing regulations for determining the disposition of Native American human remains and other ''cultural items'', as defined by NAGPRA, that have been excavated, removed, or discovered on public lands.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, 5261, Jan. 26, 1995]

§7.14 Determination of archaeological or commercial value and cost of restoration and repair.

(a) *Archaeological value.* For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in §7.4 of this part or conditions of a permit issued pursuant to this part shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) *Commercial value.* For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in §7.4 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) *Cost of restoration and repair.* For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

(1) Reconstruction of the archaeological resource;

(2) Stabilization of the archaeological resource;

(3) Ground contour reconstruction and surface stabilization;

(4) Research necessary to carry out reconstruction or stabilization;

(5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;

(6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

(7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager.

(8) Preparation of reports relating to any of the above activities.

§ 7.15 Assessment of civil penalties.

(a) The Federal land manager may assess a civil penalty against any person who has violated any prohibition contained in § 7.4 or who has violated any term or condition included in a permit issued in accordance with the Act and this part.

(b) *Notice of violation.* The Federal land manager shall serve a notice of violation upon any person believed to be subject to a civil penalty, either in person or by registered or certified mail (return receipt requested). The Federal land manager shall include in the notice:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;

(3) The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;

(4) Notification of the right to file a petition for relief pursuant to paragraph (d) of this section, or to await the Federal land manager's notice of assessment, and to request a hearing in accordance with paragraph (g) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(c) The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:

(1) Seek informal discussions with the Federal land manager;

(2) File a petition for relief in accordance with paragraph (d) of this section;

(3) Take no action and await the Federal land manager's notice of assessment;

(4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.

(d) *Petition for relief.* The person served with a notice of violation may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the Federal land manager within 45 calendar days of the date of service of the notice of violation (or of a proposed penalty amount, if later). The petition shall be in writing and signed by the person served with the notice of violation. If the person is a corporation, the petition must be signed by an officer authorized to sign such documents. The

petition shall set forth in full the legal or factual basis for the requested relief.

(e) *Assessment of penalty*. (1) The Federal land manager shall assess a civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

(2) The Federal land manager shall take into consideration all available information, including information provided pursuant to paragraphs (c) and (d) of this section or furnished upon further request by the Federal land manager.

(3) If the facts warrant a conclusion that no violation has occurred, the Federal land manager shall so notify the person served with a notice of violation, and no penalty shall be assessed.

(4) Where the facts warrant a conclusion that a violation has occurred, the Federal land manager shall determine a penalty amount in accordance with §7.16.

(f) *Notice of assessment*. The Federal land manager shall notify the person served with a notice of violation of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The Federal land manager shall include in the notice of assessment:

(1) The facts and conclusions from which it was determined that a violation did occur;

(2) The basis in §7.16 for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(g) *Hearings*. (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing a copy of the notice of assessment, and shall deliver the request as specified in the notice of assessment, personally or by registered or certified mail (return receipt requested).

(2) Failure to deliver a written request for a hearing within 45 days of the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.

(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal land manager under paragraph (f) of this section or any offer of mitigation or remission made by the Federal land manager.

(h) *Final administrative decision*. (1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;

(2) Where the person served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision;

(3) Where the person served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(i) *Payment of penalty*. (1) The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a U.S. District Court as provided in section 7(b)(1) of the Act.

(2) Upon failure to pay the penalty, the Federal land manager may request the Attorney General to institute a civil action to collect the penalty in a U.S. District Court for any district in which the person assessed a civil penalty is found, resides, or transacts business. Where the Federal land manager is not represented by the Attorney

General, a civil action may be initiated directly by the Federal land manager.

(j) *Other remedies not waived.* Assessment of a penalty under this section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

§ 7.16 Civil penalty amounts.

(a) *Maximum amount of penalty.* (1) Where the person being assessed a civil penalty has not committed any previous violation of any prohibition in § 7.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

(2) Where the person being assessed a civil penalty has committed any previous violation of any prohibition in § 7.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus double the archaeological or commercial value of archaeological resources destroyed or not recovered.

(3) Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this section.

(b) *Determination of penalty amount, mitigation, and remission.* The Federal land manager may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty.

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

(i) Agreement by the person being assessed a civil penalty to return to the Federal land manager archaeological resources removed from public lands or Indian lands;

(ii) Agreement by the person being assessed a civil penalty to assist the Federal land manager in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands or Indian lands;

(iii) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this part;

(iv) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulations in this part;

(v) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances;

(vii) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

(2) When the penalty is for a violation on Indian lands, the Federal land manager shall consult with and consider the interests of the Indian landowner and the Indian tribe having jurisdiction over the Indian lands prior to proposing to mitigate or remit the penalty.

(3) When the penalty is for a violation which may have had an effect on a known Indian tribal religious or cultural site on public lands, the Federal land manager should consult with and consider the interests of the affected tribe(s) prior to proposing to mitigate or remit the penalty.

[49 FR 1027, Jan. 6, 1984, as amended at 52 FR 47721, Dec. 16, 1987]

§ 7.17 Other penalties and rewards.

(a) Section 6 of the Act contains criminal prohibitions and provisions for criminal penalties. Section 8(b) of the Act provides that archaeological resources, vehicles, or equipment involved in a violation may be subject to forfeiture.

(b) Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Federal land manager may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State,

or local government who furnish information or render service in the performance of their official duties, and persons who have provided information under §7.16(b)(1)(iii) shall not be certified eligible to receive payment of rewards.

(c) In cases involving Indian lands, all civil penalty monies and any item forfeited under the provisions of this section shall be transferred to the appropriate Indian or Indian tribe.

§7.18 Confidentiality of archaeological resource information.

(a) The Federal land manager shall not make available to the public, under subchapter II of chapter 5 of title 5 of the United States Code or any other provision of law, information concerning the nature and location of any archaeological resource, with the following exceptions:

(1) The Federal land manager may make information available, provided that the disclosure will further the purposes of the Act and this part, or the Act of June 27, 1960, as amended (16 U.S.C. 469 through 469c), without risking harm to the archaeological resource or to the site in which it is located.

(2) The Federal land manager shall make information available, when the Governor of any State has submitted to the Federal land manager a written request for information, concerning the archaeological resources within the requesting Governor's State, provided that the request includes:

(i) The specific archaeological resource or area about which information is sought;

(ii) The purpose for which the information is sought; and

(iii) The Governor's written commitment to adequately protect the confidentiality of the information.

(b) [Reserved]

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984]

§7.19 Report.

(a) Each Federal land manager, when requested by the Secretary of the Interior, will submit such information as is necessary to enable the Secretary to comply with section 13 of the Act and comprehensively report on activities carried out under provisions of the Act.

(b) The Secretary of the Interior will include in the annual comprehensive report, submitted to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States Senate under section 13 of the Act, information on public awareness programs submitted by each Federal land manager under §7.20(b). Such submittal will fulfill the Federal land manager's responsibility under section 10(c) of the Act to report on public awareness programs.

(c) The comprehensive report by the Secretary of the Interior also will include information on the activities carried out under section 14 of the Act. Each Federal land manager, when requested by the Secretary, will submit any available information on surveys and schedules and suspected violations in order to enable the Secretary to summarize in the comprehensive report actions taken pursuant to section 14 of the Act.

[60 FR 5260, 5261, Jan. 26, 1995]

§7.20 Public awareness programs.

(a) Each Federal land manager will establish a program to increase public awareness of the need to protect important archaeological resources located on public and Indian lands. Educational activities required by section 10(c) of the Act should be incorporated into other current agency public education and interpretation programs where appropriate.

(b) Each Federal land manager annually will submit to the Secretary of the Interior the relevant information on public awareness activities required by section 10(c) of the Act for inclusion in the comprehensive report on activities required by section 13 of the Act.

[60 FR 5260, 5261, Jan. 26, 1995]

§7.21 Surveys and schedules.

(a) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority will develop plans for surveying lands under each

agency's control to determine the nature and extent of archaeological resources pursuant to section 14(a) of the Act. Such activities should be consistent with Federal agency planning policies and other historic preservation program responsibilities required by 16 U.S.C. 470 *et seq.* Survey plans prepared under this section will be designed to comply with the purpose of the Act regarding the protection of archaeological resources.

(b) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will prepare schedules for surveying lands under each agency's control that are likely to contain the most scientifically valuable archaeological resources pursuant to section 14(b) of the Act. Such schedules will be developed based on objectives and information identified in survey plans described in paragraph (a) of this section and implemented systematically to cover areas where the most scientifically valuable archaeological resources are likely to exist.

(c) Guidance for the activities undertaken as part of paragraphs (a) through (b) of this section is provided by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

(d) Other Federal land managing agencies are encouraged to develop plans for surveying lands under their jurisdictions and prepare schedules for surveying to improve protection and management of archaeological resources.

(e) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will develop a system for documenting and reporting suspected violations of the various provisions of the Act. This system will reference a set of procedures for use by officers, employees, or agents of Federal agencies to assist them in recognizing violations, documenting relevant evidence, and reporting assembled information to the appropriate authorities. Methods employed to document and report such violations should be compatible with existing agency reporting systems for documenting violations of other appropriate Federal statutes and regulations. Summary information to be included in the Secretary's comprehensive report will be based upon the system developed by each Federal land manager for documenting suspected violations.

[60 FR 5260, 5261, Jan. 26, 1995]

Subpart B—Department of the Interior Supplemental Regulations

SOURCE: 52 FR 9168, Mar. 23, 1987, unless otherwise noted.

§ 7.31 Scope and authority.

The regulations in this subpart are promulgated pursuant to section 10(b) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ii), which requires agencies to develop rules and regulations for carrying out the purposes of the Act, consistent with the uniform regulations issued pursuant to section 10(a) of the Act (subpart A of this part).

§ 7.32 Supplemental definitions.

For purposes of this subpart, the following definitions will be used:

(a) *Site of religious or cultural importance* means, for purposes of § 7.7 of this part, a location which has traditionally been considered important by an Indian tribe because of a religious event which happened there; because it contains specific natural products which are of religious or cultural importance; because it is believed to the be dwelling place of, the embodiment of, or a place conducive to communication with spiritual beings; because it contains elements of life-cycle rituals, such as burials and associated materials; or because it has other specific and continuing significance in Indian religion or culture.

(b) *Allotted lands* means lands granted to Indian individuals by the United States and held in trust for those individuals by the United States.

§ 7.33 Determination of loss or absence of archaeological interest.

(a) Under certain circumstances, a Federal land manager may determine, pursuant to § 7.3(a)(5) of this part, that certain material remains are not or are no longer of archaeological interest,

and therefore are not to be considered archaeological resources under this part.

(b) The Federal land manager may make such a determination if he/she finds that the material remains are not capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics.

(c) Prior to making a determination that material remains are not or are no longer archaeological resources, the Federal land manager shall ensure that the following procedures are completed:

(1) A professional archaeological evaluation of material remains and similar materials within the area under consideration shall be completed, consistent with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716, Sept. 29, 1983) and with 36 CFR parts 60, 63, and 65.

(2) The principal bureau archaeologist or, in the absence of a principal bureau archaeologist, the Department Consulting Archeologist, shall establish whether the material remains under consideration contribute to scientific or humanistic understandings of past human behavior, cultural adaptation and related topics. The principal bureau archaeologist or the Department Consulting Archeologist, as appropriate, shall make a recommendation to the Federal land manager concerning these material remains.

(d) The Federal land manager shall make the determination based upon the facts established by and the recommendation of the principal bureau archaeologist or the Departmental Consulting Archeologist, as appropriate, and shall fully document the basis therefor, including consultation with Indian tribes for determinations regarding sites of religious or cultural importance.

(e) The Federal land manager shall make public notice of the determination and its limitations, including any permitting requirements for activities associated with the materials determined not to be archaeological resources for purposes of this part.

(f) Any interested individual may request in writing that the Departmental Consulting Archeologist review any final determination by the Federal land manager that certain remains, are not, or are no longer, archaeological resources. Two (2) copies of the request should be sent to the Departmental Consulting Archeologist, National Park Service, P.O. Box 37127, Washington, DC 20013–7127, and should document why the requestor disagrees with the determination of the Federal land manager. The Departmental Consulting Archeologist shall review the request, and, if appropriate, shall review the Federal land manager's determination and its supporting documentation. Based on this review, the Departmental Consulting Archeologist shall prepare a final professional recommendation, and shall transmit the recommendation and the basis therefor to the head of the bureau for further consideration within 60 days of the receipt of the request.

(g) Any determination made pursuant to this section shall in no way affect the Federal land manager's obligations under other applicable laws or regulations.

§ 7.34 Procedural information for securing permits.

Information about procedures to secure a permit to excavate or remove archaeological resources from public lands or Indian lands can be obtained from the appropriate Indian tribal authorities, the Federal land manager of the bureau that administers the specific area of the public lands or Indian lands for which a permit is desired, or from the state, regional, or national office of that bureau.

§ 7.35 Permitting procedures for Indian lands.

(a) If the lands involved in a permit application are Indian lands, the consent of the appropriate Indian tribal authority or individual Indian landowner is required by the Act and these regulations.

(b) When Indian tribal lands are involved in an application for a permit or a request for extension or modification of a permit, the consent of the Indian tribal government must be obtained. For Indian allotted lands outside reservation boundaries, consent from only

the individual landowner is needed. When multiple-owner allotted lands are involved, consent by more than 50 percent of the ownership interest is sufficient. For Indian allotted lands within reservation boundaries, consent must be obtained from the Indian tribal government and the individual landowner(s).

(c) The applicant should consult with the Bureau of Indian Affairs concerning procedures for obtaining consent from the appropriate Indian tribal authorities and submit the permit application to the area office of the Bureau of Indian Affairs that is responsible for the administration of the lands in question. The Bureau of Indian Affairs shall insure that consultation with the appropriate Indian tribal authority or individual Indian landowner regarding terms and conditions of the permit occurs prior to detailed evaluation of the application. Permits shall include terms and conditions requested by the Indian tribe or Indian landowner pursuant to § 7.9 of this part.

(d) The issuance of a permit under this part does not remove the requirement for any other permit required by Indian tribal law.

§ 7.36 Permit reviews and disputes.

(a) Any affected person disputing the decision of a Federal land manager with respect to the issuance or denial of a permit, the inclusion of specific terms and conditions in a permit, or the modification, suspension, or revocation of a permit may request the Federal land manager to review the disputed decision and may request a conference to discuss the decision and its basis.

(b) The disputant, if unsatisfied with the outcome of the review or conference, may request that the decision be reviewed by the head of the bureau involved.

(c) Any disputant unsatisfied with the higher level review, and desiring to appeal the decision, pursuant to § 7.11 of this part, should consult with the appropriate Federal land manager regarding the existence of published bureau appeal procedures. In the absence of published bureau appeal procedures, the review by the head of the bureau involved will constitute the final decision.

(d) Any affected person may request a review by the Departmental Consulting Archeologist of any professional issues involved in a bureau permitting decision, such as professional qualifications, research design, or other professional archaeological matters. The Departmental Consulting Archeologist shall make a final professional recommendation to the head of the bureau involved. The head of the bureau involved will consider the recommendation, but may reject it, in whole or in part, for good cause. This request should be in writing, and should state the reasons for the request. See § 7.33(f) for the address of the Departmental Consulting Archeologist.

§ 7.37 Civil penalty hearings procedures.

(a) *Requests for hearings.* Any person wishing to request a hearing on a notice of assessment of civil penalty, pursuant to § 7.15(g) of this part, may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203–1923. The respondent shall enclose a copy of the notice of violation and the notice of assessment. The request shall state the relief sought, the basis for challenging the facts used as the basis for charging the violation and fixing the assessment, and respondent's preference as to the place and date for a hearing. A copy of the request shall be served upon the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested), at the address specified in the notice of assessment. Hearings shall be conducted in accordance with 43 CFR part 4, subparts A and B.

(b) *Waiver of right to a hearing.* Failure to file a written request for a hearing within 45 days of the date of service of a notice of assessment shall be deemed a waiver of the right to a hearing.

(c) *Commencement of hearing procedures.* Upon receipt of a request for a hearing, the Hearing Division shall assign an administrative law judge to the case. Notice of assignment shall be

given promptly to the parties, and thereafter, all pleadings, papers, and other documents in the proceeding shall be filed directly with the administrative law judge, with copies served on the opposing party.

(d) *Appearance and practice.* (1) Subject to the provisions of 43 CFR 1.3, the respondent may appear in person, by representative, or by counsel, and may participate fully in those proceedings. If respondent fails to appear and the administrative law judge determines such failure is without good cause, the administrative law judge may, in his/her discretion, determine that such failure shall constitute a waiver of the right to a hearing and consent to the making of a decision on the record made at the hearing.

(2) Departmental counsel, designated by the Solicitor of the Department, shall represent the Federal land manager in the proceedings. Upon notice to the Federal land manager of the assignment of an administrative law judge to the case, said counsel shall enter his/her appearance on behalf of the Federal land manager and shall file all petitions and correspondence exchanges by the Federal land manager and the respondent pursuant to § 7.15 of this part which shall become part of the hearing record. Thereafter, service upon the Federal land manager shall be made to his/her counsel.

(e) *Hearing administration.* (1) The administrative law judge shall have all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions in accordance with 5 U.S.C. 554–557.

(2) The transcript of testimony, the exhibits, and all papers, documents and requests filed in the proceedings, shall constitute the record for decision. The administrative law judge shall render a written decision upon the record, which shall set forth his/her findings of fact and conclusions of law, and the reasons and basis therefor, and an assessment of a penalty, if any.

(3) Unless a notice of appeal is filed in accordance with paragraph (f) of this section, the administrative law judge's decision shall constitute the final administrative determination of the Secretary in the matter and shall become effective 30 calendar days from the date of this decision.

(4) In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal land manager under § 7.15 of this part or any offer of mitigation or remission made by the Federal land manager.

(f) *Appeal.* (1) Either the respondent or the Federal land manager may appeal the decision of an administrative law judge by the filing of a ''Notice of Appeal'' with the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203–1923, within 30 calendar days of the date of the administrative law judge's decision. Such notice shall be accompanied by proof of service on the administrative law judge and the opposing party.

(2) Upon receipt of such a notice, the Director, Office of Hearings and Appeals, shall appoint an *ad hoc* appeals board to hear and decide an appeal. To the extent they are not inconsistent herewith, the provision of the Department of Hearings and Appeals Procedures in 43 CFR part 4, subparts A, B, and G shall apply to appeal proceedings under this subpart. The decision of the board on the appeal shall be in writing and shall become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered, unless otherwise specified therein.

(g) *Report service.* Copies of decisions in civil penalty proceedings instituted under the Act may be obtained by letter of request addressed to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203–1923. Fees for this service shall be as established by the Director of that Office.

[52 FR 9168, Mar. 23, 1987, as amended at 67 FR 4368, Jan. 30, 2002]

PART 8—JOINT POLICIES OF THE DEPARTMENTS OF THE INTERIOR AND OF THE ARMY RELATIVE TO RESERVOIR PROJECT LANDS

Sec.
8.0 Acquisition of lands for reservoir projects.
8.1 Lands for reservoir construction and operation.
8.2 Additional lands for correlative purposes.
8.3 Easements.
8.4 Blocking out.
8.5 Mineral rights.
8.6 Buildings.

AUTHORITY: Sec. 7, 32 Stat. 389, sec. 14, 53 Stat. 1197; 43 U.S.C. 421, 389.

SOURCE: 31 FR 9108, July 2, 1966, unless otherwise noted.

§ 8.0 Acquisition of lands for reservoir projects.

In so far as permitted by law, it is the policy of the Departments of the Interior and of the Army to acquire, as a part of reservoir project construction, adequate interest in lands necessary for the realization of optimum values for all purposes including additional land areas to assure full realization of optimum present and future outdoor recreational and fish and wildlife potentials of each reservoir.

§ 8.1 Lands for reservoir construction and operation.

The fee title will be acquired to the following:

(a) Lands necessary for permanent structures.

(b) Lands below the maximum flowage line of the reservoir including lands below a selected freeboard where necessary to safeguard against the effects of saturation, wave action, and bank erosion and the permit induced surcharge operation.

(c) Lands needed to provide for public access to the maximum flowage line as described in paragraph (b) of this section, or for operation and maintenance of the project.

§ 8.2 Additional lands for correlative purposes.

The fee title will be acquired for the following:

(a) Such lands as are needed to meet present and future requirements for fish and wildlife as determined pursuant to the Fish and Wildlife Coordination Act.

(b) Such lands as are needed to meet present and future public requirements for outdoor recreation, as may be authorized by Congress.

§ 8.3 Easements.

Easements in lieu of fee title may be taken only for lands that meet all of the following conditions:

(a) Lands lying above the storage pool.

(b) Lands in remote portions of the project area.

(c) Lands determined to be of no substantial value for protection or enhancement of fish and wildlife resources, or for public outdoor recreation.

(d) It is to the financial advantage of the Government to take easements in lieu of fee title.

§ 8.4 Blocking out.

Blocking out will be accomplished in accordance with sound real estate practices, for example, on minor sectional subdivision lines; and normally land will not be acquired to avoid severance damage if the owner will waive such damage.

§ 8.5 Mineral rights.

Mineral, oil and gas rights will not be acquired except where the development thereof would interfere with project purposes, but mineral rights not acquired will be subordinated to the Government's right to regulate their development in a manner that will not interfere with the primary purposes of the project, including public access.

§ 8.6 Buildings.

Buildings for human occupancy as well as other structures which would interfere with the operation of the project for any project purpose will be prohibited on reservoir project lands.

PART 9—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF THE INTERIOR PROGRAMS AND ACTIVITIES

Sec.
9.1 What is the purpose of these regulations?
9.2 What definitions apply to these regulations?
9.3 What programs and activities of the Department are subject to these regulations?
9.4 [Reserved]
9.5 What is the Secretary's obligation with respect to Federal interagency coordination?
9.6 What procedures apply to the selection of programs and activities under these regulations?
9.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?
9.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance and direct federal development?
9.9 How does the Secretary receive and respond to comments?
9.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
9.11 What are the Secretary's obligations in interstate situations?
9.12 How may a state simplify, consolidate, or substitute federally required state plans?
9.13 May the Secretary waive any provision of these regulations?

AUTHORITY: E.O. 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15887); and sec. 401 of the Intergovernmental Cooperation Act of 1968 as amended (31 U.S.C. 6506).

SOURCE: 48 FR 29232, June 24, 1983, unless otherwise noted.

§9.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§9.2 What definitions apply to these regulations?

Department means the U.S. Department of the Interior.

Order means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled ''Intergovernmental Review of Federal Programs.''

Secretary means the Secretary of the U.S. Department of the Interior or an official or employee of the Department acting for the Secretary under a delegation of authority.

State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§9.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the FEDERAL REGISTER a list of the Department's programs and activities that are subject to these regulations and a list of programs and activities that have existing consultation processes.

(b) With respect to programs and activities that a state chooses to cover, and that have existing consultation processes, the state must agree to adopt those existing processes.

§9.4 [Reserved]

§9.5 What is the Secretary's obligation with respect to Federal interagency coordination?

The Secretary, to the extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

§ 9.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the FEDERAL REGISTER in accordance with § 9.3 of this part for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

§ 9.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) For those programs and activities covered by a state process under § 9.6, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine views of state and local elected officials; and,

(2) Communicates with state and local elected officials, through the state process, as early in a program planning cycle as in reasonably feasible to explain specific plans and actions.

(b) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed federal financial assistance or direct federal development if:

(1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process.

This notice may be made by publication in the FEDERAL REGISTER or other appropriate means, which the Department in its discretion deems appropriate.

§ 9.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance and direct federal development?

(a) Except in unusual circumstances, the Secretary gives state processes or directly affected state, areawide, regional and local officials and entities:

(1) At least 30 days from the date established by the Secretary to comment on proposed federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Secretary to comment on proposed direct federal development or federal financial assistance other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

§ 9.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedures in § 9.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under § 9.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by a single point of contact, the Secretary follows the procedures of §9.10 of this part.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of §9.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Department by a commenting party.

§9.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of the section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§9.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance and direct Federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity;

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding pursuant to §9.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in §9.10 if a state process provides a state process recommendation to the Department through a single point of contact.

§9.12 How may a state simplify, consolidate, or substitute federally required state plans?

(a) As used in this section:

(1) *Simplify* means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) *Consolidate* means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) *Substitute* means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute Federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet Federal requirements.

§ 9.13 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

Subpart A—Introduction

Sec.
10.1 Purpose, applicability, and information collection.
10.2 Definitions

Subpart B—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony From Federal or Tribal Lands

10.3 Intentional archaeological excavations.
10.4 Inadvertent discoveries.
10.5 Consultation.
10.6 Custody.
10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved]

Subpart C—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections

10.8 Summaries.
10.9 Inventories.
10.10 Repatriation.
10.11 Disposition of culturally unidentifiable human remains.
10.12 Civil penalties.
10.13 Future applicability.

Subpart D—General

10.14 Lineal descent and cultural affiliation.
10.15 Limitations and remedies.
10.16 Review committee.
10.17 Dispute resolution.

AUTHORITY: 16 U.S.C. 470dd; 25 U.S.C. 9, 3001 *et seq.*

SOURCE: 60 FR 62158, Dec. 4, 1995, unless otherwise noted.

Subpart A—Introduction

§ 10.1 Purpose, applicability, and information collection.

(a) *Purpose.* These regulations carry out provisions of the Native American Graves Protection and Repatriation Act of 1990 (Pub.L. 101–601; 25 U.S.C. 3001–3013;104 Stat. 3048–3058). These regulations develop a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.

(b) *Applicability.* (1) These regulations pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:

(i) In Federal possession or control; or

(ii) In the possession or control of any institution or State or local government receiving Federal funds; or

(iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.

(2) These regulations apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States.

(3) Throughout this part are decision points which determine how this part applies in particular circumstances, e.g., a decision as to whether a museum ''controls'' human remains and cultural objects within the meaning of the regulations, or a decision as to whether an object is a ''human remain,'' ''funerary object,'' ''sacred object,'' or ''object of cultural patrimony'' within the meaning of the regulations. Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this

part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

(c) The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq*. and assigned control number 1024–0144. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 75 FR 12402, Mar. 15, 2010]

§ 10.2 Definitions.

In addition to the term *Act*, which means the Native American Graves Protection and Repatriation Act as described above, definitions used in these regulations are grouped in seven classes: Parties required to comply with these regulations; Parties with standing to make claims under these regulations; Parties responsible for implementing these regulations; Objects covered by these regulations; Cultural affiliation; Types of land covered by these regulations; and Procedures required by these regulations.

(a) *Who must comply with these regulations?* (1) *Federal agency* means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution as specified in section 2 (4) of the Act.

(2) *Federal agency official* means any individual authorized by delegation of authority within a Federal agency to perform the duties relating to these regulations.

(3) *Museum* means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.

(i) The term ''*possession*'' means having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency.

(ii) The term ''*control*'' means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency. Generally, a museum or Federal agency that has loaned human remains, funerary objects, sacred objects, or objects of cultural patrimony to another individual, museum, or Federal agency is considered to retain control of those human remains, funerary objects, sacred objects, or objects of cultural patrimony for purposes of these regulations.

(iii) The phrase ''*receives Federal funds*'' means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds for the purpose of these regulations.

(4) *Museum official* means the individual within a museum designated as being responsible for matters relating to these regulations.

(5) *Person* means an individual, partnership, corporation, trust, institution, association, or any other private entity, or, any official, employee, agent, department, or instrumentality of the United States, or of any Indian tribe or Native Hawaiian organization, or of any State or political subdivision

thereof that discovers or discovered human remains, funerary objects, sacred objects or objects of cultural patrimony on Federal or tribal lands after November 16, 1990.

(b) *Who has standing to make a claim under these regulations?* (1) *Lineal descendant* means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.

(2) [Reserved]

(3)(i) *Native Hawaiian organization* means any organization that:

(A) Serves and represents the interests of Native Hawaiians;

(B) Has as a primary and stated purpose the provision of services to Native Hawaiians; and

(C) Has expertise in Native Hawaiian affairs.

(ii) The term *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. Such organizations must include the Office of Hawaiian Affairs and *Hui Mālama I NāKūpuna 'O Hawai'i Nei*.

(4) *Indian tribe official* means the principal leader of an Indian tribe or Native Hawaiian organization or the individual officially designated by the governing body of an Indian tribe or Native Hawaiian organization or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to these regulations.

(c) *Who is responsible for carrying out these regulations?* (1) *Secretary* means the Secretary of the Interior or a designee.

(2) *Review Committee* means the advisory committee established pursuant to section 8 of the Act.

(3) *Manager, National NAGPRA Program* means the official of the Department of the Interior designated by the Secretary as responsible for administration of matters relating to this part. Communications to the Manager, National NAGPRA Program should be sent to the mailing address listed on the National NAGPRA Contact Information Web site, *http://www.nps.gov/nagpra/CONTACTS/INDEX.HTM*.

(d) *What objects are covered by these regulations?* The Act covers four types of Native American objects. The term *Native American* means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii.

(1) *Human remains* means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.

(2) *Funerary objects* means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains. The term *burial site* means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which, as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of gravesite. For purposes of completing the summary requirements in § 10.8 and the inventory requirements of § 10.9:

(i) *Associated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or

Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.

(ii) *Unassociated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.

(3) *Sacred objects* means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term *traditional* religious leader means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as:

(i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or

(ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices.

(4) *Objects of cultural patrimony* means items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole.

(e)(1) What is *cultural affiliation*? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion.

(2) What does *culturally unidentifiable* mean? Culturally unidentifiable refers to human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process.

(f) *What types of lands do the excavation and discovery provisions of these regulations apply to?* (1) *Federal lands* means any land other than tribal lands that are controlled or owned by the United States Government, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*). United States ''control,'' as used in this definition, refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person.

(2) *Tribal lands* means all lands which:

(i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in

trust or subject to a restriction on alienation by the United States; or

(ii) Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151; or

(iii) Are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Pub.L. 86–3; 73 Stat. 6).

(iv) Actions authorized or required under these regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution.

(g) *What procedures are required by these regulations?* (1) *Summary* means the written description of collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony required by § 10.8 of these regulations.

(2) *Inventory* means the item-by-item description of human remains and associated funerary objects.

(3) *Intentional excavation* means the planned archeological removal of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (c) of the Act.

(4) *Inadvertent discovery* means the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (d) of the Act.

(5) *Disposition* means the transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency under this part. This part establishes disposition procedures for several different situations:

(i) Custody of human remains, funerary objects, sacred objects, and objects of cultural patrimony excavated intentionally from, or discovered inadvertently on, Federal or tribal lands after November 16, 1990, is established under § 10.6.

(ii) Repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony in museum and Federal agency collections to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization is established under § 10.10.

(iii) Disposition of culturally unidentifiable human remains, with or without associated funerary objects, in museum or Federal agency collections is established under § 10.11.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 70 FR 57179, Sept. 30, 2005; 71 FR 16501, Apr. 3, 2006; 75 FR 12403, Mar. 15, 2010; 76 FR 39009, July 5, 2011; 78 FR 27082, May 9, 2013]

Subpart B—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony From Federal or Tribal Lands

§ 10.3 Intentional archaeological excavations.

(a) *General.* This section carries out section 3 (c) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are excavated intentionally from Federal or tribal lands after November 16, 1990.

(b) *Specific Requirements.* These regulations permit the intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands only if:

(1) The objects are excavated or removed following the requirements of the Archaeological Resources Protection Act (ARPA) (16 U.S.C. 470aa *et seq.*) and its implementing regulations. Regarding private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs (BIA) will serve as the issuing agency for any permits required under the Act. For BIA procedures for obtaining such permits, see 25 CFR part 262 or contact the Deputy Commissioner of Indian Affairs, Department of the Interior, Washington, DC 20240. Regarding lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86–3, the Department of Hawaiian Home Lands will serve as

the issuing agency for any permits required under the Act, with the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources acting in an advisory capacity for such issuance. Procedures and requirements for issuing permits will be consistent with those required by the ARPA and its implementing regulations;

(2) The objects are excavated after consultation with or, in the case of tribal lands, consent of, the appropriate Indian tribe or Native Hawaiian organization pursuant to § 10.5;

(3) The disposition of the objects is consistent with their custody as described in § 10.6; and

(4) Proof of the consultation or consent is shown to the Federal agency official or other agency official responsible for the issuance of the required permit.

(c) *Procedures*. (1) The Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated. The Federal agency official must also notify any present-day Indian tribe which aboriginally occupied the area of the planned activity and any other Indian tribes or Native Hawaiian organizations that the Federal agency official reasonably believes are likely to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony that are expected to be found. The notice must be in writing and describe the planned activity, its general location, the basis upon which it was determined that human remains, funerary objects, sacred objects, or objects of cultural patrimony may be excavated, and, the basis for determining likely custody pursuant to § 10.6. The notice must also propose a time and place for meetings or consultations to further consider the activity, the Federal agency's proposed treatment of any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any excavated human remains, funerary objects, sacred objects, or objects of cultural patrimony. Written notification should be followed up by telephone contact if there is no response in 15 days. Consultation must be conducted pursuant to § 10.5.

(2) Following consultation, the Federal agency official must complete a written plan of action (described in § 10.5(e)) and execute the actions called for in it.

(3) If the planned activity is also subject to review under section 106 of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*), the Federal agency official should coordinate consultation and any subsequent agreement for compliance conducted under that Act with the requirements of § 10.3 (c)(2) and § 10.5. Compliance with these regulations does not relieve Federal agency officials of requirements to comply with section 106 of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*).

(4) If an Indian tribe or Native Hawaiian organization receives notice of a planned activity or otherwise becomes aware of a planned activity that may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony on tribal lands, the Indian tribe or Native Hawaiian organization may take appropriate steps to:

(i) Ensure that the human remains, funerary objects, sacred objects, or objects of cultural patrimony are excavated or removed following § 10.3 (b), and

(ii) Make certain that the disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently as a result of the planned activity are carried out following § 10.6.

§ 10.4 Inadvertent discoveries.

(a) *General*. This section carries out section 3 (d) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of

cultural patrimony that are discovered inadvertently on Federal or tribal lands after November 16, 1990.

(b) *Discovery.* Any person who knows or has reason to know that he or she has discovered inadvertently human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal or tribal lands after November 16, 1990, must provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal agency official with respect to Federal lands, and, with respect to tribal lands, to the responsible Indian tribe official. The requirements of these regulations regarding inadvertent discoveries apply whether or not an inadvertent discovery is duly reported. If written confirmation is provided by certified mail, the return receipt constitutes evidence of the receipt of the written notification by the Federal agency official or Indian tribe official.

(c) *Ceasing activity.* If the inadvertent discovery occurred in connection with an on-going activity on Federal or tribal lands, the person, in addition to providing the notice described above, must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony discovered inadvertently.

(d) *Federal lands.* (1) As soon as possible, but no later than three (3) working days after receipt of the written confirmation of notification with respect to Federal lands described in §10.4 (b), the responsible Federal agency official must:

(i) Certify receipt of the notification;

(ii) Take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering;

(iii) Notify any known lineal descendants of a deceased Native American individual whose human remains and associated funerary objects were discovered of such discovery, and, with respect to a discovery of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, notify the Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with the cultural items, the Indian tribe or Native Hawaiian organization that aboriginally occupied the area, and any other Indian tribe or Native Hawaiian organization known to have a cultural relationship to the cultural items. This notification must be by telephone with written confirmation and must include information about the kinds of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, their condition, and the circumstances of their discovery;

(iv) Initiate consultation on the inadvertent discovery pursuant to §10.5;

(v) If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed, follow the requirements and procedures in §10.3 (b) of these regulations; and

(vi) Ensure that disposition of all inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony is carried out following §10.6.

(2) *Resumption of activity.* The activity that resulted in the inadvertent discovery may resume thirty (30) days after certification by the notified Federal agency of receipt of the written confirmation of notification of inadvertent discovery if the resumption of the activity is otherwise lawful. The activity may also resume, if otherwise lawful, at any time that a written, binding agreement is executed between the Federal agency and the affiliated Indian tribes or Native Hawaiian organizations that adopt a recovery plan for the excavation or removal of the human remains, funerary objects, sacred objects, or objects of cultural patrimony following §10.3 (b)(1) of these regulations. The disposition of all human remains, funerary objects, sacred objects, or objects of cultural patrimony must be carried out following §10.6.

(e) *Tribal lands.* (1) As soon as possible, but no later than three (3) working days after receipt of the written confirmation of notification with respect to Tribal lands described in §10.4

(b), the responsible Indian tribe official may:

(i) Certify receipt of the notification;

(ii) Take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering;

(iii) If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed, follow the requirements and procedures in § 10.3 (b) of these regulations; and

(iv) Ensure that disposition of all inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony is carried out following § 10.6.

(2) Resumption of Activity. The activity that resulted in the inadvertent discovery may resume if otherwise lawful after thirty (30) days of the certification of the receipt of notification by the Indian tribe or Native Hawaiian organization.

(f) *Federal agency officials.* Federal agency officials should coordinate their responsibilities under this section with their emergency discovery responsibilities under section 106 of the National Historical Preservation Act (16 U.S.C. 470 (f) *et seq.*), 36 CFR 800.11 or section 3 (a) of the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)). Compliance with these regulations does not relieve Federal agency officials of the requirement to comply with section 106 of the National Historical Preservation Act (16 U.S.C. 470 (f) *et seq.*), 36 CFR 800.11 or section 3 (a) of the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)).

(g) *Notification requirement in authorizations.* All Federal authorizations to carry out land use activities on Federal lands or tribal lands, including all leases and permits, must include a requirement for the holder of the authorization to notify the appropriate Federal or tribal official immediately upon the discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to § 10.4 (b) of these regulations.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 78 FR 27082, May 9, 2013]

§ 10.5 Consultation.

Consultation as part of the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands must be conducted in accordance with the following requirements.

(a) *Consulting parties.* Federal agency officials must consult with known lineal descendants and Indian tribe officials:

(1) From Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; and

(2) From Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony; and

(3) From Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(b) *Initiation of consultation.* (1) Upon receiving notice of, or otherwise becoming aware of, an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands, the responsible Federal agency official must, as part of the procedures described in §§ 10.3 and 10.4, take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to § 10.6 and § 10.14. The Federal agency official shall notify in writing:

(i) Any known lineal descendants of the deceased Native American individual whose human remains and associated funerary objects have been or

are likely to be excavated intentionally or discovered inadvertently; and

(ii) The Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently; and

(iii) The Indian tribes which aboriginally occupied the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and

(iv) The Indian tribes or Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently.

(2) The notice must propose a time and place for meetings or consultation to further consider the intentional excavation or inadvertent discovery, the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(3) The consultation must seek to identify traditional religious leaders who should also be consulted and seek to identify, where applicable, lineal descendants and Indian tribes or Native Hawaiian organizations affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(c) *Provision of information.* During the consultation process, as appropriate, the Federal agency official must provide the following information in writing to the lineal descendants and the officials of Indian tribes or Native Hawaiian organizations that are or are likely to be affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands:

(1) A list of all lineal descendants and Indian tribes or Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(2) An indication that additional documentation used to identify affiliation will be supplied upon request.

(d) *Requests for information.* During the consultation process, Federal agency officials must request, as appropriate, the following information from Indian tribes or Native Hawaiian organizations that are, or are likely to be, affiliated pursuant to §10.6 (a) with intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony:

(1) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(2) Names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process;

(3) Recommendations on how the consultation process should be conducted; and

(4) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(e) *Written plan of action.* Following consultation, the Federal agency official must prepare, approve, and sign a written plan of action. A copy of this plan of action must be provided to the lineal descendants, Indian tribes and Native Hawaiian organizations involved. Lineal descendants and Indian tribe official(s) may sign the written plan of action as appropriate. At a minimum, the plan of action must comply with §10.3 (b)(1) and document the following:

(1) The kinds of objects to be considered as cultural items as defined in §10.2 (b);

(2) The specific information used to determine custody pursuant to § 10.6;

(3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;

(4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;

(5) The kinds of analysis planned for each kind of object;

(6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian organization;

(8) The nature of reports to be prepared; and

(9) The planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following § 10.6.

(f) *Comprehensive agreements*. Whenever possible, Federal Agencies should enter into comprehensive agreements with Indian tribes or Native Hawaiian organizations that are affiliated with human remains, funerary objects, sacred objects, or objects of cultural patrimony and have claimed, or are likely to claim, those human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands. These agreements should address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Consultation should lead to the establishment of a process for effectively carrying out the requirements of these regulations regarding standard consultation procedures, the determination of custody consistent with procedures in this section and § 10.6, and the treatment and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony. The signed agreements, or the correspondence related to the effort to reach agreements, must constitute proof of consultation as required by these regulations.

(g) *Traditional religious leaders*. The Federal agency official must be cognizant that Indian tribe officials may need to confer with traditional religious leaders prior to making recommendations. Indian tribe officials are under no obligation to reveal the identity of traditional religious leaders.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 78 FR 27083, May 9, 2013]

§ 10.6 Custody.

(a) *Priority of custody*. This section carries out section 3 (a) of the Act, subject to the limitations of § 10.15, regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. For the purposes of this section, custody means ownership or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. Custody of these human remains, funerary objects, sacred objects, or objects of cultural patrimony is, with priority given in the order listed:

(1) In the case of human remains and associated funerary objects, in the lineal descendant of the deceased individual as determined pursuant to § 10.14 (b);

(2) When a lineal descendant of a deceased Native American individual cannot be ascertained with respect to the human remains and associated funerary objects, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony:

(i) In the Indian tribe on whose tribal land the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently;

(ii) In the Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the human

remains, funerary objects, sacred objects, or objects of cultural patrimony as determined pursuant to § 10.14 (c); or

(iii) In circumstances in which the cultural affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony cannot be ascertained and the objects were excavated intentionally or discovered inadvertently on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of an Indian tribe:

(A) In the Indian tribe aboriginally occupying the Federal land on which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently, or

(B) If a preponderance of the evidence shows that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the cultural items.

(b) Custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony and other provisions of the Act apply to all intentional excavations and inadvertent discoveries made after November 16, 1990, including those made before the effective date of these regulations.

(c) *Final notice, claims and disposition with respect to Federal lands.* Upon determination of the lineal descendant, Indian tribe, or Native Hawaiian organization that under these regulations appears to be entitled to custody of particular human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands, the responsible Federal agency official must, subject to the notice required herein and the limitations of § 10.15, transfer custody of the objects to the lineal descendant, Indian tribe, or Native Hawaiian organization following appropriate procedures, which must respect traditional customs and practices of the affiliated Indian tribes or Native Hawaiian organizations in each instance. Prior to any such disposition by a Federal agency official, the Federal agency official must publish general notices of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently and, if applicable, in a newspaper of general circulation in the area(s) in which affiliated Indian tribes or Native Hawaiian organizations members now reside. The notice must provide information as to the nature and affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony and solicit further claims to custody. The notice must be published at least two (2) times at least a week apart, and the transfer must not take place until at least thirty (30) days after the publication of the second notice to allow time for any additional claimants to come forward. If additional claimants do come forward and the Federal agency official cannot clearly determine which claimant is entitled to custody, the Federal agency must not transfer custody of the objects until such time as the proper recipient is determined pursuant to these regulations. The Federal agency official must send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Manager, National NAGPRA Program.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 71 FR 16501, Apr. 3, 2006; 78 FR 27083, May 9, 2013]

§ 10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved]

Subpart C—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections

§ 10.8 Summaries.

(a) *General.* This section carries out section 6 of the Act. Under section 6 of the Act, each museum or Federal agency that has possession or control over

collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony must complete a summary of these collections based upon available information held by the museum or Federal agency. The purpose of the summary is to provide information about the collections to lineal descendants and culturally affiliated Indian tribes or Native Hawaiian organizations that may wish to request repatriation of such objects. The summary serves in lieu of an object-by-object inventory of these collections, although, if an inventory is available, it may be substituted. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

(b) *Contents of summaries.* For each collection or portion of a collection, the summary must include: an estimate of the number of objects in the collection or portion of the collection; a description of the kinds of objects included; reference to the means, date(s), and location(s) in which the collection or portion of the collection was acquired, where readily ascertainable; and information relevant to identifying lineal descendants, if available, and cultural affiliation.

(c) *Completion.* Summaries must be completed not later than November 16, 1993.

(d) *Consultation.* (1) Consulting parties. Museum and Federal agency officials must consult with Indian tribe officials and traditional religious leaders:

(i) From whose tribal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated;

(ii) That are, or are likely to be, culturally affiliated with unassociated funerary objects, sacred objects, or objects of cultural patrimony; and

(iii) From whose aboriginal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated.

(2) Initiation of consultation. Museum and Federal agency officials must begin summary consultation no later than the completion of the summary process. Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue with the appropriate Indian tribe official.

(3) Provision of information. During summary consultation, museum and Federal agency officials must provide copies of the summary to lineal descendants, when known, and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the cultural items. A copy of the summary must also be provided to the Manager, National NAGPRA Program. Upon request by lineal descendants or Indian tribe officials, museum and Federal agency officials must provide lineal descendants, Indian tribe officials and traditional religious leaders with access to records, catalogues, relevant studies, or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of objects covered by the summary. Access to this information may be requested at any time and must be provided in a reasonable manner to be agreed upon by all parties. The Review committee also must be provided access to such materials.

(4) Requests for information. During the summary consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with their collections:

(i) Name and address of the Indian tribe official to act as representative in consultations related to particular objects;

(ii) Recommendations on how the consultation process should be conducted, including:

(A) Names and appropriate methods to contact any lineal descendants, if known, of individuals whose unassociated funerary objects or sacred objects are included in the summary;

(B) Names and appropriate methods to contact any traditional religious leaders that the Indian tribe or Native Hawaiian organization thinks should

be consulted regarding the collections; and

(iii) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers to be funerary objects, sacred objects, or objects of cultural patrimony.

(e) *Using summaries to determine affiliation.* Museum and Federal agency officials must document in the summary the following information. They must use this information in determining, as appropriate, the lineal descendants of a deceased Native American individual with whom unassociated funerary objects and sacred objects are affiliated, and the Indian tribes and Native Hawaiian organizations with which unassociated funerary objects, sacred objects, or objects of cultural patrimony are affiliated:

(1) Accession and catalogue entries;

(2) Information related to the acquisition of unassociated funerary object, sacred object, or object of cultural patrimony, including:

(i) The name of the person or organization from whom the object was obtained, if known;

(ii) The date of acquisition;

(iii) The place each object was acquired, i.e., name or number of site, county, State, and Federal agency administrative unit, if applicable; and

(iv) The means of acquisition, i.e., gift, purchase, or excavation;

(3) A description of each unassociated funerary object, sacred object, or object of cultural patrimony, including dimensions, materials, and photographic documentation, if appropriate, and the antiquity of such objects, if known;

(4) A summary of the evidence used to determine the cultural affiliation of the unassociated funerary objects, sacred objects, or objects of cultural patrimony pursuant to § 10.14 of these regulations.

(f) *Notification.* Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony to lineal descendants, culturally affiliated Indian tribes, or Native Hawaiian organizations as determined pursuant to § 10.10 (a), must not proceed prior to submission of a notice of intent to repatriate to the Manager, National NAGPRA Program, and publication of the notice of intent to repatriate in the FEDERAL REGISTER. The notice of intent to repatriate must describe the unassociated funerary objects, sacred objects, or objects of cultural patrimony being claimed in sufficient detail so as to enable other individuals, Indian tribes or Native Hawaiian organizations to determine their interest in the claimed objects. It must include information that identifies each claimed unassociated funerary object, sacred object, or object of cultural patrimony and the circumstances surrounding its acquisition, and describes the objects that are clearly identifiable as to cultural affiliation. It must also describe the objects that are not clearly identifiable as being culturally affiliated with a particular Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the objects, are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization. The Manager, National NAGPRA Program must publish the notice of intent to repatriate in the FEDERAL REGISTER. Repatriation may not occur until at least thirty (30) days after publication of the notice of intent to repatriate in the FEDERAL REGISTER.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 71 FR 16501, Apr. 3, 2006; 78 FR 27083, May 9, 2013]

§ 10.9 Inventories.

(a) *General.* This section carries out section 5 of the Act. Under section 5 of the Act, each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects must compile an inventory of such objects, and, to the fullest extent possible based on information possessed by the museum or Federal agency, must identify the geographical and cultural affiliation of each item. The purpose of the inventory is to facilitate repatriation by providing clear descriptions of human remains and associated funerary objects and establishing the cultural affiliation between these objects and present-day Indian tribes and Native Hawaiian organizations. Museums and Federal agencies are encouraged to

produce inventories first on those portions of their collections for which information is readily available or about which Indian tribes or Native Hawaiian organizations have expressed special interest. Early focus on these parts of collections will result in determinations that may serve as models for other inventories. Federal agencies must ensure that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

(b) *Consultation*—(1) *Consulting parties.* Museum and Federal agency officials must consult with:

(i) Lineal descendants of individuals whose remains and associated funerary objects are likely to be subject to the inventory provisions of these regulations; and

(ii) Indian tribe officials and traditional religious leaders:

(A) From whose tribal lands the human remains and associated funerary objects originated;

(B) That are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and

(C) From whose aboriginal lands the human remains and associated funerary objects originated.

(2) *Initiation of consultation.* Museum and Federal agency officials must begin inventory consultation as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted. Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue.

(3) *Provision of information.* During inventory consultation, museums and Federal agency officials must provide the following information in writing to lineal descendants, when known, and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains and associated funerary objects.

(i) A list of all Indian tribes and Native Hawaiian organizations that are, or have been, consulted regarding the particular human remains and associated funerary objects;

(ii) A general description of the conduct of the inventory;

(iii) The projected time frame for conducting the inventory; and

(iv) An indication that additional documentation used to identify cultural affiliation will be supplied upon request.

(4) *Requests for information.* During the inventory consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with their collections:

(i) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) Recommendations on how the consultation process should be conducted, including:

(A) Names and appropriate methods to contact any lineal descendants of individuals whose remains and associated funerary objects are or are likely to be included in the inventory; and

(B) Names and appropriate methods to contact traditional religious leaders who should be consulted regarding the human remains and associated funerary objects.

(iii) Kinds of objects that the Indian tribe or Native Hawaiian organization reasonably believes to have been made exclusively for burial purposes or to contain human remains of their ancestors.

(c) *Required information.* The following documentation must be included, if available, for all inventories completed by museum or Federal agency officials:

(1) Accession and catalogue entries, including the accession/catalogue entries of human remains with which funerary objects were associated;

(2) Information related to the acquisition of each object, including:

(i) The name of the person or organization from whom the object was obtained, if known;

(ii) The date of acquisition,

(iii) The place each object was acquired, i.e., name or number of site,

county, State, and Federal agency administrative unit, if applicable; and

(iv) The means of acquisition, i.e., gift, purchase, or excavation;

(3) A description of each set of human remains or associated funerary object, including dimensions, materials, and, if appropriate, photographic documentation, and the antiquity of such human remains or associated funerary objects, if known;

(4) A summary of the evidence, including the results of consultation, used to determine the cultural affiliation of the human remains and associated funerary objects pursuant to § 10.14 of these regulations.

(d) *Documents*. Two separate documents comprise the inventory:

(1) A listing of all human remains and associated funerary objects that are identified as being culturally affiliated with one or more present-day Indian tribes or Native Hawaiian organizations. The list must indicate for each item or set of items whether cultural affiliation is clearly determined or likely based upon the preponderance of the evidence; and

(2) A listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined.

(e) *Notification*. (1) If the inventory results in the identification or likely identification of the cultural affiliation of any particular human remains or associated funerary objects with one or more Indian tribes or Native Hawaiian organizations, the museum or Federal agency, not later than six (6) months after completion of the inventory, must send such Indian tribes or Native Hawaiian organizations the inventory of culturally affiliated human remains and associated funerary objects, including all information required under § 10.9 (c), and a notice of inventory completion that summarizes the results of the inventory.

(2) The notice of inventory completion must:

(i) Summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in claiming the inventoried items;

(ii) Identify each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition;

(iii) Describe the human remains or associated funerary objects that are clearly culturally affiliated with an Indian tribe or Native Hawaiian organization and identify the Indian tribe or Native Hawaiian organization;

(iv) Describe the human remains or associated funerary objects that are not clearly identifiable as culturally affiliated with an Indian tribe or Native Hawaiian organization, but that are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization given the totality of circumstances surrounding acquisition of the human remains or associated objects; and

(v) Describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that are subject to disposition under § 10.11.

(3) If the inventory results in a determination that the human remains are of an identifiable individual, the museum or Federal agency official must convey this information to the lineal descendant of the deceased individual, if known, and to the Indian tribe or Native Hawaiian organization of which the deceased individual was culturally affiliated.

(4) The notice of inventory completion and a copy of the inventory must also be sent to the Manager, National NAGPRA Program. These submissions should be sent in both printed hard copy and electronic formats. Information on the proper format for electronic submission and suggested alternatives for museums and Federal agencies unable to meet these requirements are available from the Manager, National NAGPRA Program.

(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice and inventory under paragraphs (e)(1) and (e)(2) of this section, a museum or Federal agency must supply additional available documentation.

(i) For purposes of this paragraph, ''documentation'' means a summary of existing museum or Federal agency

records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.

(ii) Documentation supplied under this paragraph by a Federal agency or to a Federal agency is considered a public record except as exempted under relevant laws, such as the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), Archaeological Resources Protection Act (16 U.S.C. 470hh), National Historic Preservation Act (16 U.S.C. 470w–3), and any other legal authority exempting the information from public disclosure.

(iii) Neither a request for documentation nor any other provisions of this part may be construed as authorizing either:

(A) The initiation of new scientific studies of the human remains and associated funerary objects; or

(B) Other means of acquiring or preserving additional scientific information from the remains and objects.

(6) This paragraph applies when a the museum or Federal agency official determines that it has possession of or control over human remains or associated funerary objects that cannot be identified as affiliated with a lineal descendent, Indian tribe, or Native Hawaiian organization The museum or Federal agency must provide the Manager, National NAGPRA Program notice of its determination and a list of the culturally unidentifiable human remains and any associated funerary objects. The Manager, National NAGPRA Program must make this information available to members of the Review Committee. Culturally unidentifiable human remains, with or without associated funerary objects, are subject to disposition under § 10.11.

(7) The Manager, National NAGPRA Program must publish notices of inventory completion received from museums and Federal agencies in the FEDERAL REGISTER.

(f) *Completion*. Inventories must be completed not later than November 16, 1995. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements from the Secretary. An indication of good faith efforts must include, but not necessarily be limited to, the initiation of active consultation and documentation regarding the collections and the development of a written plan to carry out the inventory process. Minimum components of an inventory plan are: a definition of the steps required; the position titles of the persons responsible for each step; a schedule for carrying out the plan; and a proposal to obtain the requisite funding.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997; 71 FR 16501, Apr. 3, 2006; 75 FR 12403, Mar. 15, 2010]

§ 10.10 Repatriation.

(a) *Unassociated funerary objects, sacred objects, and objects of cultural patrimony*—(1) *Criteria*. Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, a museum or Federal agency must expeditiously repatriate unassociated funerary objects, sacred objects, or objects of cultural patrimony if all the following criteria are met:

(i) The object meets the definitions established in § 10.2 (d)(2)(ii), (d)(3), or (d)(4); and

(ii) The cultural affiliation of the object is established:

(A) Through the summary, consultation, and notification procedures in § 10.14 of these regulations; or

(B) By presentation of a preponderance of the evidence by a requesting Indian tribe or Native Hawaiian organization under section 7(a)(4) of the Act; and

(iii) The known lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency does not have a right of possession to the objects as defined in § 10.10 (a)(2); and

(iv) The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession as defined below; and

(v) None of the specific exceptions listed in § 10.10 (c) apply.

(2) *Right of possession.* For purposes of this section, ''right of possession'' means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object, or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession to that object.

(3) *Notification.* Repatriation must take place within ninety (90) days of receipt of a written request for repatriation that satisfies the requirements of paragraph (a)(1) of this section from a lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization, provided that the repatriation may not occur until at least thirty (30) days after publication of the notice of intent to repatriate in the FEDERAL REGISTER as described in § 10.8.

(b) *Human remains and associated funerary objects*—(1) *Criteria.* Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, a museum and Federal agency must expeditiously repatriate human remains and associated funerary objects if all of the following criteria are met:

(i) The human remains or associated funerary object meets the definitions established in § 10.2 (d)(1) or (d)(2)(i); and

(ii) The affiliation of the deceased individual to known lineal descendant, present day Indian tribe, or Native Hawaiian organization:

(A) Has been reasonably traced through the procedures outlined in § 10.9 and § 10.14 of these regulations; or

(B) Has been shown by a preponderance of the evidence presented by a requesting Indian tribe or Native Hawaiian organization under section 7(a)(4) of the Act; and

(iii) None of the specific exceptions listed in § 10.10 (c) apply.

(2) *Notification.* Repatriation must take place within ninety (90) days of receipt of a written request for repatriation that satisfies the requirements of § 10.10 (b)(1) from the culturally affiliated Indian tribe or Native Hawaiian organization, provided that the repatriation may not occur until at least thirty (30) days after publication of the notice of inventory completion in the FEDERAL REGISTER as described in § 10.9.

(c) *Exceptions.* These requirements for repatriation do not apply to:

(1) Circumstances where human remains, funerary objects, sacred objects, or objects of cultural patrimony are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States. Human remains, funerary objects, sacred objects, or objects of cultural patrimony in such circumstances must be returned no later than ninety (90) days after completion of the study; or

(2) Circumstances where there are multiple requests for repatriation of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony and the museum or Federal agency, after complying with this part, cannot determine by a preponderance of the evidence which competing requesting party is the most appropriate claimant. In these circumstances, the museum or Federal agency may retain the cultural items in question until the competing requesting parties agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to these regulations or by a court of competent jurisdiction; or

(3) Circumstances where a court of competent jurisdiction has determined that the repatriation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony in the possession or control of a museum would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution, in which event the custody of the objects must be as provided under otherwise applicable law. Nothing in these regulations must prevent a museum or Federal agency, where otherwise so authorized, or a lineal descendant, Indian tribe, or Native Hawaiian organization, from expressly relinquishing title to, right of possession of, or control over any human remains, funerary objects,

sacred objects, or objects of cultural patrimony.

(4) Circumstances where the repatriation is not consistent with other repatriation limitations identified in § 10.15 of these regulations.

(d) *Place and manner of repatriation.* The repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the museum or Federal agency in consultation with the requesting lineal descendants, or culturally affiliated Indian tribe or Native Hawaiian organization, as appropriate, to determine the place and manner of the repatriation.

(e) The museum official or Federal agency official must inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.

(f) *Record of repatriation.* (1) Museums and Federal agencies must adopt internal procedures adequate to permanently document the content and recipients of all repatriations.

(2) The museum official or Federal agency official, at the request of the Indian tribe official, may take such steps as are considered necessary pursuant to otherwise applicable law, to ensure that information of a particularly sensitive nature is not made available to the general public.

(g) *Culturally unidentifiable human remains.* If the cultural affiliation of human remains cannot be established under this part, the human remains must be considered culturally unidentifiable.

(1) Museum and Federal agency officials must report the inventory information regarding these human remains in their holdings to the Manager, National NAGPRA Program, who will send this information to the Review Committee.

(2) The Review Committee will:

(i) Compile an inventory of culturally unidentifiable human remains in the possession or control of each museum and Federal agency; and

(ii) Recommend to the Secretary specific actions for disposition of any human remains not already addressed in § 10.11.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41294, Aug. 1, 1997; 71 FR 16501, Apr. 3, 2006; 78 FR 27083, May 9, 2013]

§ 10.11 Disposition of culturally unidentifiable human remains.

(a) *General.* This section implements section 8(c)(5) of the Act and applies to human remains previously determined to be Native American under § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

(b) *Consultation.* (1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:

(i) Within 90 days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or

(ii) If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.

(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:

(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed; and

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation for purposes of this section may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by a treaty, Act of Congress, or Executive Order.

(3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:

(i) A list of all Indian tribes and Native Hawaiian organizations that are

being, or have been, consulted regarding the particular human remains and associated funerary objects;

(ii) A list of any Indian groups that are not federally-recognized and are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.

(4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:

(i) The name and address of the Indian tribal official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;

(iii) Temporal and geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;

(iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or Indian groups that are not federally-recognized who should be included in the consultations; and

(v) A schedule and process for consultation.

(5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.

(6) If consultation results in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains and associated funerary objects must be completed as required by §10.9(e) and §10.10(b).

(c) *Disposition of culturally unidentifiable human remains and associated funerary objects.* (1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at §10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or

(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:

(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or

(ii) Upon receiving a recommendation from the Secretary or authorized representative:

(A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or

(B) Reinter culturally unidentifiable human remains according to State or other law.

(3) The Secretary may make a recommendation under paragraph (c)(2)(ii) of this section only with proof from the museum or Federal agency that it has consulted with all Indian tribes and Native Hawaiian organizations listed in paragraph (c)(1) of this section and that none of them has objected to the proposed transfer of control.

(4) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains.

The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.

(5) The exceptions listed at § 10.10(c) apply to the requirements in paragraph (c)(1) of this section.

(6) Any disposition of human remains excavated or removed from Indian lands as defined by the Archaeological Resources Protection Act (16 U.S.C. 470bb (4)) must also comply with the provisions of that statute and its implementing regulations.

(d) *Notification*. (1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) of this section may not occur until at least 30 days after publication of a notice of inventory completion in the FEDERAL REGISTER as described in § 10.9.

(2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:

(i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice's publication; and

(ii) Make the revised Review Committee inventory accessible to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

(e) *Disputes*. Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects should do so through informal negotiations to achieve a fair resolution. The Review Committee may facilitate informal resolution of any disputes that are not resolved by good faith negotiation under § 10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

[75 FR 12403, Mar. 15, 2010, as amended at 78 FR 27083, May 9, 2013]

§ 10.12 Civil penalties.

(a) *The Secretary's authority to assess civil penalties*. The Secretary is authorized by section 9 of the Act to assess civil penalties on any museum that fails to comply with the requirements of the Act. The Assistant Secretary for Fish and Wildlife and Parks may act on behalf of the Secretary.

(b) *Definition of ''failure to comply.''* (1) Your museum has failed to comply with the requirements of the Act if it:

(i) After November 16, 1990, sells or otherwise transfers human remains, funerary objects, sacred objects, or objects of cultural patrimony contrary to provisions of the Act, including, but not limited to, an unlawful sale or transfer to any individual or institution that is not required to comply with the Act; or

(ii) After November 16, 1993, or a date specified under § 10.13, whichever deadline is applicable, has not completed summaries as required by the Act; or

(iii) After November 16, 1995, or a date specified under § 10.13, or the date specified in an extension issued by the Secretary, whichever deadline is applicable, has not completed inventories as required by the Act; or

(iv) After May 16, 1996, or 6 months after completion of an inventory under an extension issued by the Secretary, or 6 months after the date specified for completion of an inventory under § 10.13, whichever deadline is applicable, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or

(v) Refuses, absent any of the exemptions specified in § 10.10(c) of this part, to repatriate human remains, funerary object, sacred object, or object of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian; or

(vi) Repatriates a human remains, funerary object, sacred object, or object of cultural patrimony before publishing the required notice in the FEDERAL REGISTER;

(vii) Does not consult with lineal descendants, Indian tribe officials, and traditional religious leaders as required; or

(viii) Does not inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with

pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.

(ix) Upon receipt of a claim consistent with § 10.11(c)(1), refuses to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession.

(2) Each instance of failure to comply will constitute a separate violation.

(c) *How to notify the Secretary of a failure to comply*. Any person may file an allegation of failure to comply. Allegations are to be sent to the NAGPRA Civil Penalties Coordinator, National NAGPRA Program, at the mailing address listed on the National NAGPRA Contact Information Web site, *http://www.nps.gov/nagpra/CONTACTS/INDEX.HTM*. The allegation must be in writing, and should:

(1) Identify each provision of the Act with which there has been a failure to comply by a museum;

(2) Include facts supporting the allegation;

(3) Include evidence that the museum has possession or control of Native American cultural items; and

(4) Include evidence that the museum receives Federal funds.

(d) *Steps the Secretary may take upon receiving such an allegation*. (1) The Secretary must acknowledge receipt of the allegation in writing.

(2) The Secretary also may:

(i) Compile and review information relevant to the alleged failure to comply. The Secretary may request additional information, such as declarations and relevant papers, books, and documents, from the person making the allegation, the museum, and other parties;

(ii) Identify the specific provisions of the Act with which you have allegedly failed to comply; and

(iii) Determine if the institution of a civil penalty action is an appropriate remedy.

(3) The Secretary must provide written notification to the person making the allegation and the museum if the review of the evidence does not show a failure comply.

(e) *How the Secretary notifies you of a failure to comply*. (1) If the allegations are verified, the Secretary must serve you with a written notice of failure to comply either by personal delivery or by registered or certified mail (return receipt requested). The notice of failure to comply must include:

(i) A concise statement of the facts believed to show a failure to comply;

(ii) A specific reference to the provisions of the Act and/or these regulations with which you allegedly have not complied; and

(iii) Notification of the right to request an informal discussion with the Secretary or a designee, to request a hearing, as provided below, or to await the Secretary's notice of assessment. The notice of failure to comply also must inform you of your right to seek judicial review of any final administrative decision assessing a civil penalty.

(2) With your consent, the Secretary may combine the notice of failure to comply with the notice of assessment described in paragraph (h) of this section.

(3) The Secretary also must send a copy of the notice of failure to comply to:

(i) Any lineal descendant of a known Native American individual whose human remains, funerary objects, or sacred objects are in question; and

(ii) Any Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony in question.

(f) *Actions you may take upon receipt of a notice of failure to comply*. If you are served with a notice of failure to comply, you may:

(1) Seek informal discussions with the Secretary;

(2) Request a hearing. Figure 1 outlines the civil penalty hearing and appeal process. Where the Secretary has issued a combined notice of failure to comply and notice of assessment, the hearing and appeal processes will also be combined.

(3) Take no action and await the Secretary's notice of assessment.

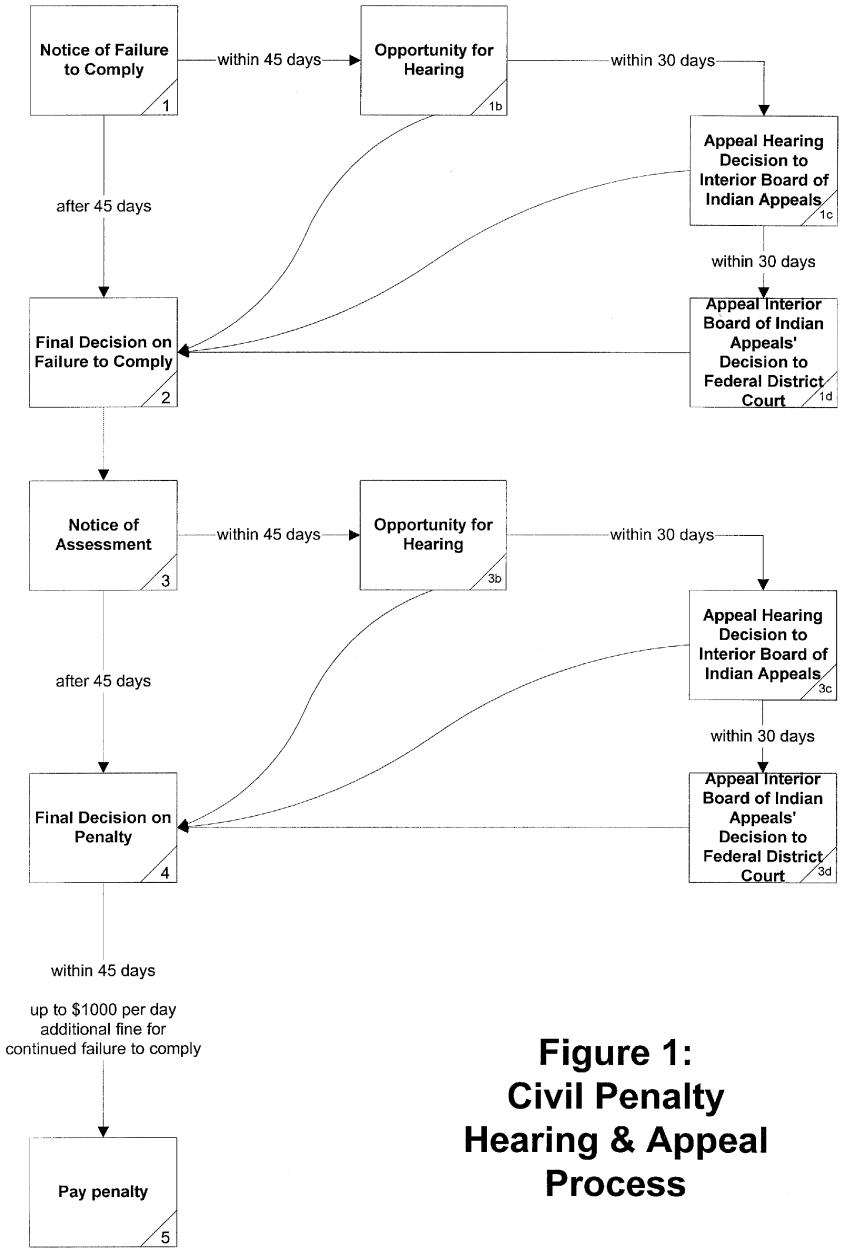

Figure 1: Civil Penalty Hearing & Appeal Process

(g) *How the Secretary determines the penalty amount.* (1) The penalty amount must be determined on the record;

(2) The penalty amount must be .25 percent of your museum's annual budget, or $5,000, whichever is less, and such additional sum as the Secretary may

determine is appropriate after taking into account:

(i) The archeological, historical, or commercial value of the human remains, funerary object, sacred object, or object of cultural patrimony involved; and

(ii) The damages suffered, both economic and non-economic, by the aggrieved party or parties including, but not limited to, expenditures by the aggrieved party to compel the museum to comply with the Act; and

(iii) The number of violations that have occurred at your museum.

(3) An additional penalty of up to $1,000 per day after the date that the final administrative decision takes effect may be assessed if your museum continues to violate the Act.

(4) The Secretary may reduce the penalty amount if there is:

(i) A determination that you did not willfully fail to comply; or

(ii) An agreement by you to mitigate the violation, including, but not limited to, payment of restitution to the aggrieved party or parties; or

(iii) A determination that you are unable to pay, provided that this factor may not apply if you have been previously found to have failed to comply with these regulations; or,

(iv) A determination that the penalty constitutes excessive punishment under the circumstances.

(h) *How the Secretary assesses the penalty*. (1) The Secretary considers all available information, including information provided during the process of assessing civil penalties or furnished upon further request by the Secretary.

(2) The Secretary may assess the civil penalty upon completing informal discussions or when the period for requesting a hearing expires, whichever is later.

(3) The Secretary notifies you in writing of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The notice of assessment includes:

(i) The basis for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(ii) Notification of the right to request a hearing, including the procedures to follow, and to seek judicial review of any final administrative decision that assesses a civil penalty.

(i) *Actions that you may take upon receipt of a notice of assessment*. If you are served with a notice of assessment, you may do one of the following:

(1) Accept in writing or by payment of the proposed penalty, or any mitigation or remission offered in the notice of assessment. If you accept the proposed penalty, mitigation, or remission, you waive the right to request a hearing.

(2) Seek informal discussions with the Secretary.

(3) *File a petition for relief*. You may file a petition for relief within 45 calendar days of receiving the notice of assessment. A petition for relief is to be sent to the NAGPRA Civil Penalties Coordinator, National NAGPRA Program, at the mailing address listed on the National NAGRPA Contact Information Web site, *http://www.nps.gov/nagpra/CONTACTS/INDEX.HTM*. Your petition may ask the Secretary not to assess a penalty or to reduce the penalty amount. Your petition must:

(i) Be in writing and signed by an official authorized to sign such documents; and

(ii) Fully explain the legal or factual basis for the requested relief.

(4) Request a hearing. Figure 1 outlines the civil penalty hearing and appeal process.

(i) In addition to the documentation required in paragraph (g) of this section, your request must include a copy of the notice of assessment and must identify the basis for challenging the assessment.

(ii) In this hearing, the amount of the civil penalty assessed must be determined in accordance with paragraph (h) of this section, and will not be limited to the amount assessed by the Secretary or any offer of mitigation or remission made by the Secretary.

(j) *How you request a hearing*. You may file a written, dated request for a hearing on a notice of failure to comply or notice of assessment with the Departmental Cases Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 405 South Main Street, Suite 400, Salt Lake City, UT 84111. You must also serve a copy of

the request on the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested) at the address specified in the notice.

(1) Your request for a hearing must:

(i) Include a copy of the notice of failure to comply or the notice of assessment;

(ii) State the relief sought;

(iii) State the basis for challenging the facts used as the basis for determining the failure to comply or fixing the assessment; and

(iv) State your preferred place and date for a hearing.

(2) Your failure to file a written request for a hearing within 45 days of the date of service of a notice of failure to comply or notice of assessment waives your right to a hearing.

(3) Upon receiving a request for a hearing, the Hearings Division assigns an administrative law judge to the case, gives notice of assignment promptly to the parties, and files all pleadings, papers, and other documents in the proceeding directly with the administrative law judge, with copies served on the opposing party.

(4) Subject to the provisions of 43 CFR 1.3, you may appear by representative or by counsel, and may participate fully in the proceedings. If you fail to appear and the administrative law judge determines that this failure is without good cause, the administrative law judge may, in his/her discretion, determine that this failure waives your right to a hearing and consent to the making of a decision on the record.

(5) Departmental counsel, designated by the Solicitor of the Department of the Interior, represents the Secretary in the proceedings. Upon notice to the Secretary of the assignment of an administrative law judge to the case, this counsel must enter his/her appearance on behalf of the Secretary and must file all petitions and correspondence exchanges by the Secretary and the respondent that become part of the hearing record. Thereafter, you must serve all documents for the Secretary on his/her counsel.

(6) *Hearing Administration*. Hearings must take place following the procedures in 43 CFR Part 4, Subparts A and B.

(i) The administrative law judge has all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions under 5 U.S.C. 554–557.

(ii) The transcript of testimony; the exhibits; and all papers, documents, and requests filed in the proceedings constitute the record for decision. The administrative law judge renders a written decision upon the record, which sets forth his/her findings of fact and conclusions of law, and the reasons and basis for them.

(iii) Unless you file a notice of appeal described in these regulations, the administrative law judge's decision constitutes the final administrative determination of the Secretary in the matter and takes effect 30 calendar days from this decision.

(k) *How you appeal a decision*. (1) Either you or the Secretary may appeal the decision of an administrative law judge by filing a Notice of Appeal. Send your Notice of Appeal to the Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 800 North Quincy Street, Suite 300, Arlington, VA 22203, within 30 calendar days of the date of the administrative law judge's decision. The notice must be accompanied by proof of service on the administrative law judge and the opposing party.

(2) To the extent they are not inconsistent with these regulations, the provisions of the Department of the Interior Hearings and Appeals Procedures in 43 CFR part 4, subpart D, apply to such appeal proceedings. The appeal board's decision on the appeal must be in writing and takes effect as the final administrative determination of the Secretary on the date that the decision is rendered, unless otherwise specified in the decision.

(3) You may obtain copies of decisions in civil penalty proceedings instituted under the Act by sending a request to the Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 800 North Quincy Street, Suite 300, Arlington, VA 22203. Fees for this service are established by the director of that office.

(l) *The final administrative decision.* (1) When you have been served with a notice of assessment and have accepted the penalty as provided in these regulations, the notice constitutes the final administrative decision.

(2) When you have been served with a notice of assessment and have not filed a timely request for a hearing as provided in these regulations, the notice of assessment constitutes the final administrative decision.

(3) When you have been served with a notice of assessment and have filed a timely request for a hearing as provided in these regulations, the decision resulting from the hearing or any applicable administrative appeal from it constitutes the final administrative decision.

(m) *How you pay the penalty.* (1) If you are assessed a civil penalty, you have 45 calendar days from the date of issuance of the final administrative decision to make full payment of the penalty assessed to the Secretary, unless you have filed a timely request for appeal with a court of competent jurisdiction.

(2) If you fail to pay the penalty, the Secretary may request the Attorney General of the United States to collect the penalty by instituting a civil action in the U.S. District Court for the district in which your museum is located. In these actions, the validity and amount of the penalty is not subject to review by the court.

(3) Assessing a penalty under this section is not a waiver by the Secretary of the right to pursue other available legal or administrative remedies.

[68 FR 16360, Apr. 3, 2003, as amended at 70 FR 57179, Sept. 30, 2005; 75 FR 12404, Mar. 15, 2010; 75 FR 64670, Oct. 20, 2010; 78 FR 27083, May 9, 2013]

§ 10.13 Future applicability.

(a) General. This section sets forth the applicability of the Act to museums and Federal agencies after expiration of the statutory deadlines for completion of summaries and inventories.

(b) New holdings or collections.

(1) Any museum or Federal agency that, after completion of the summaries and inventories as required by §§ 10.8 and 10.9, receives a new holding or collection or locates a previously unreported current holding or collection that may include human remains, funerary objects, sacred objects or objects of cultural patrimony, must:

(i) Within 6 months of receiving a new holding or collection or locating a previously unreported current holding or collection, or within 6 months of the effective date of this rule, whichever is later, provide a summary of the holding or collection as required by § 10.8 to any Indian tribe or Native Hawaiian organization that is, or is likely to be, affiliated with the collection; and

(ii) Within 2 years of receiving a new holding or collection or locating a previously unreported current holding or collection, or within 2 years of the effective date of this rule, whichever is later, prepare, in consultation with any affiliated Indian tribe or Native Hawaiian organization, an inventory as required by § 10.9 of these regulations. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements under § 10.9(f).

(2) Additional pieces or fragments of previously repatriated human remains, funerary objects, sacred objects and objects of cultural patrimony may be returned to the appropriate Indian tribe or Native Hawaiian organization without publication of a notice in the FEDERAL REGISTER, as otherwise required under §§ 10.8(f) and 10.9(e), if they do not change the number or cultural affiliation of the cultural items listed in the previous notice.

(3) A museum or Federal agency that receives a new holding or collection for which a summary or inventory was previously prepared, as required by §§ 10.8 or 10.9, may rely upon the previously prepared documents. The receiving museum or Federal agency must provide a copy of the previously prepared summary or inventory to all affiliated Indian tribes or Native Hawaiian organizations, along with notification that the receiving museum or Federal agency has assumed possession and control of the holding or collection.

(c) New Indian tribes.

(1) Any museum or Federal agency that has possession or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are, or are likely to be, culturally affiliated with a newly Federally recognized Native American tribe, must:

(i) Within 6 months of the publication in the FEDERAL REGISTER of the Native American group's placement on the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, or within 6 months of the effective date of this rule, whichever is later, provide a summary of the collection as required by § 10.8 to that Indian tribe; and

(ii) Within 2 years of the publication in the FEDERAL REGISTER of the Native American group's placement on the list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, or within 2 years of the effective date of this rule, whichever is later, prepare, in consultation with the newly recognized culturally affiliated Indian tribe an inventory as required by § 10.9. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements under § 10.9(f).

(2) The list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs is published in the FEDERAL REGISTER as required by section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1 (2006)).

(d) New Federal funds. Any museum that has possession or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds for the first time after expiration of the statutory deadlines for completion of summaries and inventories must:

(1) Within 3 years of the date of receipt of Federal funds, or within 3 years of the effective date of this rule, whichever is later, provide a summary of the collection as required by § 10.8 to any Indian tribe or Native Hawaiian organization that is, or is likely to be, culturally affiliated with the collections; and

(2) Within 5 years of the date of receipt of Federal funds, or within 5 years of the effective date of this rule, whichever is later, prepare, in consultation with any affiliated Indian tribe or Native Hawaiian organization, an inventory as required by § 10.9.

(e) Amendment of previous decision.

(1) Any museum or Federal agency that has previously published a notice in the FEDERAL REGISTER regarding the intent to repatriate unassociated funerary objects, sacred objects, and objects of cultural patrimony under § 10.8(f), or the completion of an inventory of Native American human remains and associated funerary objects as required by § 10.9(e), must publish an amendment to that notice if, based on subsequent information, the museum or Federal agency revises its decision in a way that changes the number or cultural affiliation of the cultural items listed.

(2) Repatriation may not occur until at least 30 days after publication of the amended notice in the FEDERAL REGISTER.

(f) All actions taken as required by this section must also comply with all other relevant sections of 43 CFR 10.

[72 FR 13189, Mar. 21, 2007, as amended at 78 FR 27084, May 9, 2013]

Subpart D—General

§ 10.14 Lineal descent and cultural affiliation.

(a) *General.* This section identifies procedures for determining lineal descent and cultural affiliation between present-day individuals and Indian tribes or Native Hawaiian organizations and human remains, funerary objects, sacred objects, or objects of cultural patrimony in museum or Federal agency collections or excavated intentionally or discovered inadvertently from Federal lands. They may also be used by Indian tribes and Native Hawaiian organizations with respect to tribal lands.

(b) *Criteria for determining lineal descent.* A lineal descendant is an individual tracing his or her ancestry directly and without interruption by

means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendence to a known Native American individual whose remains, funerary objects, or sacred objects are being requested under these regulations. This standard requires that the earlier person be identified as an individual whose descendants can be traced.

(c) *Criteria for determining cultural affiliation.* Cultural affiliation means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and the human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group:

(1) Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under these regulations and the Act; and

(2) Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:

(i) Establish the identity and cultural characteristics of the earlier group,

(ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or

(iii) Establish the existence of the earlier group as a biologically distinct population; and

(3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.

(d) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(e) *Evidence.* Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(f) *Standard of proof.* Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian tribe or Native Hawaiian organization to human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.

§ 10.15 Limitations and remedies.

(a) *Failure to claim prior to repatriation.* (1) Any person who fails to make a timely claim prior to the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is deemed to have irrevocably waived any right to claim such items pursuant to these regulations or the Act. For these purposes, a ''timely claim'' means the filing of a written claim with a responsible museum or Federal agency official prior to the time the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony at issue are duly repatriated or disposed of to a claimant by a museum or Federal agency pursuant to these regulations.

(2) If there is more than one (1) claimant, the human remains, funerary object, sacred object, or objects of cultural patrimony may be held by the responsible museum or Federal agency or person in possession thereof pending resolution of the claim. Any person

who is in custody of such human remains, funerary objects, sacred objects, or objects of cultural patrimony and does not claim entitlement to them must place the objects in the possession of the responsible museum or Federal agency for retention until the question of custody is resolved.

(b) *Failure to claim where no repatriation or disposition has occurred.* [Reserved]

(c) *Exhaustion of remedies.* (1) A person's administrative remedies are exhausted only when the person has filed a written claim with the responsible Federal agency and the claim has been duly denied under this part. This paragraph applies to both:

(i) Human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony subject to Subpart B of this part; and

(ii) Federal collections subject to Subpart C of this part.

(2) A Federal agency's final denial of a repatriation request constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704). As used in this paragraph, ''repatriation request'' means the request of a lineal descendant, Indian tribe, or Native Hawaiian organization for repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under the Act and this part.

(d) *Savings provisions.* Nothing in these regulations can be construed to:

(1) Limit the authority of any museum or Federal agency to:

(i) Return or repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian tribes, Native Hawaiian organizations, or individuals; and

(ii) Enter into any other agreement with the consent of the culturally affiliated Indian tribe or Native Hawaiian organization as to the disposition of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(2) Delay actions on repatriation requests that were pending on November 16, 1990;

(3) Deny or otherwise affect access to court;

(4) Limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) Limit the application of any State or Federal law pertaining to theft of stolen property.

[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41294, Aug. 1, 1997; 75 FR 12405, Mar. 15, 2010; 78 FR 27084, May 9, 2013]

§ 10.16 Review committee.

(a) *General.* The Review Committee will advise Congress and the Secretary on matters relating to these regulations and the Act, including, but not limited to, monitoring the performance of museums and Federal agencies in carrying out their responsibilities, facilitating and making recommendations on the resolution of disputes as described further in § 10.17, and compiling a record of culturally unidentifiable human remains that are in the possession or control of museums and Federal agencies and recommending actions for their disposition.

(b) *Recommendations.* Any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act.

§ 10.17 Dispute resolution.

(a) *Formal and informal resolutions.* Any person who wishes to contest actions taken by museums, Federal agencies, Indian tribes, or Native Hawaiian organizations with respect to the repatriation and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may aid in this regard as described below. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

(b) *Review Committee Role.* The Review Committee may facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions

may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act.

PART 11—NATURAL RESOURCE DAMAGE ASSESSMENTS

Subpart A—Introduction

Sec.
11.10 Scope and applicability.
11.11 Purpose.
11.12 Biennial review of regulations.
11.13 Overview.
11.14 Definitions.
11.15 What damages may a trustee recover?
11.16 [Reserved]
11.17 Compliance with applicable laws and standards.
11.18 Incorporation by reference.
11.19 [Reserved]

Subpart B—Preassessment Phase

11.20 Notification and detection.
11.21 Emergency restorations.
11.22 Sampling of potentially injured natural resources.
11.23 Preassessment screen—general.
11.24 Preassessment screen—information on the site.
11.25 Preassessment screen—preliminary identification of resources potentially at risk.

Subpart C—Assessment Plan Phase

11.30 What does the authorized official do if an assessment is warranted?
11.31 What does the Assessment Plan include?
11.32 How does the authorized official develop the Assessment Plan?
11.33 What types of assessment procedures are available?
11.34 When may the authorized official use a type A procedure?
11.35 How does the authorized official decide whether to use type A or type B procedures?
11.36 May the authorized official use both type A and type B procedures for the same release?
11.37 Must the authorized official confirm exposure before implementing the Assessment Plan?
11.38 Assessment Plan—preliminary estimate of damages.

Subpart D—Type A Procedures

11.40 What are type A procedures?
11.41 What data must the authorized official supply?
11.42 How does the authorized official apply the NRDAM/CME or NRDAM/GLE?
11.43 Can interested parties review the results of the preliminary application?
11.44 What does the authorized official do after the close of the comment period?

Subpart E—Type B Procedures

11.60 Type B assessments—general.
11.61 Injury determination phase—general.
11.62 Injury determination phase—injury definition.
11.63 Injury determination phase—pathway determination.
11.64 Injury determination phase—testing and sampling methods.
11.70 Quantification phase—general.
11.71 Quantification phase—service reduction quantification.
11.72 Quantification phase—baseline services determination.
11.73 Quantification phase—resource recoverability analysis.
11.80 Damage determination phase—general.
11.81 Damage determination phase—restoration and compensation determination plan.
11.82 Damage determination phase—alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.
11.83 Damage determination phase—use value methodologies.
11.84 Damage determination phase—implementation guidance.

Subpart F—Post-Assessment Phase

11.90 What documentation must the authorized official prepare after completing the assessment?
11.91 How does the authorized official seek recovery of the assessed damages from the potentially responsible party?
11.92 Post-assessment phase—restoration account.
11.93 Post-assessment phase—restoration plan.

APPENDIX I TO PART 11—METHODS FOR ESTIMATING THE AREAS OF GROUND WATER AND SURFACE WATER EXPOSURE DURING THE PREASSESSMENT SCREEN
APPENDIX II TO PART 11—FORMAT FOR DATA INPUTS AND MODIFICATIONS TO THE NRDAM/CME
APPENDIX III TO PART 11—FORMAT FOR DATA INPUTS AND MODIFICATIONS TO THE NRDAM/GLE

AUTHORITY: 42 U.S.C. 9651(c), as amended.

SOURCE: 51 FR 27725, Aug. 1, 1986, unless otherwise noted.

Subpart A—Introduction

§ 11.10 Scope and applicability.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. 9601 *et seq.*, and the Clean Water Act (CWA), 33 U.S.C. 1251–1376, provide that natural resource trustees may assess damages to natural resources resulting from a discharge of oil or a release of a hazardous substance covered under CERCLA or the CWA and may seek to recover those damages. This part supplements the procedures established under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, for the identification, investigation, study, and response to a discharge of oil or release of a hazardous substance, and it provides a procedure by which a natural resource trustee can determine compensation for injuries to natural resources that have not been nor are expected to be addressed by response actions conducted pursuant to the NCP. The assessment procedures set forth in this part are not mandatory. However, they must be used by Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 107(f)(2)(C) of CERCLA. This part applies to assessments initiated after the effective date of this final rule.

[53 FR 5171, Feb. 22, 1988]

§ 11.11 Purpose.

The purpose of this part is to provide standardized and cost-effective procedures for assessing natural resource damages. The results of an assessment performed by a Federal or State natural resource trustee according to these procedures shall be accorded the evidentiary status of a rebuttable presumption as provided in section 107(f)(2)(C) of CERCLA.

[53 FR 5171, Feb. 22, 1988]

§ 11.12 Biennial review of regulations.

The regulations and procedures included within this part shall be reviewed and revised as appropriate 2 years from the effective date of these rules and every second anniversary thereafter.

§ 11.13 Overview.

(a) *Purpose.* The process established by this part uses a planned and phased approach to the assessment of natural resource damages. This approach is designed to ensure that all procedures used in an assessment, performed pursuant to this part, are appropriate, necessary, and sufficient to assess damages for injuries to natural resources.

(b) *Preassessment phase.* Subpart B of this part, the preassessment phase, provides for notification, coordination, and emergency activities, if necessary, and includes the preassessment screen. The preassessment screen is meant to be a rapid review of readily available information that allows the authorized official to make an early decision on whether a natural resource damage assessment can and should be performed.

(c) *Assessment Plan phase.* If the authorized official decides to perform an assessment, an Assessment Plan, as described in subpart C of this part, is prepared. The Assessment Plan ensures that the assessment is performed in a planned and systematic manner and that the methodologies chosen demonstrate reasonable cost.

(d) *Type A assessments.* The simplified assessments provided for in section 301(c)(2)(A) of CERCLA are performed using the standard procedures specified in subpart D of this part.

(e) *Type B assessments.* Subpart E of this part covers the assessments provided for in section 301(c)(2)(B) of CERCLA. The process for implementing type B assessments has been divided into the following three phases.

(1) *Injury Determination phase.* The purpose of this phase is to establish that one or more natural resources have been injured as a result of the discharge of oil or release of a hazardous substance. The sections of subpart E comprising the Injury Determination phase include definitions of injury, guidance on determining pathways, and testing and sampling methods. These methods are to be used to determine both the pathways through which resources have been exposed to oil or a

hazardous substance and the nature of the injury.

(2) *Quantification phase.* The purpose of this phase is to establish the extent of the injury to the resource in terms of the loss of services that the injured resource would have provided had the discharge or release not occurred. The sections of subpart E comprising the Quantification phase include methods for establishing baseline conditions, estimating recovery periods, and measuring the degree of service reduction stemming from an injury to a natural resource.

(3) *Damage Determination phase.* The purpose of this phase is to establish the appropriate compensation expressed as a dollar amount for the injuries established in the Injury Determination phase and measured in the Quantification phase. The sections of subpart E of this part comprising the Damage Determination phase include guidance on acceptable cost estimating and valuation methodologies for determining compensation based on the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, plus, at the discretion of the authorized official, compensable value, as defined in § 11.83(c) of this part.

(f) *Post-assessment phase.* Subpart F of this part includes requirements to be met after the assessment is complete. The Report of Assessment contains the results of the assessment, and documents that the assessment has been carried out according to this rule. Other post-assessment requirements delineate the manner in which the demand for a sum certain shall be presented to a responsible party and the steps to be taken when sums are awarded as damages.

[51 FR 27725, Aug. 1, 1986, as amended at 59 FR 14281, Mar. 25, 1994]

§ 11.14 Definitions.

Terms not defined in this section have the meaning given by CERCLA or the CWA. As used in this part, the phrase:

(a) *Acquisition of the equivalent* or *replacement* means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(b) *Air* or *air resources* means those naturally occurring constituents of the atmosphere, including those gases essential for human, plant, and animal life.

(c) *Assessment area* means the area or areas within which natural resources have been affected directly or indirectly by the discharge of oil or release of a hazardous substance and that serves as the geographic basis for the injury assessment.

(d) *Authorized official* means the Federal or State official to whom is delegated the authority to act on behalf of the Federal or State agency designated as trustee, or an official designated by an Indian tribe, pursuant to section 126(d) of CERCLA, to perform a natural resource damage assessment. As used in this part, authorized official is equivalent to the phrase ''authorized official or lead authorized official,'' as appropriate.

(e) *Baseline* means the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred.

(f) *Biological resources* means those natural resources referred to in section 101(16) of CERCLA as fish and wildlife and other biota. Fish and wildlife include marine and freshwater aquatic and terrestrial species; game, nongame, and commercial species; and threatened, endangered, and State sensitive species. Other biota encompass shellfish, terrestrial and aquatic plants, and other living organisms not otherwise listed in this definition.

(g) *CERCLA* means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, as amended.

(h) *Committed use* means either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected.

(i) *Control area* or *control resource* means an area or resource unaffected by the discharge of oil or release of the hazardous substance under investigation. A control area or resource is selected for its comparability to the assessment area or resource and may be used for establishing the baseline condition and for comparison to injured resources.

(j) *Cost-effective* or *cost-effectiveness* means that when two or more activities provide the same or a similar level of benefits, the least costly activity providing that level of benefits will be selected.

(k) *CWA* means the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*, also referred to as the Federal Water Pollution Control Act.

(l) *Damages* means the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA.

(m) *Destruction* means the total and irreversible loss of a natural resource.

(n) *Discharge* means a discharge of oil as defined in section 311(a)(2) of the CWA, as amended, and includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil.

(o) *Drinking water supply* means any raw or finished water source that is or may be used by a public water system, as defined in the SDWA, or as drinking water by one or more individuals.

(p) *EPA* means the U.S. Environmental Protection Agency.

(q) *Exposed to* or *exposure of* means that all or part of a natural resource is, or has been, in physical contact with oil or a hazardous substance, or with media containing oil or a hazardous substance.

(r) *Fund* means the Hazardous Substance Superfund established by section 517 of the Superfund Amendments and Reauthorization Act of 1986.

(s) *Geologic resources* means those elements of the Earth's crust such as soils, sediments, rocks, and minerals, including petroleum and natural gas, that are not included in the definitions of ground and surface water resources.

(t) *Ground water resources* means water in a saturated zone or stratum beneath the surface of land or water and the rocks or sediments through which ground water moves. It includes ground water resources that meet the definition of drinking water supplies.

(u) *Hazardous substance* means a hazardous substance as defined in section 101(14) of CERCLA.

(v) *Injury* means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance, or exposure to a product of reactions resulting from the discharge of oil or release of a hazardous substance. As used in this part, injury encompasses the phrases ''injury,'' ''destruction,'' and ''loss.'' Injury definitions applicable to specific resources are provided in § 11.62 of this part.

(w) *Lead authorized official* means a Federal or State official authorized to act on behalf of all affected Federal or State agencies acting as trustees where there are multiple agencies, or an official designated by multiple tribes where there are multiple tribes, affected because of coexisting or contiguous natural resources or concurrent jurisdiction.

(x) *Loss* means a measurable adverse reduction of a chemical or physical quality or viability of a natural resource.

(y) *Natural Contingency Plan* or *NCP* means the National Oil and Hazardous Substances Contingency Plan and revisions promulgated by EPA, pursuant to section 105 of CERCLA and codified in 40 CFR part 300.

(z) *Natural resources* or *resources* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976), any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

These natural resources have been categorized into the following five groups: Surface water resources, ground water resources, air resources, geologic resources, and biological resources.

(aa) *Natural resource damage assessment* or *assessment* means the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to determine damages for injuries to natural resources as set forth in this part.

(bb) *Oil* means oil as defined in section 311(a)(1) of the CWA, as amended, of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

(cc) *On-Scene Coordinator* or *OSC* means the On-Scene Coordinator as defined in the NCP.

(dd) *Pathway* means the route or medium through which oil or a hazardous substance is or was transported from the source of the discharge or release to the injured resource.

(ee) *Reasonable cost* means the amount that may be recovered for the cost of performing a damage assessment. Costs are reasonable when: the Injury Determination, Quantification, and Damage Determination phases have a well-defined relationship to one another and are coordinated; the anticipated increment of extra benefits in terms of the precision or accuracy of estimates obtained by using a more costly injury, quantification, or damage determination methodology are greater than the anticipated increment of extra costs of that methodology; and the anticipated cost of the assessment is expected to be less than the anticipated damage amount determined in the Injury, Quantification, and Damage Determination phases.

(ff) *Rebuttable presumption* means the procedural device provided by section 107(f)(2)(C) of CERCLA describing the evidentiary weight that must be given to any determination or assessment of damages in any administrative or judicial proceeding under CERCLA or section 311 of the CWA made by a Federal or State natural resource trustee in accordance with the rule provided in this part.

(gg) *Recovery period* means either the longest length of time required to return the services of the injured resource to their baseline condition, or a lesser period of time selected by the authorized official and documented in the Assessment Plan.

(hh) *Release* means a release of a hazardous substance as defined in section 101(22) of CERCLA.

(ii) *Replacement* or *acquisition of the equivalent* means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(jj) *Response* means remove, removal, remedy, or remedial actions as those phrases are defined in sections 101(23) and 101(24) of CERCLA.

(kk) *Responsible party or parties* and *potentially responsible party or parties* means a person or persons described in or potentially described in one or more of the categories set forth in section 107(a) of CERCLA.

(ll) *Restoration* or *rehabilitation* means actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided, when such actions are in addition to response actions completed or anticipated, and when such actions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(mm) *SDWA* means the Safe Drinking Water Act, 42 U.S.C. 300f–300j–10.

(nn) *Services* means the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource.

(oo) *Site* means an area or location, for purposes of response actions under the NCP, at which oil or hazardous substances have been stored, treated, discharged, released, disposed, placed, or otherwise came to be located.

(pp) *Surface water resources* means the waters of the United States, including the sediments suspended in water or lying on the bank, bed, or shoreline

and sediments in or transported through coastal and marine areas. This term does not include ground water or water or sediments in ponds, lakes, or reservoirs designed for waste treatment under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901–6987 or the CWA, and applicable regulations.

(qq) *Technical feasibility* or *technically feasible* means that the technology and management skills necessary to implement an Assessment Plan or Restoration and Compensation Determination Plan are well known and that each element of the plan has a reasonable chance of successful completion in an acceptable period of time.

(rr) *Trustee* or *natural resource trustee* means any Federal natural resources management agency designated in the NCP and any State agency designated by the Governor of each State, pursuant to section 107(f)(2)(B) of CERCLA, that may prosecute claims for damages under section 107(f) or 111(b) of CERCLA; or an Indian tribe, that may commence an action under section 126(d) of CERCLA.

(ss) *Type A assessment* means standard procedures for simplified assessments requiring minimal field observation to determine damages as specified in section 301(c)(2)(A) of CERCLA.

(tt) *Type B assessment* means alternative methodologies for conducting assessments in individual cases to determine the type and extent of short- and long-term injury and damages, as specified in section 301(c)(2)(B) of CERCLA.

(uu) *Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5171, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994]

§ 11.15 What damages may a trustee recover?

(a) In an action filed pursuant to section 107(f) or 126(d) of CERCLA, or sections 311(f) (4) and (5) of the CWA, a natural resource trustee who has performed an assessment in accordance with this rule may recover:

(1) Damages as determined in accordance with this part and calculated based on injuries occurring from the onset of the release through the recovery period, less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries that are reasonably unavoidable as a result of response actions taken or anticipated;

(2) The costs of emergency restoration efforts under § 11.21 of this part;

(3) The reasonable and necessary costs of the assessment, to include:

(i) The cost of performing the preassessment and Assessment Plan phases and the methodologies provided in subpart D or E of this part; and

(ii) Administrative costs and expenses necessary for, and incidental to, the assessment, assessment planning, and restoration, rehabilitation, replacement, and/or acquisition of equivalent resources planning, and any restoration, rehabilitation, replacement, and/or acquisition of equivalent resources undertaken; and

(4) Interest on the amounts recoverable as set forth in section 107(a) of CERCLA. The rate of interest on the outstanding amount of the claim shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954. Such interest shall accrue from the later of: The date payment of a specified amount is demanded in writing, or the date of the expenditure concerned;

(b) The determination of the damage amount shall consider any applicable limitations provided for in section 107(c) of CERCLA.

(c) Where an assessment determines that there is, in fact, no injury, as defined in § 11.62 of this part, the natural resource trustee may not recover assessment costs.

(d) There shall be no double recovery under this rule for damages or for assessment costs, that is, damages or assessment costs may only be recovered once, for the same discharge or release

and natural resource, as set forth in section 107(f)(1) of CERCLA.

(e) Actions for damages and assessment costs shall comply with the statute of limitations set forth in section 113(g), or, where applicable, section 126(d) of CERCLA.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9095, Mar. 20, 1987; 53 FR 5172, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994; 61 FR 20609, May 7, 1996]

§ 11.16 [Reserved]

§ 11.17 Compliance with applicable laws and standards.

(a) *Worker health and safety*. All worker health and safety considerations specified in the NCP shall be observed, except that requirements applying to response actions shall be taken to apply to the assessment process.

(b) *Resource protection*. Before taking any actions under this part, particularly before taking samples or making determinations of restoration or replacement, compliance is required with any applicable statutory consultation or review requirements, such as the Endangered Species Act; the Migratory Bird Treaty Act; the Marine Protection, Research, and Sanctuaries Act; and the Marine Mammal Protection Act, that may govern the taking of samples or in other ways restrict alternative management actions.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5172, Feb. 22, 1988]

§ 11.18 Incorporation by reference.

(a) The following publications or portions of publications are incorporated by reference:

(1) Part II only (Fish-Kill Counting Guidelines) of ''Monetary Values of Freshwater Fish and Fish-Kill Guidelines,'' American Fisheries Society Special Publication Number 13, 1982; available for purchase from the American Fisheries Society, 5410 Grosvenor Lane, Bethesda, MD 20814, ph: (301) 897–8616. Reference is made to this publication in §§ 11.62(f)(4)(i)(B) and 11.71(l)(5)(iii)(A) of this part.

(2) Appendix 1 (Travel Cost Method), Appendix 2 (Contingent Valuation (Survey) Methods), and Appendix 3 (Unit Day Value Method) only of Section VIII of ''National Economic Development (NED) Benefit Evaluation Procedures'' (Procedures), which is Chapter II of *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies*, U.S. Department of the Interior, Water Resources Council, Washington, DC, 1984, DOI/WRC/–84/01; available for purchase from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161; PB No. 84–199–405; ph: (703) 487–4650. Reference is made to this publication in § 11.83(a)(3) of this part.

(3) ''Uniform Appraisal Standards for Federal Land Acquisition'' (Uniform Appraisal Standards), Interagency Land Acquisition Conference, Washington, DC, 1973; available for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; Stock Number 052–059–00002–0; ph: (202) 783–3238. Reference is made to this publication in § 11.83(c)(2)(i) of this part.

(4) The CERCLA Type A Natural Resource Damage Assessment Model for Coastal and Marine Environments Technical Documentation, Volumes I-VI, dated April 1996, including Revision I dated October 1997, and Revision II dated December 1999, prepared for the U.S. Department of the Interior by Applied Science Associates, Inc., A.T. Kearney, Inc., and Hagler Bailly Consulting, Inc. (NRDAM/CME technical document). Interested parties may obtain a copy of this document from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161; PB96–501788; ph: (703) 487–4650. Sections 11.34 (a), (b), and (e), 11.35(a), 11.36(b), 11.40(a), and 11.42(a), and Appendix II refer to this document.

(5) The CERCLA Type A Natural Resource Damage Assessment Model for Great Lakes Environments Technical Documentation, Volumes I-IV, dated April 1996, including Revision I dated October 1997, and Revision II dated December 1999, prepared for the U.S. Department of the Interior by Applied Science Associates, Inc., and Hagler Bailly Consulting, Inc. (NRDAM/GLE technical document). Interested parties may obtain a copy of this document from the National Technical Information Service, 5285 Port Royal Road,

Springfield, VA 22161; PB96–501770; ph: (703) 487–4650. Sections 11.34 (a), (b), and (e), 11.35(a), 11.36(b), 11.40(a), and 11.42(a), and Appendix III refer to this document.

(b) The publications or portions of publications listed in paragraph (a) of this section are available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a). These materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the FEDERAL REGISTER.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 9772, Mar. 25, 1988; 61 FR 20609, May 7, 1996; 62 FR 60459, Nov. 10, 1997; 65 FR 6014, Feb. 8, 2000; 69 FR 18803, Apr. 9, 2004]

§ 11.19 [Reserved]

Subpart B—Preassessment Phase

§ 11.20 Notification and detection.

(a) *Notification*. (1) Section 104(b)(2) of CERCLA requires prompt notification of Federal and State natural resource trustees of potential damages to natural resources under investigation and requires coordination of the assessments, investigations, and planning under section 104 of CERCLA with such trustees.

(2) The NCP provides for the OSC or lead agency to notify the natural resource trustee when natural resources have been or are likely to be injured by a discharge of oil or a release of a hazardous substance being investigated under the NCP.

(3) Natural resource trustees, upon such notification described in paragraphs (a) (1) and (2) of this section, shall take such actions, as may be consistent with the NCP.

(b) *Previously unreported discharges or releases*. If a natural resource trustee identifies or is informed of apparent injuries to natural resources that appear to be a result of a previously unidentified or unreported discharge of oil or release of a hazardous substance, he should first make reasonable efforts to determine whether a discharge or release has taken place. In the case of a discharge or release not yet reported or being investigated under the NCP, the natural resource trustee shall report that discharge or release to the appropriate authority as designated in the NCP.

(c) *Identification of co-trustees*. The natural resource trustee should assist the OSC or lead agency, as needed, in identifying other natural resource trustees whose resources may be affected as a result of shared responsibility for the resources and who should be notified.

[53 FR 5172, Feb. 22, 1988]

§ 11.21 Emergency restorations.

(a) *Reporting requirements and definition*. (1) In the event of a natural resource emergency, the natural resource trustee shall contact the National Response Center (800/424–8802) to report the actual or threatened discharge or release and to request that an immediate response action be taken.

(2) An emergency is any situation related to a discharge or release requiring immediate action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources, or a situation in which there is a similar need for emergency action.

(b) *Emergency actions*. If no immediate response actions are taken at the site of the discharge or release by the EPA or the U.S. Coast Guard within the time that the natural resource trustee determines is reasonably necessary, or if such actions are insufficient, the natural resource trustee should exercise any existing authority he may have to take on-site response actions. The natural resource trustee shall determine whether the potentially responsible party, if his identity is known, is taking or will take any response action. If no on-site response actions are taken, the natural resource trustee may undertake limited off-site restoration action consistent with its

existing authority to the extent necessary to prevent or reduce the immediate migration of the oil or hazardous substance onto or into the resource for which the Federal or State agency or Indian tribe may assert trusteeship.

(c) *Limitations on emergency actions.* The natural resource trustee may undertake only those actions necessary to abate the emergency situation, consistent with its existing authority. The normal procedures provided in this part must be followed before any additional restoration actions other than those necessary to abate the emergency situation are undertaken. The burden of proving that emergency restoration was required and that restoration costs were reasonable and necessary based on information available at the time rests with the natural resource trustee.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5173, Feb. 22, 1988]

§ 11.22 Sampling of potentially injured natural resources.

(a) *General limitations.* Until the authorized official has made the determination required in § 11.23 of this part to proceed with an assessment, field sampling of natural resources should be limited to the conditions identified in this section. All sampling and field work shall be subject to the provisions of § 11.17 of this part concerning safety and applicability of resource protection statutes.

(b) *Early sampling and data collection.* Field samples may be collected or site visits may be made before completing the preassessment screen to preserve data and materials that are likely to be lost if not collected at that time and that will be necessary to the natural resource damage assessment. Field sampling and data collection at this stage should be coordinated with the lead agency under the NCP to minimize duplication of sampling and data collection efforts. Such field sampling and data collection should be limited to:

(1) Samples necessary to preserve perishable materials considered likely to have been affected by, and contain evidence of, the oil or hazardous substance. These samples generally will be biological materials that are either dead or visibly injured and that evidence suggests have been injured by oil or a hazardous substance;

(2) Samples of other ephemeral conditions or material, such as surface water or soil containing or likely to contain oil or a hazardous substance, where those samples may be necessary for identification and for measurement of concentrations, and where necessary samples may be lost because of factors such as dilution, movement, decomposition, or leaching if not taken immediately; and

(3) Counts of dead or visibly injured organisms, which may not be possible to take if delayed because of factors such as decomposition, scavengers, or water movement. Such counts shall be subject to the provisions of § 11.71(l)(5)(iii) of this part.

§ 11.23 Preassessment screen—general.

(a) *Requirement.* Before beginning any assessment efforts under this part, except as provided for under the emergency restoration provisions of § 11.21 of this part, the authorized official shall complete a preassessment screen and make a determination as to whether an assessment under this part shall be carried out.

(b) *Purpose.* The purpose of the preassessment screen is to provide a rapid review of readily available information that focuses on resources for which the Federal or State agency or Indian tribe may assert trusteeship under section 107(f) or section 126(d) of CERCLA. This review should ensure that there is a reasonable probability of making a successful claim before monies and efforts are expended in carrying out an assessment.

(c) *Determination.* When the authorized official has decided to proceed with an assessment under this part, the authorized official shall document the decision in terms of the criteria provided in paragraph (e) of this section in a Preassessment Screen Determination. This Preassessment Screen Determination shall be included in the Report of Assessment described in § 11.90 of this part.

(d) *Content.* The preassessment screen shall be conducted in accordance with the guidance provided in this section and in § 11.24—Preassessment screen—information on the site and § 11.25—

Preassessment screen—preliminary identification of resources potentially at risk, of this part.

(e) *Criteria.* Based on information gathered pursuant to the preassessment screen and on information gathered pursuant to the NCP, the authorized official shall make a preliminary determination that all of the following criteria are met before proceeding with an assessment:

(1) A discharge of oil or a release of a hazardous substance has occurred;

(2) Natural resources for which the Federal or State agency or Indian tribe may assert trusteeship under CERCLA have been or are likely to have been adversely affected by the discharge or release;

(3) The quantity and concentration of the discharged oil or released hazardous substance is sufficient to potentially cause injury, as that term is used in this part, to those natural resources;

(4) Data sufficient to pursue an assessment are readily available or likely to be obtained at reasonable cost; and

(5) Response actions, if any, carried out or planned do not or will not sufficiently remedy the injury to natural resources without further action.

(f) *Coordination.* (1) In a situation where response activity is planned or underway at a particular site, assessment activity shall be coordinated with the lead agency consistent with the NCP.

(2) Whenever, as part of a response action under the NCP, a preliminary assessment or an OSC Report is to be, or has been, prepared for the site, the authorized official should consult with the lead agency under the NCP, as necessary, and to the extent possible use information or materials gathered for the preliminary assessment or OSC Report, unless doing so would unnecessarily delay the preassessment screen.

(3) Where a preliminary assessment or an OSC Report does not exist or does not contain the information described in this section, that additional information may be gathered.

(4) If the natural resource trustee already has a process similar to the preassessment screen, and the requirements of the preassessment screen can be satisfied by that process, the processes may be combined to avoid duplication.

(g) *Preassessment phase costs.* (1) The following categories of reasonable and necessary costs may be incurred in the preassessment phase of the damage assessment:

(i) Release detection and identification costs;

(ii) Trustee identification and notification costs;

(iii) Potentially injured resource identification costs;

(iv) Initial sampling, data collection, and evaluation costs;

(v) Site characterization and preassessment screen costs; and

(vi) Any other preassessment costs for activities authorized by §§ 11.20 through 11.25 of this part.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred by the authorized official for, and specifically allocable to, site-specific efforts taken during the preassessment phase for assessment of damages to natural resources for which the agency or Indian tribe is acting as trustee. Such costs shall be supported by appropriate records and documentation and shall not reflect regular activities performed by the agency or Indian tribe in management of the natural resource. Activities undertaken as part of the preassessment phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5173, Feb. 22, 1988]

§ 11.24 Preassessment screen—information on the site.

(a) *Information on the site and on the discharge or release.* The authorized official shall obtain and review readily available information concerning:

(1) The time, quantity, duration, and frequency of the discharge or release;

(2) The name of the hazardous substance, as provided for in Table 302.4—List of Hazardous Substances and Reportable Quantities, 40 CFR 302.4;

(3) The history of the current and past use of the site identified as the source of the discharge of oil or release of a hazardous substance;

(4) Relevant operations occurring at or near the site;

(5) Additional oil or hazardous substances potentially discharged or released from the site; and

(6) Potentially responsible parties.

(b) *Damages excluded from liability under CERCLA.* (1) The authorized official shall determine whether the damages:

(i) Resulting from the discharge or release were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement or other comparable environmental analysis, that the decision to grant the permit or license authorizes such commitment of natural resources, and that the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe; or

(ii) And the release of a hazardous substance from which such damages resulted have occurred wholly before enactment of CERCLA; or

(iii) Resulted from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135–135k; or

(iv) Resulted from any other federally permitted release, as defined in section 101(10) of CERCLA; or

(v) Resulting from the release or threatened release of recycled oil from a service station dealer described in section 107(a)(3) or (4) of CERCLA if such recycled oil is not mixed with any other hazardous substance and is stored, treated, transported or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act and other applicable authorities.

(2) An assessment under this part shall not be continued for potential injuries meeting one or more of the criteria described in paragraph (b)(1) of this section, which are exceptions to liability provided in sections 107(f), (i), and (j) and 114(c) of CERCLA.

(c) *Damages excluded from liability under the CWA.* (1) The authorized official shall determine whether the discharge meets one or more of the exclusions provided in section 311 (a)(2) or (b)(3) of the CWA.

(2) An assessment under this part shall not be continued for potential injuries from discharges meeting one or more of the CWA exclusions provided for in paragraph (c)(1) of this section.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9095, Mar. 20, 1987; 53 FR 5173, Feb. 22, 1988]

§ 11.25 Preassessment screen—preliminary identification of resources potentially at risk.

(a) *Preliminary identification of pathways.* (1) The authorized official shall make a preliminary identification of potential exposure pathways to facilitate identification of resources at risk.

(2) Factors to be considered in this determination should include, as appropriate, the circumstances of the discharge or release, the characteristics of the terrain or body of water involved, weather conditions, and the known physical, chemical, and toxicological properties of the oil or hazardous substance.

(3) Pathways to be considered shall include, as appropriate, direct contact, surface water, ground water, air, food chains, and particulate movement.

(b) *Exposed areas.* An estimate of areas where exposure or effects may have occurred or are likely to occur shall be made. This estimate shall identify:

(1) Areas where it has been or can be observed that the oil or hazardous substance has spread;

(2) Areas to which the oil or hazardous substance has likely spread through pathways; and

(3) Areas of indirect effect, where no oil or hazardous substance has spread, but where biological populations may have been affected as a result of animals moving into or through the site.

(c) *Exposed water estimates.* The area of ground water or surface water that may be or has been exposed may be estimated by using the methods described in appendix I of this part.

(d) *Estimates of concentrations.* An estimate of the concentrations of oil or a hazardous substance in those areas of potential exposure shall be developed.

(e) *Potentially affected resources.* (1) Based upon the estimate of the areas of potential exposure, and the estimate of concentrations in those areas, the authorized official shall identify natural resources for which he may assert trusteeship that are potentially affected by the discharge or release. This preliminary identification should be used to direct further investigations, but it is not intended to preclude consideration of other resources later found to be affected.

(2) A preliminary estimate, based on information readily available from resource managers, of the services of the resources identified as potentially affected shall be made. This estimate will be used in determining which resources to consider if further assessment efforts are justified.

Subpart C—Assessment Plan Phase

§ 11.30 What does the authorized official do if an assessment is warranted?

(a) If the authorized official determines during the Preassessment Phase that an assessment is warranted, the authorized official must develop a plan for the assessment of natural resource damages.

(b) *Purpose.* The purpose of the Assessment Plan is to ensure that the assessment is performed in a planned and systematic manner and that methodologies selected from subpart D for a type A assessment or from subpart E for a type B assessment, including the Injury Determination, Quantification, and Damage Determination phases, can be conducted at a reasonable cost, as that phrase is used in this part.

(c) *Assessment Plan phase costs.* (1) The following categories of reasonable and necessary costs may be incurred in the Assessment Plan phase of the damage assessment:

(i) Methodology identification and screening costs;

(ii) Potentially responsible party notification costs;

(iii) Public participation costs;

(iv) Exposure confirmation analysis costs;

(v) Preliminary estimate of damages costs; and

(vi) Any other Assessment Plan costs for activities authorized by §§ 11.30 through 11.38.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site specific efforts taken in the development of an Assessment Plan for a resource for which the agency or Indian tribe is acting as trustee. Such costs shall be supported by appropriate records and documentation, and shall not reflect regular activities performed by the agency or tribe in management of the natural resource. Activities undertaken as part of the Assessment Plan phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5174, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994; 61 FR 20609, May 7, 1996]

§ 11.31 What does the Assessment Plan include?

(a) *General content and level of detail.* (1) The Assessment Plan must identify and document the use of all of the type A and/or type B procedures that will be performed.

(2) The Assessment Plan shall be of sufficient detail to serve as a means of evaluating whether the approach used for assessing the damage is likely to be cost-effective and meets the definition of reasonable cost, as those terms are used in this part. The Assessment Plan shall include descriptions of the natural resources and the geographical areas involved. The Assessment Plan shall also include a statement of the authority for asserting trusteeship, or co-trusteeship, for those natural resources considered within the Assessment Plan. The authorized official's statement of the authority for asserting trusteeship shall not have the force and effect of a rebuttable presumption under § 11.91(c) of this part. In addition, for type B assessments, the Assessment Plan shall include the sampling locations within those geographical areas, sample and survey design, numbers and types of samples to be collected, analyses to be performed, preliminary determination of the recovery period, and

other such information required to perform the selected methodologies.

(3) The Assessment Plan shall contain information sufficient to demonstrate that the damage assessment has been coordinated to the extent possible with any remedial investigation feasibility study or other investigation performed pursuant to the NCP.

(4) The Assessment Plan shall contain procedures and schedules for sharing data, split samples, and results of analyses, when requested, with any identified potentially responsible parties and other natural resource trustees.

(b) *Identification of types of assessment procedures.* The Assessment Plan must identify whether the authorized official plans to use a type A procedure, type B procedures, or a combination. Sections 11.34 through 11.36 contain standards for deciding which types of procedures to use. The Assessment Plan must include a detailed discussion of how these standards are met.

(c) *Specific requirements for type B procedures.* If the authorized official plans to use type B procedures, the Assessment Plan must also include the following:

(1) The results of the confirmation of exposure performed under § 11.37;

(2) A Quality Assurance Plan that satisfies the requirements listed in the NCP and applicable EPA guidance for quality control and quality assurance plans;

(3) The objectives, as required in § 11.64(a)(2) of this part, of any testing and sampling for injury or pathway determination; and

(4) The Restoration and Compensation Determination Plan developed in accordance with the guidance in § 11.81 of this part. If existing data are not sufficient to develop the Restoration and Compensation Determination Plan as part of the Assessment Plan, the Restoration and Compensation Determination Plan may be developed later, after the completion of the Injury Determination or Quantification phases. If the Restoration and Compensation Determination Plan is published separately, the public review and comment will be conducted pursuant to § 11.81(d) of this part.

(d) *Specific requirements for type A procedures.* If the authorized official plans to use a type A procedure, the Assessment Plan must also contain the information described in subpart D.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9095, Mar. 20, 1987; 53 FR 5174, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994; 61 FR 20609, May 7, 1996; 73 FR 57265, Oct. 2, 2008]

§ 11.32 How does the authorized official develop the Assessment Plan?

(a) *Pre-development requirements.* The authorized official shall fulfill the following requirements before developing an Assessment Plan.

(1) *Coordination.* (i) If the authorized official's responsibility is shared with other natural resource trustees as a result of coexisting or contiguous natural resources or concurrent jurisdiction, the authorized official shall ensure that all other known affected natural resource trustees are notified that an Assessment Plan is being developed. This notification shall include the results of the Preassessment Screen Determination.

(ii) Authorized officials from different agencies or Indian tribes are encouraged to cooperate and coordinate any assessments that involve coexisting or contiguous natural resources or concurrent jurisdiction. They may arrange to divide responsibility for implementing the assessment in any manner that is agreed to by all of the affected natural resource trustees with the following conditions:

(A) A lead authorized official shall be designated to administer the assessment. The lead authorized official shall act as coordinator and contact regarding all aspects of the assessment and shall act as final arbitrator of disputes if consensus among the authorized officials cannot be reached regarding the development, implementation, or any other aspect of the Assessment Plan. The lead authorized official shall be designated by mutual agreement of all the natural resource trustees. If consensus cannot be reached as to the designation of the lead authorized official, the lead authorized official shall be designated in accordance with paragraphs (a)(1)(ii) (B), (C), or (D) of this section:

(B) When the natural resources being assessed are located on lands or waters subject to the administrative jurisdiction of a Federal agency, a designated official of the Federal agency shall act as the lead authorized official.

(C) When the natural resources being assessed, pursuant to section 126(d) of CERCLA, are located on lands or waters of an Indian tribe, an official designated by the Indian tribe shall act as the lead authorized official.

(D) For all other natural resources for which the State may assert trusteeship, a designated official of the State agency shall act as the lead authorized official.

(iii) If there is a reasonable basis for dividing the assessment, the natural resource trustee may act independently and pursue separate assessments, actions, or claims so long as the claims do not overlap. In these instances, the natural resource trustees shall coordinate their efforts, particularly those concerning the sharing of data and the development of the Assessment Plans.

(2) *Identification and involvement of the potentially responsible party.* (i) If the lead agency under the NCP for response actions at the site has not identified potentially responsible parties, the authorized official shall make reasonable efforts to identify any potentially responsible parties.

(ii) In the event the number of potentially responsible parties is large or if some of the potentially responsible parties cannot be located, the authorized official may proceed against any one or more of the parties identified. The authorized official should use reasonable efforts to proceed against most known potentially responsible parties or at least against all those potentially responsible parties responsible for significant portions of the potential injury.

(iii)(A) The authorized official shall send a Notice of Intent to Perform an Assessment to all identified potentially responsible parties. The Notice shall invite the participation of the potentially responsible party, or, if several parties are involved and if agreed to by the lead authorized official, a representative or representatives designated by the parties, in the development of the type and scope of the assessment and in the performance of the assessment. The Notice shall briefly describe, to the extent known, the site, vessel, or facility involved, the discharge of oil or release of hazardous substance of concern to the authorized official, and the resources potentially at risk. The Notice shall also contain a statement of authority for asserting trusteeship, or co-trusteeship, over those natural resources identified as potentially at risk.

(B) The authorized official shall allow at least 30 calendar days, with reasonable extensions granted as appropriate, for the potentially responsible party or parties notified to respond to the Notice before proceeding with the development of the Assessment Plan or any other assessment actions.

(b) *Plan approval.* The authorized official shall have final approval as to the appropriate methodologies to include in the Assessment Plan and any modifications to the Assessment Plan.

(c) *Public involvement in the Assessment Plan.* (1) The authorized official must make the Assessment Plan available for review by any identified potentially responsible parties, other natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested member of the public for a period of at least 30 calendar days, with reasonable extensions granted as appropriate. The authorized official may not perform any type B procedures described in the Assessment Plan until after this review period.

(2) Any comments concerning the Assessment Plan received from identified potentially responsible parties, other natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of the public, together with responses to those comments, shall be included as part of the Report of Assessment, described in § 11.90 of this part.

(d) *Plan implementation.* At the option of the authorized official and if agreed to by any potentially responsible party, or parties acting jointly, the potentially responsible party or any other party under the direction, guidance, and monitoring of the authorized

official may implement all or any part of the Assessment Plan finally approved by the authorized official. Any decision by the authorized official to allow or not allow implementation by the potentially responsible party shall be documented in the Assessment Plan.

(e) *Plan modification.* (1) The Assessment Plan may be modified at any stage of the assessment as new information becomes available.

(2)(i) Any modification to the Assessment Plan that in the judgment of the authorized official is significant shall be made available for review by any identified potentially responsible party, any other affected natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of the public for a period of at least 30 calendar days, with reasonable extensions granted as appropriate, before tasks called for in the modified plan are begun.

(ii) Any modification to the Assessment Plan that in the judgment of the authorized official is not significant shall be made available for review by any identified potentially responsible party, any other affected natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of the public, but the implementation of such modification need not be delayed as a result of such review.

(f) *Plan review.* (1) After the Injury Determination phase is completed and before the Quantification phase is begun, the authorized official shall review the decisions incorporated in the Assessment Plan.

(2) The purpose of this review is to ensure that the selection of methodologies for the Quantification and Damage Determination phases is consistent with the results of the Injury Determination phase, and that the use of such methodologies remains consistent with the requirements of reasonable cost, as that term is used in this part.

(3) Paragraphs (f)(1) and (f)(2) of this section do not apply to the use of a type A procedure.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5174, Feb. 22, 1988; 59 FR 14282, Mar. 25, 1994; 61 FR 20609, May 7, 1996]

§ 11.33 What types of assessment procedures are available?

There are two types of assessment procedures:

(a) Type A procedures are simplified procedures that require minimal field observation. Subpart D describes the type A procedures. There are two type A procedures: a procedure for coastal or marine environments, which incorporates the Natural Resource Damage Assessment Model for Coastal and Marine Environments, Version 2.51 (NRDAM/CME); and a procedure for Great Lakes environments, which incorporates the Natural Resource Damage Assessment Model for Great Lakes Environments, Version 1.51 (NRDAM/GLE).

(b) Type B procedures require more extensive field observation than the type A procedures. Subpart E describes the type B procedures.

[61 FR 20610, May 7, 1996, as amended at 62 FR 60459, Nov. 10, 1997; 65 FR 6014, Feb. 8, 2000]

§ 11.34 When may the authorized official use a type A procedure?

The authorized official may use a type A procedure only if:

(a) The released substance entered an area covered by the NRDAM/CME or NRDAM/GLE. Section 3.4, Volume III of the NRDAM/CME technical document (incorporated by reference, see § 11.18) identifies the areas that the NRDAM/CME covers. Section 6.2, Volume III of the NRDAM/GLE technical document (incorporated by reference, see § 11.18) describes the areas that the NRDAM/GLE covers;

(b) The NRDAM/CME or NRDAM/GLE cover the released substance. Table 7.1, Volume I of the NRDAM/CME technical document lists the substances that the NRDAM/CME covers. Table 7.1, Volume I of the NRDAM/GLE technical document lists the substances that the NRDAM/GLE covers;

(c) The released substance entered water at or near the surface;

(d) At the time of the release, winds did not vary spatially over the area affected by the release in a way that would significantly affect the level or extent of injuries;

(e) The authorized official is not aware of any reliable evidence that, for

species that are likely to represent a significant portion of the claim, the species biomass is significantly lower than the species biomass assigned by the NRDAM/CME or the NRDAM/GLE Tables IV.2.1 through IV.2.115 and IV.5.1 through IV.5.77, Volume III of the NRDAM/CME technical document list the species biomasses in the NRDAM/CME. Tables III.3.17 through III.3.27 and III.3.40 through III.3.50, Volume III of the NRDAM/GLE technical document list the species biomasses in the NRDAM/GLE ; and

(f) Subsurface currents either: are not expected to significantly affect the level or extent of injuries; or are reasonably uniform with depth over the water column in the area affected by the release.

[61 FR 20610, May 7, 1996]

§ 11.35 How does the authorized official decide whether to use type A or type B procedures?

(a) If the authorized official determines under § 11.34 that a type A procedure is available, the authorized official must then decide whether to use that procedure or use type B procedures. The authorized official must make this decision by weighing the difficulty of collecting site-specific data against the suitability of the averaged data and simplifying assumptions in the type A procedure for the release being assessed. The authorized official may use type B procedures if they can be performed at a reasonable cost and if the increase in accuracy provided by those procedures outweighs the increase in assessment costs. Section 1, Volume I of the NRDAM/CME technical document (incorporated by reference, see § 11.18) lists the simplifying assumptions made in the NRDAM/CME. Volumes III through IV of the NRDAM/CME technical document list the data in the NRDAM/CME. Section 1, Volume I of the NRDAM/GLE technical document (incorporated by reference, see § 11.18) lists the simplifying assumptions made in the NRDAM/GLE. Volume III of the NRDAM/GLE technical document lists the data in the NRDAM/GLE.

(b) The authorized official must use type B procedures rather than a type A procedure whenever a potentially responsible party:

(1) Submits a written request for use of type B procedures along with documentation of the reasons supporting the request; and

(2) Advances all reasonable costs of using type B procedures within a time frame acceptable to the authorized official.

(c) If there is no available type A procedure, the authorized official must use type B procedures to calculate all damages.

(d) Except as provided in paragraph (b) of this section, the authorized official may change the type of procedure used in light of comments received on the Assessment Plan. [See § 11.32(e)(2) to determine if the authorized official must provide for additional public review.] However, if the authorized official decides to use type B procedures in lieu of a type A procedure, and cannot confirm exposure under § 11.37, the authorized official may not then use a type A procedure.

[61 FR 20610, May 7, 1996]

§ 11.36 May the authorized official use both type A and type B procedures for the same release?

(a) The authorized official may use both a type A procedure and type B procedures for the same release if:

(1) The type B procedures are cost-effective and can be performed at a reasonable cost;

(2) There is no double recovery; and

(3) The type B procedures are used only to determine damages for injuries or compensable values that do not fall into the categories addressed by the type A procedure. [Sections 11.14(v) and 11.62 define ''injury.'' Section 11.83(c)(1) defines ''compensable value.'']

(b) The type A procedures address the following categories of injury and compensable value:

(1) Direct mortality of species covered by the NRDAM/CME or NRDAM/GLE resulting from short-term exposure to the released substance. Volume IV of the NRDAM/CME technical document (incorporated by reference, see § 11.18) lists the species that the NRDAM/CME covers. Section 3, Volume III of the NRDAM/GLE technical document (incorporated by reference,

see § 11.18) lists the species that the NRDAM/GLE covers;

(2) Direct loss of production of species covered by the NRDAM/CME or NRDAM/GLE resulting from short-term exposure to the released substance;

(3) Indirect mortality of species covered by the NRDAM/CME or NRDAM/GLE resulting from disruption of the food web by direct mortality or direct loss of production;

(4) Indirect loss of production of species covered by the NRDAM/CME or NRDAM/GLE resulting from disruption of the food web by direct mortality or direct loss of production;

(5) Lost assimilative capacity of water column and sediments;

(6) Lost economic rent for lost commercial harvests resulting from any closures specified by the authorized official and/or from population losses;

(7) Lost recreational harvests resulting from any closures specified by the authorized official and/or from population losses;

(8) For the type A procedure for coastal and marine environments, lost wildlife viewing, resulting from population losses, by residents of the States bordering the provinces in which the population losses occurred. [A province is one of the geographic areas delineated in Table 6.1, Volume I of the NRDAM/CME technical document.] For the type A procedure for Great Lakes environments, lost wildlife viewing, resulting from population losses, by residents of local areas bordering the provinces in which the population losses occurred. [A province is one of the geographic areas delineated in Table 8.1, Volume I of the NRDAM/GLE technical document.];

(9) Lost beach visitation due to closure; and

(10) For the type A procedure for Great Lakes environments, lost boating due to closure.

(c) If the authorized official uses both type A and type B procedures, he or she must explain in the Assessment Plan how he or she intends to prevent double recovery.

(d) When the authorized official uses type B procedures for injuries not addressed in a type A procedure, he or she must follow all of subpart E (which contains standards for determining and quantifying injury as well as determining damages), § 11.31(c) (which addresses content of the Assessment Plan), and § 11.37 (which addresses confirmation of exposure). When the authorized official uses type B procedures for compensable values that are not included in a type A procedure but that result from injuries that are addressed in the type A procedure, he or she need not follow all of subpart E, § 11.31(c), and § 11.37. Instead, the authorized official may rely on the injury predictions of the type A procedure and simply use the valuation methodologies authorized by § 11.83(c) to calculate compensable value. When using valuation methodologies, the authorized official must comply with § 11.84.

[61 FR 20610, May 7, 1996]

§ 11.37 Must the authorized official confirm exposure before implementing the Assessment Plan?

(a) Before including any type B methodologies in the Assessment Plan, the authorized official must confirm that at least one of the natural resources identified as potentially injured in the preassessment screen has in fact been exposed to the released substance.

(b) *Procedures.* (1) Whenever possible, exposure shall be confirmed by using existing data, such as those collected for response actions by the OSC, or other available studies or surveys of the assessment area.

(2) Where sampling has been done before the completion of the preassessment screen, chemical analyses of such samples may be performed to confirm that exposure has occurred. Such analyses shall be limited to the number and type required for confirmation of exposure.

(3) Where existing data are unavailable or insufficient to confirm exposure, one or more of the analytical methodologies provided in the Injury Determination phase may be used. The collection and analysis of new data shall be limited to that necessary to confirm exposure and shall not include testing for baseline levels or for injury, as those phrases are used in this part.

[51 FR 27725, Aug. 1, 1986. Redesignated and amended at 61 FR 20610, 20611, May 7, 1996]

§ 11.38 Assessment Plan—preliminary estimate of damages.

(a) *Requirement*. When performing a type B assessment pursuant to the requirements of subpart E of this part, the authorized official shall develop a preliminary estimate of: the anticipated costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources for the injured natural resources; and the compensable value, as defined in § 11.83(c) of this part, of the injured natural resources, if the authorized official intends to include compensable value in the damage claim. This preliminary estimate is referred to as the preliminary estimate of damages. The authorized official shall use the guidance provided in this section, to the extent possible, to develop the preliminary estimate of damages.

(b) *Purpose*. The purpose of the preliminary estimate of damages is for reference in the scoping of the Assessment Plan to ensure that the choice of the scientific, cost estimating, and valuation methodologies expected to be used in the damage assessment fulfills the requirements of reasonable cost, as that term is used in this part. The authorized official will also use the preliminary estimate of damages in the review of the Assessment Plan, as required in § 11.32(f) of this part, to ensure the requirements of reasonable cost are still met.

(c) *Steps*. The preliminary estimate of damages should include consideration of the ability of the resources to recover naturally and, if relevant, the compensable value through the recovery period with and without possible alternative actions. The authorized official shall consider the following factors, to the extent possible, in making the preliminary estimate of damages:

(1) The preliminary estimate of costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources should include consideration of a range of possible alternative actions that would accomplish the restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured natural resources.

(i) The preliminary estimate of costs should take into account the effects, or anticipated effects, of any response actions.

(ii) The preliminary estimate of costs should represent the expected present value of anticipated costs, expressed in constant dollars, and should include direct and indirect costs, and include the timing of those costs. The provisions detailed in §§ 11.80–11.84 of this part are the basis for the development of the estimate.

(iii) The discount rate to be used in developing the preliminary estimate of costs shall be that determined in accordance with the guidance in § 11.84(e) of this part.

(2) The preliminary estimate of compensable value should be consistent with the range of possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources being considered.

(i) The preliminary estimate of compensable value should represent the expected present value of the anticipated compensable value, expressed in constant dollars, accrued through the period for the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources to baseline conditions, *i.e.*, between the occurrence of the discharge or release and the completion of (A) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (B) the replacement and/or acquisition of equivalent natural resources capable of providing such services. The estimate should use the same base year as the preliminary estimate of costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. The provisions detailed in §§ 11.80–11.84 of this part are the basis for the development of this estimate.

(ii) The preliminary estimate of compensable value should take into account the effects, or anticipated effects, of any response actions.

(iii) The discount rate to be used in developing the preliminary estimate of compensable value shall be that determined in accordance with the guidance in § 11.84(e) of this part.

(d) *Content and timing*. (1) In making the preliminary estimate of damages, the authorized official should rely upon

existing data and studies. The authorized official should not undertake significant new data collection or perform significant modeling efforts at this stage of the assessment planning phase.

(2) Where possible, the authorized official should make the preliminary estimate of damages before the completion of the Assessment Plan as provided for in § 11.31 of this part. If there is not sufficient existing data to make the preliminary estimate of damages at the same time as the assessment planning phase, this analysis may be completed later, at the end of the Injury Determination phase of the assessment, at the time of the Assessment Plan review.

(3) The authorized official is not required to disclose the preliminary estimate before the conclusion of the assessment. At the conclusion of the assessment, the preliminary estimate of damages, along with its assumptions and methodology, shall be included in the Report of the Assessment as provided for in § 11.91 of this part.

(e) *Review*. The authorized official shall review, and revise as appropriate, the preliminary estimate of damages at the end of the Injury Determination and Quantification phases. If there is any significant modification of the preliminary estimate of damages, the authorized official shall document it in the Report of the Assessment.

[59 FR 14282, Mar. 25, 1994. Redesignated at 61 FR 20610, May 7, 1996, as amended at 73 FR 57266, Oct. 2, 2008]

Subpart D—Type A Procedures

§ 11.40 What are type A procedures?

(a) A type A procedure is a standardized methodology for performing Injury Determination, Quantification, and Damage Determination that requires minimal field observation. There are two type A procedures: the type A procedure for coastal and marine environments; and the type A procedure for Great Lakes environments. The type A procedure for coastal and marine environments incorporates a computer model called the Natural Resource Damage Assessment Model for Coastal and Marine Environments Version 2.51 (NRDAM/CME). The NRDAM/CME technical document (incorporated by reference, see § 11.18) includes and explains the NRDAM/CME. The type A procedure for Great Lakes environments incorporates a computer model called the Natural Resource Damage Assessment Model for Great Lakes Environments Version 1.51 (NRDAM/GLE). The NRDAM/GLE technical document (incorporated by reference, see § 11.18) includes and explains the NRDAM/GLE. The authorized official must follow §§ 11.41 through 11.44 when using the type A procedures.

(b) The reasonable and necessary costs incurred in conducting assessments under this subpart shall be limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, incident-specific efforts taken in the assessment of damages for natural resources for which the agency or Indian tribe is acting as trustee. Such costs shall be supported by appropriate records and documentation, and shall not reflect regular activities performed by the agency or the Indian tribe in management of the natural resource. Activities undertaken as part of the damage assessment shall be taken in a manner that is cost-effective, as that phrase is used in this part.

[52 FR 9096, Mar. 20, 1987, as amended at 53 FR 5175, Feb. 22, 1988; 61 FR 20611, May 7, 1996; 62 FR 60459, Nov. 10, 1997; 65 FR 6014, Feb. 8, 2000]

§ 11.41 What data must the authorized official supply?

(a) The NRDAM/CME and the NRDAM/GLE require several data inputs to operate. The authorized official must develop the following data inputs:

(1) The identity of the released substance;

(2) The mass or volume of the identified substance that was released;

(3) The duration of the release;

(4) The time of the release;

(5) The location of the release;

(6) The wind conditions;

(7) The extent of response actions;

(8) The extent of any closures;

(9) The implicit price deflator; and

(10) For the NRDAM/CME, the condition of the currents and tides.

(b) The authorized official must change the data in the NRDAM/CME

and the NRDAM/GLE for the following parameters if he or she is aware of more accurate data:

(1) Air temperature;

(2) Water temperature at the surface;

(3) Total suspended sediment concentration;

(4) Mean settling velocity of suspended solids; and

(5) Habitat type.

(c)(1) If the release occurred in Alaska and the authorized official is not aware of any reliable evidence that ice was absent from the site of the release, then he or she must turn on the ice modeling function. Otherwise, the authorized official must leave the ice modeling function off.

(2) If the release occurred in the Great Lakes and the authorized official is aware of reliable evidence that ice was absent from the site of the release, then he or she must turn off the ice modeling function.

(d) The authorized official must develop the data inputs and modifications and include them in the Assessment Plan in the format specified in Appendix II (for the NRDAM/CME) or Appendix III (for the NRDAM/GLE).

[61 FR 20611, May 7, 1996]

§ 11.42 How does the authorized official apply the NRDAM/CME or NRDAM/GLE?

(a) The authorized official must perform a preliminary application of the NRDAM/CME or NRDAM/GLE with the data inputs and modifications developed under § 11.41. Volume II of the NRDAM/CME technical document (incorporated by reference, see § 11.18) describes how to apply the NRDAM/CME. Volume II of the NRDAM/GLE technical document (incorporated by reference, see § 11.18) describes how to apply the NRDAM/GLE. For cases involving releases of two or more substances or a release of a mixture of substances, the authorized official may only apply the NRDAM/CME or NRDAM/GLE once using only one of the substances.

(b) If the preliminary application of the NRDAM/CME or NRDAM/GLE indicates damages in excess of $100,000, then the authorized official must decide whether to:

(1) Limit the portion of his or her claim calculated with the type A procedure to $100,000; or

(2) Compute all damages using type B procedures.

[61 FR 20611, May 7, 1996]

§ 11.43 Can interested parties review the results of the preliminary application?

After completing the preliminary application of the NRDAM/CME or NRDAM/GLE, if the authorized official decides to continue with the type A procedure, he or she must issue an Assessment Plan for public comment as described in § 11.32. The Assessment Plan must include the information described in § 11.31, the data inputs and modifications developed under § 11.41, and a summary of the results of the preliminary application. The Assessment Plan must also identify a contact from whom a complete copy of the printout of the preliminary application can be obtained.

[61 FR 20612, May 7, 1996]

§ 11.44 What does the authorized official do after the close of the comment period?

(a) The authorized official must carefully review all comments received on the Assessment Plan, provide substantive responses to all comments, and modify the Plan as appropriate. [See § 11.32(e)(2) to determine if the authorized official must provide for additional public review.]

(b) If, after reviewing the public comments, the authorized official decides to continue with the type A procedure, he or she must then perform a final application of the NRDAM/CME or NRDAM/GLE, using final data inputs and modifications based on § 11.41 and any reliable information received during the public review and comment period.

(c) After completing the final application of the NRDAM/CME or NRDAM/GLE, the authorized official must prepare a Report of Assessment. The Report of Assessment must include the printed output from the final application as well as the Preassessment Screen Determination and the Assessment Plan.

(d) If the authorized official is aware of reliable evidence that a private party has recovered damages for commercial harvests lost as a result of the release, the authorized official must eliminate from the claim any damages for such lost harvests that are included in the lost economic rent calculated by the NRDAM/CME or NRDAM/GLE.

(e) If the authorized official is aware of reliable evidence that the NRDAM/CME or NRDAM/GLE application covers resources beyond his or her trustee jurisdiction, the authorized official must either:

(1) Have the other authorized official(s) who do have trustee jurisdiction over those resources join in the type A assessment; or

(2) Eliminate any damages for those resources from the claim for damages.

(f) If the final application of the NRDAM/CME or NRDAM/GLE, adjusted as needed under paragraphs (d) and (e), calculates damages in excess of $100,000, then the authorized official must limit the portion of his or her claim calculated with the type A procedure to $100,000.

(g) After preparing the Report of Assessment, the authorized official must follow the steps described in subpart F.

[61 FR 20612, May 7, 1996]

Subpart E—Type B Procedures

§ 11.60 Type B assessments—general.

(a) *Purpose*. The purpose of the type B assessment is to provide alternative methodologies for conducting natural resource damage assessments in individual cases.

(b) *Steps in the type B assessment*. The type B assessment consists of three phases: § 11.61—Injury Determination; § 11.70—Quantification; and § 11.80—Damage Determination, of this part.

(c) *Completion of type B assessment*. After completion of the type B assessment, a Report of Assessment, as described in § 11.90 of this part, shall be prepared. The Report of Assessment shall include the determinations made in each phase.

(d) *Type B assessment costs*. (1) The following categories of reasonable and necessary costs may be incurred in the assessment phase of the damage assessment:

(i) Sampling, testing, and evaluation costs for injury and pathway determination;

(ii) Quantification costs (including baseline service determination and resource recoverability analysis);

(iii) Restoration and Compensation Determination Plan development costs including:

(A) Development of alternatives;

(B) Evaluation of alternatives;

(C) Potentially responsible party, agency, and public reviews;

(D) Other such costs for activities authorized by § 11.81 of this part;

(iv) Cost estimating and valuation methodology calculation costs; and

(v) Any other assessment costs authorized by §§ 11.60–11.84 of this part.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site-specific efforts taken in the assessment of damages for a natural resource for which the agency or Indian tribe is acting as trustee. Such costs shall be supported by appropriate records and documentation, and shall not reflect regular activities performed by the agency or the Indian tribe in management of the natural resource. Activities undertaken as part of the damage assessment phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5175, Feb. 22, 1988; 59 FR 14283, Mar. 25, 1994]

§ 11.61 Injury determination phase—general.

(a) *Requirement*. (1) The authorized official shall, in accordance with the procedures provided in the Injury Determination phase of this part, determine: whether an injury to one or more of the natural resources has occurred; and that the injury resulted from the discharge of oil or release of a hazardous substance based upon the exposure pathway and the nature of the injury.

(2) The Injury Determination phase consists of § 11.61—general; § 11.62—injury definition; § 11.63—pathway determination; and § 11.64—testing and sampling methods, of this part.

(b) *Purpose*. The purpose of the Injury Determination phase is to ensure that only assessments involving well documented injuries resulting from the discharge of oil or release of a hazardous substance proceed through the type B assessment.

(c) *Injury Determination phase steps*. (1) The authorized official shall determine whether the potentially injured resource constitutes a surface water, ground water, air, geologic, or biological resource as defined in § 11.14 of this part. The authorized official shall then proceed in accordance with the guidance provided in the injury definition section, § 11.62 of this part, to determine if the resource is injured.

(2) The authorized official shall follow the guidance provided in the testing and sampling methods section, § 11.64 of this part, in selecting the methodology for determining injury. The authorized official shall select from available testing and sampling procedures one or more procedures that meet the requirements of the selected methodologies.

(3) The authorized official shall follow the guidance provided in the pathway section, § 11.63 of this part, to determine the route through which the oil or hazardous substance is or was transported from the source of the discharge or release to the injured resource.

(4) If more than one resource, as defined in § 11.14(z) of this part, has potentially been injured, an injury determination for each resource shall be made in accordance with the guidance provided in each section of the Injury Determination phase.

(d) *Selection of methodologies*. (1) One of the methodologies provided in § 11.64 of this part for the potentially injured resource, or one that meets the acceptance criteria provided for that resource, shall be used to establish injury.

(2) Selection of the methodologies for the Injury Determination phase shall be based upon cost-effectiveness as that phrase is used in this part.

(e) *Completion of Injury Determination phase*. (1) Upon completion of the Injury Determination phase, the Assessment Plan shall be reviewed in accordance with the requirements of § 11.32(f) of this part.

(2) When the authorized official has determined that one or more of the natural resources has been injured as a result of the discharge or release, the authorized official may proceed to the Quantification and the Damage Determination phases.

(3) When the authorized official has determined that an injury has not occurred to at least one of the natural resources or that an injury has occurred but that the injury cannot be linked to the discharge or release, the authorized official shall not pursue further assessment under this part.

§ 11.62 Injury determination phase—injury definition.

(a) The authorized official shall determine that an injury has occurred to natural resources based upon the definitions provided in this section for surface water, ground water, air, geologic, and biological resources. The authorized official shall test for injury using the methodologies and guidance provided in § 11.64 of this part. The test results of the methodologies must meet the acceptance criteria provided in this section to make a determination of injury.

(b) *Surface water resources*. (1) An injury to a surface water resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(i) Concentrations and duration of substances in excess of drinking water standards as established by sections 1411–1416 of SDWA, or by other Federal or State laws or regulations that establish such standards for drinking water, in surface water that was potable before the discharge or release;

(ii) Concentrations and duration of substances in excess of water quality criteria established by section 1401(1)(D) of SDWA, or by other Federal or State laws or regulations that establish such criteria for public water supplies, in surface water that before the

discharge or release met the criteria and is a committed use, as the phrase is used in this part, as a public water supply;

(iii) Concentrations and duration of substances in excess of applicable water quality criteria established by section 304(a)(1) of the CWA, or by other Federal or State laws or regulations that establish such criteria, in surface water that before the discharge or release met the criteria and is a committed use, as that phrase is used in this part, as a habitat for aquatic life, water supply, or recreation. The most stringent criterion shall apply when surface water is used for more than one of these purposes;

(iv) Concentrations of substances on bed, bank, or shoreline sediments sufficient to cause the sediment to exhibit characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act, 42 U.S.C. 6921; or

(v) Concentrations and duration of substances sufficient to have caused injury as defined in paragraphs (c), (d), (e), or (f) of this section to ground water, air, geologic, or biological resources, when exposed to surface water, suspended sediments, or bed, bank, or shoreline sediments.

(2)(i) The acceptance criterion for injury to the surface water resource is the measurement of concentrations of oil or a hazardous substance in two samples from the resource. The samples must be one of the following types, except as specified in paragraph (b)(3) of this section:

(A) Two water samples from different locations, separated by a straight-line distance of not less than 100 feet; or

(B) Two bed, bank, or shoreline sediment samples from different locations separated by a straight-line distance of not less than 100 feet; or

(C) One water sample and one bed, bank, or shoreline sediment sample; or

(D) Two water samples from the same location collected at different times.

(ii) In those instances when injury is determined and no oil or hazardous substances are detected in samples from the surface water resource, it must be demonstrated that the substance causing injury occurs or has occurred in the surface water resource as a result of physical, chemical, or biological reactions initiated by the discharge of oil or release of a hazardous substance.

(3) If the maximum straight-line distance of the surface water resource is less than 100 feet, then the samples required in paragraph (b)(2)(i) (A) and (B) of this section should be separated by one-half the maximum straight-line distance of the surface water resource.

(c) *Ground water resources.* (1) An injury to the ground water resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(i) Concentrations of substances in excess of drinking water standards, established by sections 1411–1416 of the SDWA, or by other Federal or State laws or regulations that establish such standards for drinking water, in ground water that was potable before the discharge or release;

(ii) Concentrations of substances in excess of water quality criteria, established by section 1401(1)(d) of the SDWA, or by other Federal or State laws or regulations that establish such criteria for public water supplies, in ground water that before the discharge or release met the criteria and is a committed use, as the phrase is used in this part, as a public water supply;

(iii) Concentrations of substances in excess of applicable water quality criteria, established by section 304(a)(1) of the CWA, or by other Federal or State laws or regulations that establish such criteria for domestic water supplies, in ground water that before the discharge or release met the criteria and is a committed use as that phrase is used in this part, as a domestic water supply; or

(iv) Concentrations of substances sufficient to have caused injury as defined in paragraphs (b), (d), (e), or (f) of this section to surface water, air, geologic, or biological resources, when exposed to ground water.

(2) The acceptance criterion for injury to ground water resources is the measurement of concentrations of oil or hazardous substance in two ground water samples. The water samples must be from the same geohydrologic unit and must be obtained from one of

the following pairs of sources, except as specified in paragraph (c)(3) of this section:

(i) Two properly constructed wells separated by a straight-line distance of not less than 100 feet; or

(ii) A properly constructed well and a natural spring or seep separated by a straight-line distance of not less than 100 feet; or

(iii) Two natural springs or seeps separated by a straight-line distance of not less than 100 feet.

(3) If the maximum straight-line distance of the ground water resource is less than 100 feet, the samples required in paragraph (c)(2) of this section should be separated by one-half of the maximum straight-line distance of the ground water resource.

(4) In those instances when injury is determined and no oil or hazardous substance is detected in samples from the ground water resource, it must be demonstrated that the substance causing injury occurs or has occurred in the ground water resource as a result of physical, chemical, or biological reactions initiated by the discharge of oil or release of hazardous substances.

(d) *Air resources.* An injury to the air resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(1) Concentrations of emissions in excess of standards for hazardous air pollutants established by section 112 of the Clean Air Act, 42 U.S.C. 7412, or by other Federal or State air standards established for the protection of public welfare or natural resources; or

(2) Concentrations and duration of emissions sufficient to have caused injury as defined in paragraphs (b), (c), (e), or (f) of this section to surface water, ground water, geologic, or biological resources when exposed to the emissions.

(e) *Geologic resources.* An injury to the geologic resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(1) Concentrations of substances sufficient for the materials in the geologic resource to exhibit characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act, 42 U.S.C. 6921;

(2) Concentrations of substances sufficient to raise the negative logarithm of the hydrogen ion concentration of the soil (pH) to above 8.5 (above 7.5 in humid areas) or to reduce it below 4.0;

(3) Concentrations of substances sufficient to yield a salt saturation value greater than 2 millimhos per centimeter in the soil or a sodium adsorption ratio of more than 0.176;

(4) Concentrations of substances sufficient to decrease the water holding capacity such that plant, microbial, or invertebrate populations are affected;

(5) Concentrations of substances sufficient to impede soil microbial respiration to an extent that plant and microbial growth have been inhibited;

(6) Concentrations in the soil of substances sufficient to inhibit carbon mineralization resulting from a reduction in soil microbial populations;

(7) Concentrations of substances sufficient to restrict the ability to access, develop, or use mineral resources within or beneath the geologic resource exposed to the oil or hazardous substance;

(8) Concentrations of substances sufficient to have caused injury to ground water, as defined in paragraph (c) of this section, from physical or chemical changes in gases or water from the unsaturated zone;

(9) Concentrations in the soil of substances sufficient to cause a toxic response to soil invertebrates;

(10) Concentrations in the soil of substances sufficient to cause a phytotoxic response such as retardation of plant growth; or

(11) Concentrations of substances sufficient to have caused injury as defined in paragraphs (b), (c), (d), or (f), of this section to surface water, ground water, air, or biological resources when exposed to the substances.

(f) *Biological resources.* (1) An injury to a biological resource has resulted from the discharge of oil or release of a hazardous substance if concentration of the substance is sufficient to:

(i) Cause the biological resource or its offspring to have undergone at least one of the following adverse changes in viability: death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations; or

(ii) Exceed action or tolerance levels established under section 402 of the Food, Drug and Cosmetic Act, 21 U.S.C. 342, in edible portions of organisms; or

(iii) Exceed levels for which an appropriate State health agency has issued directives to limit or ban consumption of such organism.

(2) The method for determining injury to a biological resource, as defined in paragraph (f)(1)(i) of this section, shall be chosen based upon the capability of the method to demonstrate a measurable biological response. An injury can be demonstrated if the authorized official determines that the biological response under consideration can satisfy all of the following acceptance criteria:

(i) The biological response is often the result of exposure to oil or hazardous substances. This criterion excludes biological responses that are caused predominately by other environmental factors such as disturbance, nutrition, trauma, or weather. The biological response must be a commonly documented response resulting from exposure to oil or hazardous substances.

(ii) Exposure to oil or hazardous substances is known to cause this biological response in free-ranging organisms. This criterion identifies biological responses that have been documented to occur in a natural ecosystem as a result of exposure to oil or hazardous substances. The documentation must include the correlation of the degree of the biological response to the observed exposure concentration of oil or hazardous substances.

(iii) Exposure to oil or hazardous substances is known to cause this biological response in controlled experiments. This criterion provides a quantitative confirmation of a biological response occurring under environmentally realistic exposure levels that may be linked to oil or hazardous substance exposure that has been observed in a natural ecosystem. Biological responses that have been documented only in controlled experimental conditions are insufficient to establish correlation with exposure occurring in a natural ecosystem.

(iv) The biological response measurement is practical to perform and produces scientifically valid results. The biological response measurement must be sufficiently routine such that it is practical to perform the biological response measurement and to obtain scientifically valid results. To meet this criterion, the biological response measurement must be adequately documented in scientific literature, must produce reproducible and verifiable results, and must have well defined and accepted statistical criteria for interpreting as well as rejecting results.

(3) Unless otherwise provided for in this section, the injury determination must be based upon the establishment of a statistically significant difference in the biological response between samples from populations in the assessment area and in the control area. The determination as to what constitutes a statistically significant difference must be consistent with the quality assurance provisions of the Assessment Plan. The selection of the control area shall be consistent with the guidance provided in § 11.72 of this part.

(4) The biological responses listed in this paragraph have been evaluated and found to satisfy the acceptance criteria provided in paragraph (f)(2) of this section. The authorized official may, when appropriate, select from this list to determine injury to fish and wildlife resources or may designate another response as the determiner of injury provided that the designated response can satisfy the acceptance criteria provided in paragraph (f)(2) of this section. The biological responses are listed by the categories of injury for which they may be applied.

(i) *Category of injury—death*. Five biological responses for determining when death is a result of exposure to the discharge of oil or release of a hazardous substance have met the acceptance criteria.

(A) *Brain cholinesterase (ChE) enzyme activity*. Injury has occurred when brain

ChE activity in a sample from the population has been inhibited by at least 50 percent compared to the mean for normal brain ChE activity of the wildlife species. These enzymes are in the nervous system of vertebrate organisms and the rate of ChE activity is associated with the regulation of nerve impulse transmission. This biological response may be used to confirm injury when anti-ChE substances, such as organophosphorus and carbamate pesticides, are suspected to have resulted in death to bird and mammal species.

(B) *Fish kill investigations.* Injury has occurred when a significant increase in the frequency or numbers of dead or dying fish can be measured in accordance with the procedures for counting dead or dying fish contained in Part II (Fish-Kill Counting Guidelines) of ''Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines,'' American Fisheries Society Special Publication Number 13, 1982 (incorporated by reference, see § 11.18).

(C) *Wildlife kill investigations.* Injury has occurred when a significant increase in the frequency or number of dead or dying birds or mammal species can be measured in a population sample from the assessment area as compared to a population sample from a control area. Wildlife kill investigations may be used when acute mortality has occurred to multiple wildlife species, or when detectable quantities of oil or hazardous substances have adherred to, bound to, or otherwise covered surface tissue, or had been ingested or inhaled by dead or dying bird or mammal species.

(D) *In situ bioassay.* Injury has occurred when a statistically significant difference can be measured in the total mortality and/or mortality rates between population samples exposed in situ to a discharge of oil or a release of hazardous substance and those in a control site. In situ caged or confined bioassay may be used to confirm injury when oil or hazardous substances are suspected to have caused death to fish species.

(E) *Laboratory toxicity testing.* Injury has occurred when a statistically significant difference can be measured in the total mortality and/or mortality rates between population samples of the test organisms placed in exposure chambers containing concentrations of oil or hazardous substances and those in a control chamber. Published standardized laboratory fish toxicity testing methodologies for acute flow-through, acute static, partial-chronic (early life stage), and chronic (life cycle) toxicity tests may be used to confirm injury. The oil or hazardous substance used in the test must be the exact substance or a substance that is reasonably comparable to that suspected to have caused death to the natural population of fish.

(ii) *Category of injury—disease.* One biological response for determining when disease is a result of exposure to the discharge of oil or release of a hazardous substance has met the acceptance criteria.

(A) *Fin erosion.* Injury has occurred when a statistically significant difference can be measured in the frequency of occurrence of fin erosion (also referred to as fin rot) in a population sample from the assessment area as compared to a sample from the control area. Fin erosion shall be confirmed by appropriate histological procedures. Fin erosion may be used when oil or hazardous substances are suspected to have caused the disease.

(iii) *Category of injury—behavioral abnormalities.* Two biological responses for determining when behavioral abnormalities are a result of the exposure to the discharge of oil or release of a hazardous substance have met the acceptance criteria.

(A) *Clinical behavioral signs of toxicity.* Injury has occurred when a statistically significant difference can be measured in the frequency of occurrence of clinical behavioral signs of toxicity in a population sample from the assessment area as compared to a sample from the control area. Clinical behavioral signs of toxicity are characteristic behavioral symptoms expressed by an organism in response to exposure to an oil or hazardous substance. The clinical behavioral signs of toxicity used shall be those that have been documented in published literature.

(B) *Avoidance*. Injury has occurred when a statistically significant difference can be measured in the frequency of avoidance behavior in population samples of fish placed in testing chambers with equal access to water containing oil or a hazardous substance and the control water. The oil or hazardous substance used in the test must be the exact substance or a substance that is reasonably comparable to that suspected to have caused avoidance to the natural populations of fish. This biological response may be used to confirm injury when oil or hazardous substances are suspected to have resulted in avoidance behavior in fish species.

(iv) *Category of injury—cancer*. One biological response for determining when cancer is a result of exposure to the discharge of oil or release of a hazardous substance has met the acceptance criteria.

(A) *Fish neoplasm*. Injury has occurred when a statistically significant difference can be measured in the frequency of occurrence of the fish neoplasia when comparing population samples from the assessment area and a control area. Neoplasms are characterized by relatively autonomous growth of abnormal cells that by proliferation infiltrate, press upon, or invade healthy tissue thereby causing destruction of cells, interference with physiological functions, or death of the organism. The following type of fish neoplasia may be used to determine injury: liver neoplasia and skin neoplasia. The neoplasms shall be confirmed by histological procedures and such confirmation procedures may also include special staining techniques for specific tissue components, ultra-structural examination using electron microscopy to identify cell origin, and to rule out or confirm viral, protozoan, or other causal agents. Fish neoplasm may be used to determine injury when oil or hazardous substances are suspected to have been the causal agent.

(v) *Category of injury—physiological malfunctions*. Five biological responses for determining when physiological malfunctions are a result of exposure to the discharge of oil or release of a hazardous substance have met the acceptance criteria.

(A) *Eggshell thinning*. Injury has occurred when eggshell thicknesses for samples for a population of a given species at the assessment area are thinner than those for samples from a population at a control area, or are at least 15 percent thinner than eggshells collected before 1946 from the same geographic area and stored in a museum. This biological response is a measure of avian eggshell thickness resulting from the adult bird having assimilated the oil or hazardous substance. This biological response may be used when the organochlorine pesticide DDT or its metabolites are suspected to have caused such physiological malfunction injury.

(B) *Reduced avian reproduction*. Injury has occurred when a statistically significant difference can be measured in the mean number of young fledged per active nest when comparing samples from populations in the assessment area and a control area. The fledging success (the number of healthy young leaving the nest) shall be used as the measurement of injury. Factors that may contribute to this measurement include egg fertility, hatching success, and survival of young. This biological response may be used when oil or hazardous substances are suspected to have reduced the nesting success of avian species.

(C) *Cholinesterase (ChE) enzyme inhibition*. Injury has occurred when brain ChE activity in a sample from the population at the assessment area shows a statistically significant inhibition when compared to the mean activity level in samples from populations in a control area. These enzymes are in the nervous systems of vertebrate organisms and the rate of ChE activity is associated with the regulation of nerve impulse transmission. This biological response may be used as a demonstration of physiological malfunction injury to birds, mammals, and reptiles when anti-ChE substances, such as organophosphorus and carbamate pesticides, have been discharged or released.

(D) *Delta-aminolevulinic acid dehydratase (ALAD) inhibition*. Injury has occurred when the activity level of whole blood ALAD in a sample from the population of a given species at an

assessment area is significantly less than mean values for a population at a control area, and ALAD depression of at least 50 percent can be measured. The ALAD enzyme is associated with the formation of hemoglobin in blood and in chemical detoxification processes in the liver. This biological response is a measure of the rate of ALAD activity. This biological response may be used to determine injury to bird and mammal species that have been exposed to lead.

(E) *Reduced fish reproduction*. Injury has occurred when a statistically significant difference in reproduction success between the control organisms and the test organisms can be measured based on the use of published standardized laboratory toxicity testing methodologies. This biological response may be used when the oil or hazardous substance is suspected to have caused a reduction in the reproductive success of fish species. Laboratory partial-chronic and laboratory chronic toxicity tests may be used. The oil or hazardous substance used in the test must be the exact substance or a substance that is reasonably comparable to that suspected to have caused reduced reproductive success in the natural population of fish.

(vi) *Category of injury—physical deformation*. Four biological responses for determining when physical deformations are a result of exposure to the discharge of oil or release of a hazardous substance have met the injury acceptance criteria.

(A) *Overt external malformations*. Injury has occurred when a statistically significant difference can be measured in the frequency of overt external malformation, such as small or missing eyes, when comparing samples from populations of wildlife species from the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

(B) *Skeletal deformities*. Injury has occurred when a statistically significant difference can be measured in the frequency of skeletal deformities, such as defects in growth of bones, when comparing samples from populations of wildlife species from the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

(C) *Internal whole organ and soft tissue malformation*. Injury has occurred when a statistically significant difference can be measured in the frequency of malformations to brain, heart, liver, kidney, and other organs, as well as soft tissues of the gastrointestinal tract and vascular system, when comparing samples from populations of wildlife species in the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

(D) *Histopathological lesions*. Injury has occurred when a statistically significant difference can be measured in the frequency of tissue or cellular lesions when comparing samples from populations of wildlife species from the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

§ 11.63 Injury determination phase—pathway determination.

(a) *General*. (1) To determine the exposure pathways of the oil or hazardous substance, the following shall be considered:

(i) The chemical and physical characteristics of the discharged oil or released hazardous substance when transported by natural processes or while present in natural media;

(ii) The rate or mechanism of transport by natural processes of the discharged oil or released hazardous substance; and

(iii) Combinations of pathways that, when viewed together, may transport the discharged oil or released hazardous substance to the resource.

(2) The pathway may be determined by either demonstrating the presence of the oil or hazardous substance in sufficient concentrations in the pathway resource or by using a model that

demonstrates that the conditions existed in the route and in the oil or hazardous substance such that the route served as the pathway.

(3) To the extent that the information needed to make this determination is not available, tests shall be conducted and necessary data shall be collected to meet the requirements of this section. Methods that may be used to conduct these additional tests and collect new information are described in § 11.64 of this part.

(b) *Surface water pathway*. (1) When the surface water resource is suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether the surface water resource, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2)(i) Using available information and such additional tests as necessary, it should be determined whether the surface water resource downstream or downcurrent of the source of discharge or release has been exposed to the oil or hazardous substance.

(ii) When the source of discharge or release is on an open water body, such as a marsh, pond, lake, reservoir, bay, estuary, gulf, or sound, it should be determined, using available information and such additional tests as necessary, whether the surface water resource in the vicinity of the source of discharge or release has been exposed to the oil or hazardous substance.

(3)(i) If a surface water resource is or likely has been exposed, the areal extent of the exposed surface water resource should be estimated, including delineation of:

(A) Channels and reaches:

(B) Seasonal boundaries of open water bodies; and

(C) Depth of exposed bed, bank, or shoreline sediments.

(ii) As appropriate to the exposed resource, the following should be determined:

(A) Hydraulic parameters and streamflow characteristics of channels and reaches;

(B) Bed sediment and suspended sediment characteristics, including grain size, grain mineralogy, and chemistry of grain surfaces;

(C) Volume, inflow-outflow rates, degree of stratification, bathymetry, and bottom sediment characteristics of surface water bodies;

(D) Suspended sediment concentrations and loads and bed forms and loads of streams and tidally affected waters; and

(E) Tidal flux, current direction, and current rate in coastal and marine waters.

(4)(i) Using available information and data from additional tests as necessary, the mobility of the oil or hazardous substance in the exposed surface water resource should be estimated. This estimate should consider such physical and chemical characteristics of the oil or hazardous substance as aqueous solubility, aqueous miscibility, density, volatility, potential for chemical degradation, chemical precipitation, biological degradation, biological uptake, and adsorption.

(ii) Previous studies of the characteristics discussed in paragraph (b)(4)(i) of this section should be relied upon if hydraulic, physical, and chemical conditions in the exposed surface water resource are similar to experimental conditions of the previous studies. In the absence of this information, those field and laboratory studies necessary to estimate the mobility of the oil or hazardous substance in surface water flow may be performed.

(5)(i) The rate of transport of the oil or hazardous substance in surface water should be estimated using available information and with consideration of the hydraulic properties of the exposed resource and the physical and chemical characteristics of the oil or hazardous substance.

(ii) Transport rates may be estimated using:

(A) The results of previous time-of-travel and dispersion studies made in the exposed surface water resource before the discharge or release;

(B) The results of previous studies, conducted with the same or similar chemical substances to those discharged or released under experimental conditions similar to the hydraulic, chemical, and biological conditions in the exposed surface water resource;

(C) The results of field measurements of time-of-travel and dispersion made in the exposed or comparable surface water resource, using natural or artificial substances with transport characteristics that reasonably approximate those of the oil or hazardous substance; and

(D) The results of simulation studies using the results of appropriate time-of-travel and dispersion studies in the exposed or comparable surface water resource.

(c) *Ground water pathway.* (1) When ground water resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether ground water resources, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) Using available information and such additional tests as necessary, it should be determined whether the unsaturated zone, the ground water, or the geologic materials beneath or downgradient of the source of discharge or release have been exposed to the oil or hazardous substance.

(3) If a ground water resource is or likely has been exposed, available information and such additional tests should be used as necessary to determine the characteristics of the unsaturated zone, as well as any aquifers and confining units containing the exposed ground water, in the vicinity of the source of discharge or release. The characteristics of concern include:

(i) Local geographical extent of aquifers and confining units;

(ii) Seasonal depth to saturated zone beneath the site;

(iii) Direction of ground water flow in aquifers;

(iv) Local variation in direction of ground water flow resulting from seasonal or pumpage effects;

(v) Elevation of top and bottom of aquifer and confining units;

(vi) Lithology, mineralogy, and porosity of rocks or sediments comprising the unsaturated zone, aquifers, and confining units;

(vii) Transmissivity and hydraulic conductivity of aquifers and confining units; and

(viii) Nature and amount of hydraulic connection between ground water and local surface water resources.

(4)(i) Using available information and such additional tests as necessary, the mobility of the oil or hazardous substance within the unsaturated zone and in the exposed ground water resources should be estimated. This estimate should consider local recharge rates and such physical and chemical characteristics of the oil or hazardous substance as aqueous solubility, aqueous miscibility, density, volatility, potential for chemical degradation, chemical precipitation, biological degradation, biological uptake, and adsorption onto solid phases in the unsaturated zone, aquifers, and confining units.

(ii) Previous studies of the characteristics discussed in paragraph (c)(4)(i) of this section should be relied upon if geohydrologic, physical, and chemical conditions in the exposed ground water resource are similar to experimental conditions of the previous studies. In the absence of this information, field and laboratory studies may be performed as necessary to estimate the mobility of the oil or hazardous substance within the unsaturated zone and in ground water flows.

(5)(i) The rate of transport of the oil or hazardous substance in ground water should be estimated using available information and with consideration of the site hydrology, geohydrologic properties of the exposed resource, and the physical and chemical characteristics of the oil or hazardous substance.

(ii) Transport rates may be estimated using:

(A) Results of previous studies conducted with the same or similar chemical substance, under experimental geohydrological, physical, and chemical conditions similar to the ground water resource exposed to the oil or hazardous substance;

(B) Results of field measurements that allow computation of arrival times of the discharged or released substance at downgradient wells, so that an empirical transport rate may be derived; or

(C) Results of simulation studies, including analog or numerical modeling of the ground water system.

(d) *Air pathway*. (1) When air resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether the air resources either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) Using available information, air modeling, and additional field sampling and analysis, it should be determined whether air resources have been exposed to the discharge of oil or release of a hazardous substance.

(3)(i) If an air resource is or has likely been exposed, available information and such additional tests as necessary should be used to estimate the areal extent of exposure and the duration and frequency of exposure of such areas to emissions from the discharge of oil or release of a hazardous substance.

(ii) The areal extent of exposure is defined as the geographical surface area or space where emissions from the source of discharge or release are found or otherwise determined to be present for such duration and frequency as to potentially result in injury to resources present within the area or space.

(4) Previous studies of the characteristics discussed in paragraph (d)(3)(i) of this section should be relied upon if the conditions in the exposed air resource are similar to experimental conditions of the previous studies. In the absence of this information, air sampling and analysis methods identified in §11.64(d) of this part, air modeling methods, or a combination of these methods may be used in identifying the air exposure pathway and in estimating the areal extent of exposure and duration and frequency of exposure.

(5) For estimating the areal extent, duration, and frequency of exposure from the discharge or release, the following factors shall be considered as may be appropriate for each emissions event:

(i) The manner and nature in which the discharge or release occurs, including the duration of the emissions, amount of the discharge or release, and emergency or other time critical factors;

(ii) The configuration of the emitting source, including sources such as ponds, lagoons, pools, puddles, land and water surface spills, and venting from containers and vessels;

(iii) Physical and chemical properties of substances discharged or released, including volatility, toxicity, solubility, and physical state;

(iv) The deposition from the air and re-emission to the air of gaseous and particulate emissions that provide periodic transport of the emissions; and

(v) Air transport and dispersion factors, including wind speed and direction, and atmospheric stability and temperature.

(e) *Geologic pathway*. (1) When geologic resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether geologic resources, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2)(i) Using available information and the methods listed in §11.64(e) of this part, it should be determined whether any element of the geologic resource has been exposed to the oil or hazardous substance. If a geologic resource is or has likely been exposed, the areal extent of the exposed geologic resource, including the lateral and vertical extent of the dispersion, should be estimated.

(ii) To determine whether the unsaturated zone served as a pathway, the guidance provided in paragraph (c) of this section should be followed.

(f) *Biological pathway*. (1) When biological resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using the guidance provided in this paragraph, whether biological resources, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) Biological pathways that resulted from either direct or indirect exposure to the oil or hazardous substance, or from exposure to products of chemical or biological reactions initiated by the discharge or release shall be identified. Direct exposure can result from direct

physical contact with the discharged oil or released hazardous substance. Indirect exposure can result from food chain processes.

(3) If the oil or hazardous substance adhered to, bound to, or otherwise covered surface tissue, or was ingested, or inhaled but not assimilated, the area of dispersion may be determined based upon chemical analysis of the appropriate tissues or organs (such as leaves, lungs, stomach, intestine, or their contents) that were directly exposed to the oil or hazardous substance.

(4) If the oil or hazardous substance was assimilated, the areal dispersion may be determined based upon one or more of the following alternative procedures:

(i) If direct exposure to the biological resource has occurred, chemical analysis of the organisms that have been exposed may be performed.

(ii) If indirect exposure to the biological resource has occurred, either chemical analysis of free-ranging biological resources using one or more indicator species as appropriate, or laboratory analysis of one or more in situ placed indicator species as appropriate may be performed.

(A) *Indicator species*, as used in this section, means a species of organism selected consistent with the following factors to represent a trophic level of a food chain:

(*1*) General availability of resident organisms in the assessment area;

(*2*) Potential for exposure to the oil or hazardous substance through ingestion, assimilation, or inhalation;

(*3*) Occurrence of the substance in a chemical form that can be assimilated by the organism;

(*4*) Capacity of the organism to assimilate, bioconcentrate, bioaccumulate, and/or biomagnify the substance;

(*5*) Capacity of the organism to metabolize the substance to a form that cannot be detected through available chemical analytical procedures; and

(*6*) Extent to which the organism is representative of the food chain of concern.

(B) Collection of the indicator species should be limited to the number necessary to define the areal dispersion and to provide sufficient sample volume for chemical analysis.

(C) When in situ procedures are used, indicator species that behave comparably to organisms existing under free-ranging conditions shall be collected. The indicator species used in this procedure shall be obtained either from a control area selected consistent with provisions of § 11.72 of this part or obtained from a suitable supply of wild-strain organisms reared in a laboratory setting. Appropriate chemical analysis shall be performed on a representative subsample of the indicator species before in situ placement.

(iii) In situ placement procedures shall be used where the collection of samples would be inconsistent with the provisions of § 11.17(b) of this part.

(5) Sampling sites and the number of replicate samples to be collected at the sampling sites shall be consistent with the quality assurance provisions of the Assessment Plan.

(6) Chemical analysis of biological resource samples collected for the purpose of this section shall be conducted in accordance with the quality assurance provisions of the Assessment Plan.

§ 11.64 Injury determination phase—testing and sampling methods.

(a) *General*. (1) The guidance provided in this section shall be followed for selecting methodologies for the Injury Determination phase.

(2) Before selecting methodologies, the objectives to be achieved by testing and sampling shall be defined. These objectives shall be listed in the Assessment Plan. In developing these objectives, the availability of information from response actions relating to the discharge or release, the resource exposed, the characteristics of the oil or hazardous substance, potential physical, chemical, or biological reactions initiated by the discharge or release, the potential injury, the pathway of exposure, and the potential for injury resulting from that pathway should be considered.

(3) When selecting testing and sampling methods, only those methodologies shall be selected:

(i) For which performance under conditions similar to those anticipated at the assessment area has been demonstrated;

(ii) That ensure testing and sampling performance will be cost-effective;

(iii) That will produce data that were previously unavailable and that are needed to make the determinations; and

(iv) That will provide data consistent with the data requirements of the Quantification phase.

(4) Specific factors that should be considered when selecting testing and sampling methodologies to meet the requirements in paragraph (a)(3) of this section include:

(i) Physical state of the discharged or released substance;

(ii) The duration, frequency, season, and time of the discharge or release;

(iii) The range of concentrations of chemical compounds to be analyzed in different media;

(iv) Detection limits, accuracy, precision, interferences, and time required to perform alternative methods;

(v) Potential safety hazards to obtain and test samples;

(vi) Costs of alternative methods; and

(vii) Specific guidance provided in paragraphs (b), (c), (d), (e), and (f) of this section.

(b) *Surface water resources.* (1) Testing and sampling for injury to surface water resources shall be performed using methodologies described in the Assessment Plan.

(2) Chemical analyses performed to meet the requirements of the Injury Determination phase for surface water resources shall be conducted in accordance with methods that are generally accepted or have been scientifically verified and documented.

(3) The term ''water sample'' shall denote a volume of water collected and preserved to represent the bulk water and any dissolved or suspended materials or microorganisms occurring in the surface water resource.

(4) Sampling of water and sediments from surface water resources shall be conducted according to generally accepted methods.

(5) Measurement of the hydrologic properties of the resource shall be conducted according to generally accepted methods.

(6)(i) Interpretation of surface-water flow or estimation of transport of oil or hazardous substance in surface water through the use of models shall be based on hydrologic literature and current practice.

(ii) The applicability of models used during the assessment should be demonstrated, including citation or description of the following:

(A) Physical, chemical, and biological processes simulated by the model;

(B) Mathematical or statistical methods used in the model; and

(C) Model computer code (if any), test cases proving the code works, and any alteration of previously documented code made to adapt the model to the assessment area.

(iii) The validity of models used during the assessment should be established, including a description of the following:

(A) Hydraulic geometry, physiographic features, and flow characteristics of modeled reaches or areas;

(B) Sources of hydrological, chemical, biological, and meteorological data used in the model;

(C) Lists or maps of data used to describe initial conditions;

(D) Time increments or time periods modeled;

(E) Comparison of predicted fluxes of water and solutes with measured fluxes;

(F) Calibration-verification procedures and results; and

(G) Types and results of sensitivity analyses made.

(c) *Ground water resources.* (1) Testing and sampling for injury to ground water resources shall be performed using methodologies described in the Assessment Plan.

(2) Chemical analyses performed to meet the requirements of the Injury Determination phase for ground water resources shall be conducted in accordance with methods that are generally accepted or have been scientifically verified and documented.

(3)(i) The term ''water sample'' shall denote a volume of water collected and preserved to represent the bulk water and any dissolved or suspended materials or microorganisms occurring in the ground water resource.

(ii) The source of ground water samples may be from natural springs, in seeps, or from wells constructed according to generally accepted methods.

(4) Sampling of ground water or of geologic materials through which the ground water migrates shall be conducted according to generally accepted methods.

(5) Measurement of the geohydrologic properties of the resource shall be conducted according to generally accepted practice.

(6) Description of lithologies, minerals, cements, or other sedimentary characteristics of the ground water resource should follow generally accepted methods.

(7) Interpretation of the geohydrological setting, including identifying geologic layers comprising aquifers and any confining units, shall be based on geohydrologic and geologic literature and generally accepted practice.

(8)(i) Interpretation of ground-water flow systems or estimation of transport of oil or hazardous substances in ground water through the use of models shall be based on geohydrologic literature and current practice.

(ii) The applicability of models used during the assessment should be demonstrated, including citation or description of the following.

(A) Physical, chemical, and biological processes simulated by the model;

(B) Mathematical or statistical methods used in the model; and

(C) Model computer code (if any), test cases proving the code works, and any alteration of previously documented code made to adapt the model to the assessment area.

(iii) The validity of models used during the assessment should be established, including a description of the following:

(A) Model boundary conditions and stresses simulated;

(B) How the model approximates the geohydrological framework of the assessment area;

(C) Grid size and geometry;

(D) Sources of geohydrological, chemical, and biological data used in the model;

(E) Lists or maps of data used to describe initial conditions;

(F) Time increments or time periods modeled;

(G) Comparison of predicted fluxes of water and solutes with measured fluxes;

(H) Calibration-verification procedures and results; and

(I) Type and results of sensitivity analyses made.

(d) *Air resources.* (1) Testing and sampling for injury to air resources shall be performed using methodologies that meet the selection and documentation requirements in this paragraph. Methods identified in this section and methods meeting the selection requirements identified in this section shall be used to detect, identify, and determine the presence and source of emissions of oil or a hazardous substance, and the duration, frequency, period of exposure (day, night, seasonal, etc.), and levels of exposure.

(2) The sampling and analysis methods identified in this paragraph are the primary methods to be used for determining injury to the air resource. Air modeling methods may be used for injury determination only when air sampling and analysis methods are not available or the discharge or release occurred with no opportunity to monitor or sample the emissions.

(3)(i) Methods developed, evaluated, approved, and published by the U.S. Environmental Protection Agency may be used for sampling and analysis to determine injury to the air resource.

(ii) Methods selected for air sampling and analysis may include those methods that have been formally reviewed, evaluated, and published by the following government and professional organizations: the National Institute for Occupational Safety and Health, the American Society for Testing and Materials, and the American Public Health Association.

(iii) Methods selected for air sampling and analysis shall be methods that are documented for each of the following:

(A) The range of field conditions for which the methods are applicable;

(B) Quality assurance and quality control requirements necessary to achieve the data quality the methods are capable of producing;

(C) Operational costs of conducting the methods; and

(D) Time required to conduct the methods.

(iv) The determination of concentrations in excess of emission standards for hazardous air pollutants established under section 112 of the Clean Air Act, 42 U.S.C. 7412, shall be conducted in accordance with the primary methods or alternative methods as required in ''National Emission Standards for Hazardous Air Pollutants: Source Test and Analytical Methods,'' 40 CFR 61.14, and as may be applicable to the determination of injury to air resources.

(4) In selecting methods for testing and sampling for injury to air resources, the following performance factors of the sampling and analysis methods and the influencing characteristics of the assessment area and the general vicinity shall be considered:

(i) Method detection limits, accuracy, precision, specificity, interferences, and analysis of time and cost;

(ii) Sampling area locations and frequency, duration of sampling, and chemical stability of emissions; and

(iii) Meteorological parameters that influence the transport of emissions and the spatial and temporal variation in concentration.

(e) *Geologic resources*. (1) Testing and sampling for injury to geologic resources shall be performed using methodologies described in this paragraph.

(2) Testing pH level in soils shall be performed using standard pH measurement techniques, taking into account the nature and type of organic and inorganic constituents that contribute to soil acidity; the soil/solution ratio; salt or electrolytic content; the carbon dioxide content; and errors associated with equipment standardization and liquid junction potentials.

(3) Salinity shall be tested by measuring the electrical conductivity of the saturation extraction of the soil.

(4) Soil microbial respiration shall be tested by measuring uptake of oxygen or release of carbon dioxide by bacterial, fungal, algal, and protozoan cells in the soil. These tests may be made in the laboratory or in situ.

(5) Microbial populations shall be tested using microscopic counting, soil fumigation, glucose response, or adenylate enegry charge.

(6) Phytotoxicity shall be tested by conducting tests of seed germination, seedling growth, root elongation, plant uptake, or soil-core microcosms.

(7) Injury to mineral resources shall be determined by describing restrictions on access, development, or use of the resource as a result of the oil or hazardous substance. Any appropriate health and safety considerations that led to the restrictions should be documented.

(f) *Biological resources*. (1) Testing and sampling for injury to biological resources shall be performed using methodologies provided for in this paragraph.

(2)(i) Testing may be performed for biological responses that have satisfied the acceptance criteria of § 11.62(f)(2) of this part.

(ii) Testing methodologies that have been documented and are applicable to the biological response being tested may be used.

(3) Injury to biological resources, as such injury is defined in § 11.62(f)(1)(ii) of this part, may be determined by using methods acceptable to or used by the Food and Drug Administration or the appropriate State health agency in determining the levels defined in that paragraph.

§ 11.70 Quantification phase—general.

(a) *Requirement*. (1) Upon completing the Injury Determination phase, the authorized official shall quantify for each resource determined to be injured and for which damages will be sought, the effect of the discharge or release in terms of the reduction from the baseline condition in the quantity and quality of services, as the phrase is used in this part, provided by the injured resource using the guidance provided in the Quantification phase of this part.

(2) The Quantification phase consists of § 11.70—general; § 11.71—service reduction quantification; § 11.72—baseline services determination; and § 11.73—resource recoverability analysis, of this part.

(b) *Purpose*. The purpose of the Quantification phase is to quantify the effects of the discharge or release on the

injured natural resources for use in determining the appropriate amount of compensation.

(c) *Steps in the Quantification phase.* In the Quantification phase, the extent of the injury shall be measured, the baseline condition of the injured resource shall be estimated, the baseline services shall be identified, the recoverability of the injured resource shall be determined, and the reduction in services that resulted from the discharge or release shall be estimated.

(d) *Completion of Quantification phase.* Upon completing the Quantification phase, the authorized official shall make a determination as to the reduction in services that resulted from the discharge or release. This Quantification Determination shall be used in the Damage Determination phase and shall be maintained as part of the Report of Assessment described in § 11.90 of this part.

§ 11.71 Quantification phase—service reduction quantification.

(a) *Requirements.* (1) The authorized official shall quantify the effects of a discharge of oil or release of a hazardous substance by determining the extent to which natural resource services have been reduced as a result of the injuries determined in the Injury Determination phase of the assessment.

(2) This determination of the reduction in services will be used in the Damage Determination phase of the assessment.

(3) Quantification will be done only for resources for which damages will be sought.

(b) *Steps.* Except as provided in § 11.71(f) of this part, the following steps are necessary to quantify the effects:

(1) Measure the extent to which the injury demonstrated in the Injury Determination phase has occurred in the assessment area;

(2) Measure the extent to which the injured resource differs from baseline conditions, as described in § 11.72 of this part, to determine the change attributable to the discharge or release;

(3) Determine the services normally produced by the injured resource, which are considered the baseline services or the without-a-discharge-or-release condition as described in § 11.72 of this part;

(4) Identify interdependent services to avoid double counting in the Damage Determination phase and to discover significant secondary services that may have been disrupted by the injury; and

(5) Measure the disruption of services resulting from the discharge or release, which is considered the change in services or the with-a-discharge-or-release condition.

(c) *Contents of the quantification.* The following factors should be included in the quantification of the effects of the discharge or release on the injured resource:

(1) Total area, volume, or numbers affected of the resource in question;

(2) Degree to which the resource is affected, including consideration of subunits or subareas of the resource, as appropriate;

(3) Ability of the resource to recover, expressed as the time required for restoration of baseline services as described in § 11.73 of this part;

(4) Proportion of the available resource affected in the area;

(5) Services normally provided by the resource that have been reduced as a result of the discharge or release; and

(6) Factors identified in the specific guidance in paragraphs (h), (i), (j), (k), and (l) of this section dealing with the different kinds of natural resources.

(d) *Selection of resources, services, and methodologies.* Specific resources or services to quantify and the methodology for doing so should be selected based upon the following factors:

(1) Degree to which a particular resource or service is affected by the discharge or release;

(2) Degree to which a given resource or service can be used to represent a broad range of related resources or services;

(3) Consistency of the measurement with the requirements of the economic methodology to be used;

(4) Technical feasibility, as that phrase is used in this part, of quantifying changes in a given resource or service at reasonable cost; and

(5) Preliminary estimates of services at the assessment area and control

area based on resource inventory techniques.

(e) *Services*. In quantifying changes in natural resource services, the functions provided in the cases of both with- and without-a-discharge-or-release shall be compared. For the purposes of this part, services include provision of habitat, food and other needs of biological resources, recreation, other products or services used by humans, flood control, ground water recharge, waste assimilation, and other such functions that may be provided by natural resources.

(f) *Direct quantification of services*. The effects of a discharge or release on a resource may be quantified by directly measuring changes in services provided by vhe resource, instead of quantifying the changes in the resource itself, when it is determined that all of the following conditions are met:

(1) The change in the services from baseline can be demonstrated to have resulted from the injury to the natural resource;

(2) The extent of change in the services resulting from the injury can be measured without also calculating the extent of change in the resource; and

(3) The services to be measured are anticipated to provide a better indication of damages caused by the injury than would direct quantification of the injury itself.

(g) *Statutory exclusions*. In quantifying the effects of the injury, the following statutory exclusions shall be considered, as provided in sections 107 (f), (i), and (j) and 114(c) of CERCLA, that exclude compensation for damages to natural resources that were a result of:

(1) An irreversible and irretrievable commitment of natural resources identified in an environmental impact statement or other comparable environmental analysis, and the decision to grant the permit or license authorizes such a commitment, and the facility was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that license or permit was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe; or

(2) The damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of CERCLA; or

(3) The application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135–135k; or

(4) Any other federally permitted release, as defined in section 101(10) of CERCLA; or

(5) Resulting from the release or threatened release of recycled oil from a service station dealer as described in section 107(a) (3) or (4) of CERCLA if such recycled oil is not mixed with any other hazardous substance and is stored, treated, transported or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act and other applicable authorities.

(h) *Surface water resources*. (1) The area where the injured surface water resource differs from baseline shall be determined by determining the areal extent of oil or hazardous substances in the water or on the sediments.

(2)(i) Areal variation in concentrations of the discharged or released substances dissolved in or floating on water, adhering to suspended sediments, or adhering to bed, bank, or shoreline sediments from exposed areas should be determined in sufficient detail to approximately map the boundary separating areas with concentrations above baseline from areas with concentrations equal to or less than baseline.

(ii) The size, shape, and location of the plume may be estimated using time of travel and dispersion data obtained under § 11.63 of this part, since plumes of dissolved or floating substances may be rapidly transported and dispersed in surface water.

(3) Water and sediment samples may be collected and chemically analyzed and stage, water discharge, or tidal flux measurements made, as appropriate, to collect new data required by this section.

(4)(i) Within the area determined in paragraph (h)(2) of this section to be above baseline, the services provided by the surface water or sediments that are affected should be determined. This

determination may include computation of volumes of water or sediments affected, total areas of water or sediment affected, volume of water used from the affected surface water resource, or other appropriate measures.

(ii) The services should be determined with consideration of potential effects on downstream or downcurrent resources during the recovery period, as determined in § 11.73 of this part, resulting from transport of dissolved substances and of substances adhering to sediments.

(i) *Ground water resources.* (1) The area where the injured ground water resource differs from baseline should be determined by determining the areal extent of oil or hazardous substances in water or geologic materials in the unsaturated zone and identified geohydrological units, which are aquifers or confining layers, within the assessment area.

(2)(i) The lateral and vertical extent of discharged or released substances in the unsaturated zone, if it is known to be exposed, should be determined.

(ii) The lateral and vertical extent of plumes within geohydrologic units known to be exposed should be determined. Concentrations of substances within and adjacent to each plume should be determined in sufficient detail to approximately locate the boundary separating areas with concentrations above baseline from areas with concentrations equal to or less than baseline.

(3) Water or geologic materials may be sampled and chemically analyzed, or surface-geophysical techniques may be used for collecting new data required by this section. General verification of the plume boundaries by chemical analysis of selected water samples should be done if boundary locations are initially determined by surface-geophysical measurements.

(4)(i) Within the area determined in paragraph (i)(2)(ii) of this section to be above baseline, the services provided by the ground water that is affected should be determined. This determination may include computation of the volume of water affected, volume of affected ground water pumped from wells, volume of affected ground water discharged to streams or lakes, or other appropriate measures.

(ii) The services should be determined with consideration of potential enlargement of the plume during the recovery period, as determined in § 11.73 of this part, resulting from ground water transport of the substances.

(iii) The effects on the ground water resource during the recovery period resulting from potential remobilization of discharged or released substances that may be adhering, coating, or otherwise bonding to geologic materials should be considered.

(j) *Air resources.* The area where the injured air resource differs from baseline should be determined by determining the geographical area affected, the degree of impairment of services, and the period of time impairment occurred.

(k) *Geologic resources.* The area where the injured geologic resource differs from baseline should be determined by determining:

(1) The surface area of soil with reduced ability to sustain the growth of vegetation from the baseline level;

(2) The surface area or volume of soil with reduced suitability as habitat for biota from the baseline level;

(3) The volume of geologic resources that may act as a source of toxic leachate;

(4) The tonnage of mineral resources whose access, development, or use is restricted as a result of the discharge or release.

(l) *Biological resources.* (1) The extent to which the injured biological resource differs from baseline should be determined by analysis of the population or the habitat or ecosystem levels. Although it may be necessary to measure populations to determine changes in the habitats or ecosystems, and vice versa, the final result should be expressed as either a population change or a habitat or ecosystem change in order to prevent double counting in the economic analysis. This separation may be ignored only for resources that do not interact significantly and where it can be demonstrated that double counting is being avoided.

(2) Analysis of population changes or habitat or ecosystem changes should be

based upon species, habitats, or ecosystems that have been selected from one or more of the following categories:

(i) Species or habitats that can represent broad components of the ecosystem, either as representatives of a particular ecological type, of a particular food chain, or of a particular service;

(ii) Species, habitats, or ecosystems that are especially sensitive to the oil or hazardous substance and the recovery of which will provide a useful indicator of successful restoration; or

(iii) Species, habitats, or ecosystems that provide especially significant services.

(3) Analysis of populations, habitats, or ecosystems shall be limited to those populations, habitats, or ecosystems for which injury has been determined in the Injury Determination phase or those that can be linked directly through services to resources for which injury has been so determined. Documentation of the service link to the injured resource must be provided in the latter case.

(4) Population, habitat, or ecosystem measurement methods that provide data that can be interpreted in terms of services must be selected. To meet this requirement, a method should:

(i) Provide numerical data that will allow comparison between the assessment area data and the control area or baseline data;

(ii) Provide data that will be useful in planning efforts for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, and in later measuring the success of those efforts, and, where relevant, will allow calculation of compensable value; and

(iii) Allow correction, as applicable, for factors such as dispersal of organisms in or out of the assessment area, differential susceptibility of different age classes of organisms to the analysis methods and other potential systematic biases in the data collection.

(5) When estimating population differences of animals, standard and widely accepted techniques, such as census, mark-recapture, density, and index methods, and other estimation techniques appropriate to the species and habitat shall be used. Frequencies of injury observed in the population shall be measured as applicable.

(i) In general, methods used for estimates of wildlife populations should follow standard and widely accepted techniques such as those recommendations provided in the ''Wildlife Management Techniques Manual'' (4th edition, Wildlife Society, 1980, available from the Wildlife Society, 5410 Grosvenor Lane, Bethesda, MD 20814), including references cited and recommended in that manual. The specific technique used need not be cited in that manual, but should meet its recommendations for producing reliable estimates or indices.

(ii) Measurement of age structures, life table statistics, or age structure models generally will not provide satisfactory measurement of changes due to a discharge of oil or release of a hazardous substance unless there is clear evidence that the oil or hazardous substance has differentially affected different age classes and there are reliable baseline age structure data available for the population being assessed.

(iii) Mortality from single incidents may be used to estimate changes in populations only when there are available baseline population data for the area, so that the proportion lost can be estimated, and when corrections can be made for potential sampling biases, such as natural mortality and factors influencing distribution of carcasses and ability of investigators to find them. Specific techniques for measuring mortality include the following:

(A) Fish mortality in freshwater areas may be estimated from counts of carcasses, using methods and guidelines for estimating numbers of fish killed contained in Part II (Fish-Kill Counting Guidelines) of the ''Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines,'' American Fisheries Society Special Publication Number 13, 1982 (incorporation by reference, see § 11.18), including use of appropriate random sampling methods and tagged carcasses as identified and discussed in Part II of that publication.

(B) The authorized official may adapt the techniques discussed in paragraph (l) (5) (iii) (A) of this section for counting dead aquatic birds or for counting marine or estuarine fish or birds. Such

adaptation will require the documentation of the methods used to avoid sampling biases.

(C) Fish mortality may also be estimated by use of an in situ bioassay technique that is similar to that identified in § 11.62(f)(4)(i)(C) of this part, if the oil or hazardous substance is still present at levels that resulted in injury and if appropriate instream controls can be maintained at control areas.

(6) Plant populations may be measured using standard techniques, such as population density, species composition, diversity, dispersion, and cover,

(7) Forest and range resources may be estimated by standard forestry and range management evaluation techniques.

(8) Habitat quality may be measured using techniques such as the Habitat Evaluation Procedures (HEP) developed and used by the U.S. Fish and Wildlife Service.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5175, Feb. 22, 1988; 59 FR 14283, Mar. 25, 1994]

§ 11.72 Quantification phase—baseline services determination.

(a) *Requirements*. The authorized official shall determine the physical, chemical, and biological baseline conditions and the associated baseline services for injured resources at the assessment area to compare that baseline with conditions found in § 11.71 of this part.

(b) *General guidelines*. Baseline data shall be selected according to the following general guidelines:

(1) Baseline data should reflect conditions that would have been expected at the assessment area had the discharge of oil or release of hazardous substances not occurred, taking into account both natural processes and those that are the result of human activities.

(2) Baseline data should include the normal range of physical, chemical, or biological conditions for the assessment area or injured resource, as appropriate for use in the analysis in § 11.71 of this part, with statistical descriptions of that variability. Causes of extreme or unusual value in baseline data should be identified and described.

(3) Baseline data should be as accurate, precise, complete, and representative of the resource as the data used or obtained in § 11.71 of this part. Data used for both the baseline and services reduction determinations must be collected by comparable methods. When the same method is not used, comparability of the data collection methods must be demonstrated.

(4) Baseline data collection shall be restricted to those data necessary for conducting the assessment at a reasonable cost. In particular, data collected should focus on parameters that are directly related to the injuries quantified in § 11.71 of this part and to data appropriate and necessary for the Damage Determination phase.

(5) The authorized official may use or authorize for use baseline data that are not expected to represent fully the baseline conditions, subject to the following requirements:

(i) The authorized official shall document how the requirements of this paragraph are met:

(ii) These substitute baseline data shall not cause the difference between baseline and the conditions in the assessment area to exceed the difference that would be expected if the baseline were completely measured; and

(iii) The authorized official has determined that it is either not technically feasible or not cost-effective, as those phrases are used in this part, to measure the baseline conditions fully and that these baseline data are as close to the actual baseline conditions as can be obtained subject to these limitations.

(c) *Historical data*. If available and applicable, historical data for the assessment area or injured resource should be used to establish the baseline. If a significant length of time has elapsed since the discharge or release first occurred, adjustments should be made to historical data to account for changes that have occurred as a result of causes other than the discharge or release. In addition to specialized sources identified in paragraphs (g) through (k) of this section, one or more of the following general sources of historical baseline data may be used:

(1) Environmental Impact Statements or Environmental Assessments previously prepared for purposes of the National Environmental Policy Act

(NEPA), 42 U.S.C. 4321–4361, similar documents prepared under other Federal and State laws, and background studies done for any of these documents;

(2) Standard scientific and management literature sources appropriate to the resource;

(3) Computerized data bases for the resource in question;

(4) Public or private landholders in the assessment area or in neighboring areas;

(5) Studies conducted or sponsored by natural resource trustees for the resource in question;

(6) Federally sponsored research identified by the National Technical Information Service;

(7) Studies carried out by educational institutions; and

(8) Other similar sources of data.

(d) *Control areas.* Where historical data are not available for the assessment area or injured resource, or do not meet the requirements of this section, baseline data should be collected from control areas. Historical data for a control area should be used if available and if they meet the guidelines of this section. Otherwise, the baseline shall be defined by field data from the control area. Control areas shall be selected according to the following guidelines, and both field and historical data for those areas should also conform to these guidelines:

(1) One or more control areas shall be selected based upon their similarity to the assessment area and lack of exposure to the discharge or release;

(2) Where the discharge or release occurs in a medium flowing in a single direction, such as a river or stream, at least one control area upstream or upcurrent of the assessment area shall be included, unless local conditions indicate such an area is inapplicable as a control area;

(3) The comparability of each control area to the assessment area shall be demonstrated, to the extent technically feasible, as that phrase is used in this part;

(4) Data shall be collected from the control area over a period sufficient to estimate normal variability in the characteristics being measured and should represent at least one full cycle normally expected in that resource;

(5) Methods used to collect data at the control area shall be comparable to those used at the assessment area, and shall be subject to the quality assurance provisions of the Assessment Plan;

(6) Data collected at the control area should be compared to values reported in the scientific or management literature for similar resources to demonstrate that the data represent a normal range of conditions; and

(7) A control area may be used for determining the baseline for more than one kind of resource, if sampling and data collection for each resource do not interfere with sampling and data collection for the other resources.

(e) *Baseline services.* The baseline services associated with the physical, chemical, or biological baseline data shall be determined.

(f) *Other requirements.* The methodologies in paragraphs (g) through (k) of this section shall be used for determining baseline conditions for specific resources in addition to following the general guidelines identified in paragraphs (a) through (e) of this section. If a particular resource is not being assessed for the purpose of the Damage Determination phase, and data on that resource are not needed for the assessment of other resources, baseline data for the resource shall not be collected.

(g) *Surface water resources.* (1) This paragraph provides additional guidance on determining baseline services for surface water resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the surface water resource at the assessment area. If deemed inadequate for determining baseline conditions, such data shall be used to the extent technically feasible, as that phrase is used in this part, in designating the control areas described in paragraph (g)(3) of this section for the surface water resource determined to be injured.

(3) Control areas shall be selected for the surface water resource subject to

the general criteria in paragraph (d) of this section and additional criteria as follows:

(i) For each injured stream or river reach, a control area shall be designated consisting of a stream or river reach of similar size, that is as near to the assessment area as practical and, if practical, that is upstream or upcurrent from the injured resource, such that the channel characteristics, sediment characteristics, and streamflow characteristics are similar to the injured resource and the water and sediments of the control area, because of location, have not been exposed to the discharge or release.

(ii) For each injured standing water body, such as a marsh, pond, lake, bay, or estuary, a control area shall be designated consisting of a standing water body of similar size that is as near to the assessment area as practical, such that the sediment characteristics and inflow-outflow characteristics of the control area are similar to the injured resource and the water and sediments of the control area, because of location, have not been exposed to the discharge or release.

(4)(i) Within the control area locations shall be designated for obtaining samples of water and sediments.

(ii) The water discharge, stage, or tidal flux shall be measured and representative water and sediments collected as follows:

(A) Measure stage, water discharge, and tidal flux as appropriate at the same time that water and sediment samples are collected; and

(B) Obtain comparable samples and measurements at both the control and assessment areas under similar hydraulic conditions.

(iii) Measurement and samples shall be obtained as described in this paragraph in numbers sufficient to determine:

(A) The approximate range of concentration of the substances in water and sediments;

(B) The variability of concentration of the substances in water and sediments during different conditions of stage, water discharge, or tidal flux; and

(C) The variability of physical and chemical conditions during different conditions of stage, water discharge, or tidal flux relating to the transport or storage of the substances in water and sediments.

(5) Samples should be analyzed from the control area to determine the physical properties of the water and sediments, suspended sediment concentrations in the water, and concentrations of oil or hazardous substances in water or in the sediments. Additional chemical, physical, or biological tests may be made, if necessary, to obtain otherwise unavailable data for the characteristics of the resource and comparison with the injured resource at the assessment area.

(6) In order to establish that differences between surface water conditions of the control and assessment areas are statistically significant, the median and interquartile range of the available data or the test results should be compared using the Mann-Whitney and ranked squares tests, respectively.

(7) Additional tests may be made of samples from the control area, if necessary, to provide otherwise unavailable information about physical, chemical, or biochemical processes occurring in the water or sediments relating to the ability of the injured surface water resource to recover naturally.

(h) *Ground water resources.* (1) This paragraph provides additional guidance on determining baseline services for ground water resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the ground water resource at the assessment area. If deemed inadequate for determining baseline conditions, such data shall be used to the extent technically feasible, as that phrase is used in this part, in designating the control areas described in paragraph (h)(3) of this section for the ground water resource determined to be injured.

(3) A control area shall be designated subject to the general criteria in paragraph (d) of this section and as near to the assessment area as practical, such

that, within the control area, geological materials, geohydrological units, and hydrologic conditions are similar to the assessment area, and ground water resources are not exposed to substances from the discharge or release.

(4) Within the control area, wells shall be identified or drilled, designated as control wells, to obtain representative ground water samples for analysis. The location, depth, and number of control wells and the number of ground water samples collected should be sufficient to estimate the vertical and lateral variation in concentration of the substances in both the unsaturated zone and in ground water from geohydrologic units similar to units tested in the assessment area.

(i) Representative water samples from each control well shall be collected and analyzed. The analyses should determine the physical and chemical properties of the ground water relating to the occurrence of oil or hazardous substances.

(ii) If the oil or hazardous substances are commonly more concentrated on geologic materials than in ground water, representative samples of geologic materials from aquifers and the unsaturated zone as appropriate should be obtained and chemically analyzed. The location, depth, and number of these samples should be sufficient to determine the vertical and lateral variation in concentration of the oil or hazardous substances absorbing or otherwise coating geologic materials in the control area. These samples may also be analyzed to determine porosity, mineralogy, and lithology of geologic materials if these tests will provide otherwise unavailable information on storage or mobility of the oil or hazardous substances in the ground water resource.

(5) In order to establish that differences between ground water conditions of the control and assessment areas are statistically significant, the median and interquartile range of available data or the test results from similar geohydrologic units should be compared using the Mann-Whitney and ranked squares test, respectively.

(6) Additional tests may be made of samples from the control area, if necessary, to provide otherwise unavailable information about chemical, geochemical, or biological processes occurring in the ground relating to the ability of the injured ground water resource to recover naturally.

(i) *Air resources.* (1) This paragraph provides additional guidance on determining baseline services for air resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered on ambient air quality and source emissions to determine baseline conditions for the air resource. These historical data may be used to determine baseline conditions if the data satisfy the general guidelines in paragraph (d) of this section and if all the following criteria are met:

(i) The methodology used to obtain these historical data would detect the oil or hazardous substance at levels appropriate for comparison to the concentrations measured in §11.71 of this part;

(ii) The effect of known or likely emission sources near the assessment area other than the source of the discharge or release can be identified or accounted for in the historical data; and

(iii) The historical data show that normal concentrations of the oil or hazardous substance are sufficiently predictable that changes as a result of the discharge or release are likely to be detectable.

(3) If historical data appropriate to determine baseline conditions at the assessment area are lacking, one or more control areas, as needed, shall be designated subject to the general criteria of paragraph (d) of this section and the following additional factors, which shall also be considered in establishing a monitoring schedule;

(i) Applicable and available historical data shall be used to the extent technically feasible, as that phrase is used in this part, in designating control areas or, lacking historical data, the factors in paragraph (i)(3)(iii) of this section shall be considered;

(ii) Control areas shall be spatially representative of the range of air quality and meteorological conditions likely to have occurred at the assessment area during the discharge or release into the atmosphere; and

(iii) The following additional factors shall be considered:

(A) The nature of the discharge or release and of potential alternative sources of the oil or hazardous substance, including such factors as existing sources, new sources, intermittent sources, mobile sources, exceptional events, trends, cycles, and the nature of the material discharged or released;

(B) Environmental conditions affecting transport, such as wind speed and direction, atmospheric stability, temperature, humidity, solar radiation intensity, and cloud cover; and

(C) Other factors, such as timing of the discharge or release, use patterns of the affected area, and the nature of the injury resulting from the discharge or release.

(4)(i) The preferred measurement method is to measure air concentrations of the oil or hazardous substance directly using the same methodology employed in § 11.71 of this part.

(ii) Nonspecific or chemical compound class methodologies may be used to determine baseline generically only in situations where it can be demonstrated that measuring indicator substances will adequately represent air concentrations of other components in a complex mixture.

(j) *Geologic resources*. (1) This paragraph provides additional guidance on determining baseline services for geologic resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the geologic resource at the assessment area. If deemed inadequate for determining baseline conditions, such data shall be used to the extent technically feasible, as that phrase is used in this part, in designating the control areas described in paragraph (j)(3) of this section for the geologic resource determined to be injured.

(3) Control areas shall be selected for geologic resources subject to the general criteria in paragraph (d) of this section and additional criteria as follows:

(i) Similarity of exposed soil or geologic material in the assessment area with the geologic resource in the control area should be the primary factor in selecting the control area. Other factors, including climate, depth of ground water, vegetation type and area covered, land slope and land area, and hydraulic gradients and spatial relation to source should be comparable to the assessment area.

(ii) The control area shall be selected such that the geologic resource in the control area is not exposed to the discharge or release.

(4)(i) A sufficient number of samples from unbiased, randomly selected locations in the control area shall be obtained in order to characterize the areal variability of the parameters measured. Each sample should be analyzed to determine the physical and chemical properties of the geologic materials relating to the occurrence of the oil or hazardous substance. Additional chemical, physical, or biological tests may be made, if necessary, to obtain otherwise unavailable data for the characterization and comparison with the injured resource at the assessment area.

(ii) The mean and standard deviation of each parameter measured shall be used as the basis of comparison between the assessment and control areas.

(k) *Biological resources*. (1) This paragraph provides additional guidance on determining baseline services for biological resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the biological resource at the assessment area and should include both population and habitat data if available. These data may be derived from the data sources identified in paragraph (c) of this section, as well as from the following:

(i) Aerial photographs or maps showing distribution and extent of habitat types or other biological resources before the discharge or release;

(ii) Biological specimens in systematic museum or herbarium collections and associated records, including labels and collectors' field notes; and

(iii) Photographs showing the nature of the habitat before the discharge or release when the location and date are well documented.

(3)(i) Control areas shall be selected for biological resources subject to the general criteria in paragraph (d) of this section and additional criteria as follows:

(A) The control area shall be comparable to the habitat or ecosystem at the assessment area in terms of distribution, type, species composition, plant cover, vegetative types, quantity, and relationship to other habitats;

(B) Physical characteristics of the control and assessment areas shall be similar; and

(C) If more than one habitat or ecosystem type is to be assessed, comparable control areas should be established for each, or a control area should be selected containing those habitat types in a comparable distribution.

(ii) To the extent they are available, historical data should be gathered and used for the control area. Lacking adequate historical data for both the control and assessment areas, the control areas shall be used for the following purposes, as appropriate to the quantification:

(A) To measure baseline biota population levels or habitat or ecosystem quality, as discussed in § 11.71(l) of this part; and

(B) To measure the natural frequency, if any, of the injury being assessed in unaffected populations or to demonstrate the lack of that injury in unaffected populations if these have not been done for purposes of the Injury Determination, and if needed for purposes of the Quantification.

(4) In addition, a control area should be used to collect control specimens, as needed, for the Injury Determination procedures.

(5) The identity of species for which Damage Determinations will be made or that play an important role in the assessment shall be confirmed except in the case where collecting the specimens of a species is likely to compromise the restoration of the species. One or more of the following methods shall be used:

(i) Specimens of the species shall be provided to an independent taxonomist or systematic biologist, who has access to a major systematic biology collection for that taxon, and who shall provide written confirmation of their identity to the species level;

(ii) A reference collection of specimens of the species, prepared and preserved in a way standard for systematic collections for that taxon, shall be maintained at least through final resolution of the damage action at which time it should be transferred to a major systematic biology collection; or

(iii) In the case of a species where collecting specimens is likely to compromise the recovery or restoration of that species population, the authorized official shall determine and use an alternative method for confirming species identity that will be consistent with established management goals for that species.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5175, Feb. 22, 1988; 59 FR 14283, Mar. 25, 1994]

§ 11.73 Quantification phase—resource recoverability analysis.

(a) *Requirement*. The time needed for the injured resources to recover to the state that the authorized official determines services are restored, rehabilitated, replaced, and/or the equivalent have been acquired to baseline levels shall be estimated. The time estimated for recovery or any lesser period of time as determined in the Assessment Plan must be used as the recovery period for purposes of § 11.38 and the Damage Determination phase, §§ 11.80 through 11.84.

(1) In all cases, the amount of time needed for recovery if no restoration, rehabilitation, replacement, and/or acquisition of equivalent resources efforts are undertaken beyond response actions performed or anticipated shall be estimated. This time period shall be

used as the ''No Action-Natural Recovery'' period for purposes of § 11.82 and § 11.84(g)(2)(ii) of this part.

(2) The estimated time for recovery shall be included in possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, as developed in § 11.82 of this part, and the data and process by which these recovery times were estimated shall be documented.

(b) *Restoration not feasible.* If the authorized official determines that restoration will not be technically feasible, as that phrase is used in this part, the reasoning and data on which this decision is based shall be documented as part of the justification for any replacement alternatives that may be considered or proposed.

(c) *Estimating recovery time.* (1) The time estimates required in paragraph (a) of this section shall be based on the best available information and where appropriate may be based on cost-effective models. Information gathered may come from one or more of the following sources, as applicable:

(i) Published studies on the same or similar resources;

(ii) Other data sources identified in § 11.72 of this part;

(iii) Experience of managers or resource specialists with the injured resource;

(iv) Experience of managers or resource specialists who have dealt with restoration for similar discharges or releases elsewhere; and

(v) Field and laboratory data from assessment and control areas as necessary.

(2) The following factors should be considered when estimating recovery times:

(i) Ecological succession patterns in the area;

(ii) Growth or reproductive patterns, life cycles, and ecological requirements of biological species involved, including their reaction or tolerance to the oil or hazardous substance involved;

(iii) Bioaccumulation and extent of oil or hazardous substances in the food chain;

(iv) Chemical, physical, and biological removal rates of the oil or hazardous substance from the media involved, especially as related to the local conditions, as well as the nature of any potential degradation or decomposition products from the process including:

(A) Dispersion, dilution, and volatilization rates in air, sediments, water, or geologic materials;

(B) Transport rates in air, soil, water, and sediments;

(C) Biological degradation, depuration, or decomposition rates and residence times in living materials;

(D) Soil or sediment properties and adsorption-desorption rates between soil or sediment components and water or air;

(E) Soil surface runoff, leaching, and weathering processes; and

(F) Local weather or climatological conditions that may affect recovery rates.

[51 FR 27725, Aug. 1, 1986, as amended at 59 FR 14283, Mar. 25, 1994; 61 FR 20612, May 7, 1996]

§ 11.80 Damage determination phase—general.

(a) *Requirement.* (1) The authorized official shall make his damage determination by estimating the monetary damages resulting from the discharge of oil or release of a hazardous substance based upon the information provided in the Quantification phase and the guidance provided in this Damage Determination phase.

(2) The Damage Determination phase consists of § 11.80—general; § 11.81—Restoration and Compensation Determination Plan; § 11.82—alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources; § 11.83—cost estimating and valuation methodologies; and § 11.84—implementation guidance, of this part.

(b) *Purpose.* The purpose of the Damage Determination phase is to establish the amount of money to be sought in compensation for injuries to natural resources resulting from a discharge of oil or release of a hazardous substance. The measure of damages is the cost of (i) restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services. Damages may

also include, at the discretion of the authorized official, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of baseline.

(c) *Steps in the Damage Determination phase.* The authorized official shall develop a Restoration and Compensation Determination Plan, described in § 11.81 of this part. To prepare this Restoration and Compensation Determination Plan, the authorized official shall develop a reasonable number of possible alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources and select, pursuant to the guidance of § 11.82 of this part, the most appropriate of those alternatives; and identify the cost estimating and valuation methodologies, described in § 11.83 of this part, that will be used to calculate damages. The guidance provided in § 11.84 of this part shall be followed in implementing the cost estimating and valuation methodologies. After public review of the Restoration and Compensation Determination Plan, the authorized official shall implement the Restoration and Compensation Determination Plan.

(d) *Completion of the Damage Determination phase.* Upon completion of the Damage Determination phase, the type B assessment is completed. The results of the Damage Determination phase shall be documented in the Report of Assessment described in § 11.90 of this part.

[59 FR 14283, Mar. 25, 1994, as amended at 73 FR 75266, Oct. 2, 2008]

§ 11.81 Damage determination phase—restoration and compensation determination plan.

(a) *Requirement.* (1) The authorized official shall develop a Restoration and Compensation Determination Plan that will list a reasonable number of possible alternatives for (i) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services, and, where relevant, the compensable value; select one of the alternatives and the actions required to implement that alternative; give the rationale for selecting that alternative; and identify the methodologies that will be used to determine the costs of the selected alternative and, at the discretion of the authorized official, the compensable value of the services lost to the public associated with the selected alternative.

(2) The Restoration and Compensation Determination Plan shall be of sufficient detail to evaluate the possible alternatives for the purpose of selecting the appropriate alternative to use in determining the cost of baseline restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, and, where relevant, the compensable value.

(b) The authorized official shall use the guidance in §§ 11.82, 11.83, and 11.84 of this part to develop the Restoration and Compensation Determination Plan.

(c) The authorized official shall list the methodologies he expects to use to determine the costs of all actions considered within the selected alternative and, where relevant, the compensable value of the lost services through the recovery period associated with the selected alternative. The methodologies to use in determining costs and compensable value are described in § 11.83 of this part.

(d)(1) The Restoration and Compensation Determination Plan shall be part of the Assessment Plan developed in subpart B of this part. If existing data are not sufficient to develop the Restoration and Compensation Determination Plan at the time that the overall Assessment Plan is made available for public review and comment, the Restoration and Compensation Determination Plan may be developed later, after the completion of the Injury Determination or Quantification phases.

(2) If the Restoration and Compensation Determination Plan is prepared later than the Assessment Plan, it shall be made available separately for public review by any identified potentially responsible party, other natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of

the public for a period of no less than 30 calendar days. Reasonable extensions may be granted as appropriate.

(3) Comments received from any identified potentially responsible party, other natural resource trustees, other affected Federal or State agencies or Indian tribes, or any other interested members of the public, together with responses to those comments, shall be included as part of the Report of Assessment, described in § 11.90 of this part.

(4) Appropriate public review of the plan must be completed before the authorized official performs the methodologies listed in the Restoration and Compensation Determination Plan.

(e) The Restoration and Compensation Determination Plan may be expanded to incorporate requirements from procedures required under other portions of CERCLA or the CWA or from other Federal, State, or tribal laws applicable to restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured resources or may be combined with other plans for related purposes, so long as the requirements of this section are fulfilled.

[59 FR 14283, Mar. 25, 1994, as amended at 73 FR 57266, Oct. 2, 2008]

§ 11.82 Damage determination phase—alternatives for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(a) *Requirement.* The authorized official shall develop a reasonable number of possible alternatives for (i) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services. For each possible alternative developed, the authorized official will identify an action, or set of actions, to be taken singly or in combination by the trustee agency to achieve the baseline restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources. The authorized official shall then select from among the possible alternatives the alternative that he determines to be the most appropriate based on the guidance provided in this section.

(b) *Steps.* (1) The authorized official shall develop a reasonable number of possible alternatives that would restore, rehabilitate, replace, and/or acquire the equivalent of the injured resources. Each of the possible alternatives may, at the discretion of the authorized official, consist of actions, singly or in combination, that would achieve those purposes.

(i) Restoration or rehabilitation actions are those actions undertaken to return injured resources to their baseline condition, as measured in terms of the physical, chemical, or biological properties that the injured resources would have exhibited or the services that would have been provided by those resources had the discharge of oil or release of the hazardous substance under investigation not occurred. Such actions would be in addition to response actions completed or anticipated pursuant to the National Contingency Plan (NCP).

(ii) Replacement or acquisition of the equivalent means the substitution for injured resources with resources that provide the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(iii) Possible alternatives are limited to those actions that (i) restore or rehabilitate the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) replace and/or acquire equivalent natural resources capable of providing such services.

(2) *Services provided by the resources.* (i) In developing each of the possible alternatives, the authorized official shall list the proposed actions that would restore, rehabilitate, replace, and/or acquire the equivalent of the services provided by the injured natural resources that have been lost, and the period of time over which these services would continue to be lost.

(ii) The authorized official shall identify services previously provided by the resources in their baseline condition in

accordance with § 11.72 of this part and compare those services with services now provided by the injured resources, that is, the with-a-discharge-or-release condition. All estimates of the with-a-discharge-or-release condition shall incorporate consideration of the ability of the resources to recover as determined in § 11.73 of this part.

(c) *Range of possible alternatives.* (1) The possible alternatives considered by the authorized official that return the injured resources to their baseline level of services could range from intensive action on the part of the authorized official to return the various resources and services provided by those resources to baseline conditions as quickly as possible, to natural recovery with minimal management actions. Possible alternatives within this range could reflect varying rates of recovery, combinations of management actions, and needs for resource replacements or acquisitions.

(2) An alternative considering natural recovery with minimal management actions, based upon the ''No Action-Natural Recovery'' determination made in § 11.73(a)(1) of this part, shall be one of the possible alternatives considered.

(d) *Factors to consider when selecting the alternative to pursue.* When selecting the alternative to pursue, the authorized official shall evaluate each of the possible alternatives based on all relevant considerations, including the following factors:

(1) Technical feasibility, as that term is used in this part.

(2) The relationship of the expected costs of the proposed actions to the expected benefits from the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(3) Cost-effectiveness, as that term is used in this part.

(4) The results of any actual or planned response actions.

(5) Potential for additional injury resulting from the proposed actions, including long-term and indirect impacts, to the injured resources or other resources.

(6) The natural recovery period determined in § 11.73(a)(1) of this part.

(7) Ability of the resources to recover with or without alternative actions.

(8) Potential effects of the action on human health and safety.

(9) Consistency with relevant Federal, State, and tribal policies.

(10) Compliance with applicable Federal, State, and tribal laws.

(e) A Federal authorized official shall not select an alternative that requires acquisition of land for Federal management unless the Federal authorized official determines that restoration, rehabilitation, and/or other replacement of the injured resources is not possible.

[59 FR 14284, Mar. 25, 1994, as amended at 73 FR 57266, Oct. 2, 2008; 73 FR 65274, Nov. 3, 2008]

§ 11.83 Damage determination phase—use value methodologies.

(a) *General.* (1) This section contains guidance and methodologies for determining: The costs of the selected alternative for (i) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services; and the compensable value of the services lost to the public through the completion of the baseline restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

(2)(i) The authorized official shall select among the cost estimating and valuation methodologies set forth in this section, or methodologies that meet the acceptance criterion of either paragraph (b)(3) or (c)(3) of this section.

(ii) The authorized official shall define the objectives to be achieved by the application of the methodologies.

(iii) The authorized official shall follow the guidance provided in this section for choosing among the methodologies that will be used in the Damage Determination phase.

(iv) The authorized official shall describe his selection of methodologies and objectives in the Restoration and Compensation Determination Plan.

(3) The authorized official shall determine that the following criteria have been met when choosing among the cost estimating and valuation methodologies. The authorized official shall document this determination in

the Report of the Assessment. Only those methodologies shall be chosen:

(i) That are feasible and reliable for a particular incident and type of damage to be measured.

(ii) That can be performed at a reasonable cost, as that term is used in this part.

(iii) That avoid double counting or that allow any double counting to be estimated and eliminated in the final damage calculation.

(iv) That are cost-effective, as that term is used in this part.

(4) Factors that may be considered by trustees to evaluate the feasibility and reliability of methodologies can include:

(i) Is the methodology capable of providing information of use in determining the restoration cost or compensable value appropriate for a particular natural resource injury?

(ii) Does the methodology address the particular natural resource injury and associated service loss in light of the nature, degree, and spatial and temporal extent of the injury?

(iii) Has the methodology been subject to peer review, either through publication or otherwise?

(iv) Does the methodology enjoy general or widespread acceptance by experts in the field?

(v) Is the methodology subject to standards governing its application?

(vi) Are methodological inputs and assumptions supported by a clearly articulated rationale?

(vii) Are cutting edge methodologies tested or analyzed sufficiently so as to be reasonably reliable under the circumstances?

(5) All of the above factors may not be applicable to every case, and other factors may be considered to evaluate feasibility and reliability. The authorized official shall document any consideration of factors deemed applicable in the Report of Assessment.

(b) *Costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.* (1) Costs for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources are the amount of money determined by the authorized official as necessary to complete all actions identified in the selected alternative for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, as selected in the Restoration and Compensation Determination Plan of § 11.81 of this part. Such costs shall include direct and indirect costs, consistent with the provisions of this section.

(i) Direct costs are those that are identified by the authorized official as attributed to the selected alternative. Direct costs are those charged directly to the conduct of the selected alternative including, but not limited to, the compensation of employees for the time and effort devoted to the completion of the selected alternative; cost of materials acquired, consumed, or expended specifically for the purpose of the action; equipment and other capital expenditures; and other items of expense identified by the authorized official that are expected to be incurred in the performance of the selected alternative.

(ii) Indirect costs are costs of activities or items that support the selected alternative, but that cannot practically be directly accounted for as costs of the selected alternative. The simplest example of indirect costs is traditional overhead, e.g., a portion of the lease costs of the buildings that contain the offices of trustee employees involved in work on the selected alternative may, under some circumstances, be considered as an indirect cost. In referring to costs that cannot practically be directly accounted for, this subpart means to include costs that are not readily assignable to the selected alternative without a level of effort disproportionate to the results achieved.

(iii) An indirect cost rate for overhead costs may, at the discretion of the authorized official, be applied instead of calculating indirect costs where the benefits derived from the estimation of indirect costs do not outweigh the costs of the indirect cost estimation. When an indirect cost rate is used, the authorized official shall document the assumptions from which that rate has been derived.

(2) *Cost estimating methodologies.* The authorized official may choose among the cost estimating methodologies listed in this section or may choose other

methodologies that meet the acceptance criterion in paragraph (b)(3) of this section. Nothing in this section precludes the use of a combination of cost estimating methodologies so long as the authorized official does not double count or uses techniques that allow any double counting to be estimated and eliminated in the final damage calculation.

(i) *Comparison methodology*. This methodology may be used for unique or difficult design and estimating conditions. This methodology requires the construction of a simple design for which an estimate can be found and applied to the unique or difficult design.

(ii) *Unit methodology*. This methodology derives an estimate based on the cost per unit of a particular item. Many other names exist for describing the same basic approach, such as order of magnitude, lump sum, module estimating, flat rates, and involve various refinements. Data used by this methodology may be collected from technical literature or previous cost expenditures.

(iii) *Probability methodologies*. Under these methodologies, the cost estimate represents an ''average'' value. These methodologies require information which is called certain, or deterministic, to derive the expected value of the cost estimate. Expected value estimates and range estimates represent two types of probability methodologies that may be used.

(iv) *Factor methodology*. This methodology derives a cost estimate by summing the product of several items or activities. Other terms such as ratio and percentage methodologies describe the same basic approach.

(v) *Standard time data methodology*. This methodology provides for a cost estimate for labor. Standard time data are a catalogue of standard tasks typically undertaken in performing a given type of work.

(vi) *Cost- and time-estimating relationships (CERs and TERs)*. CERs and TERs are statistical regression models that mathematically describe the cost of an item or activity as a function of one or more independent variables. The regression models provide statistical relationships between cost or time and physical or performance characteristics of past designs.

(3) *Other cost estimating methodologies*. Other cost estimating methodologies that are based upon standard and accepted cost estimating practices and are cost-effective are acceptable methodologies to determine the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources under this part.

(c) *Compensable value*. (1) Compensable value is the amount of money required to compensate the public for the loss in services provided by the injured resources between the time of the discharge or release and the time the resources are fully returned to their baseline conditions, or until the resources are replaced and/or equivalent natural resources are acquired. The compensable value can include the economic value of lost services provided by the injured resources, including both public use and nonuse values such as existence and bequest values. Economic value can be measured by changes in consumer surplus, economic rent, and any fees or other payments collectible by a Federal or State agency or an Indian tribe for a private party's use of the natural resources; and any economic rent accruing to a private party because the Federal or State agency or Indian tribe does not charge a fee or price for the use of the resources. Alternatively, compensable value can be determined utilizing a restoration cost approach, which measures the cost of implementing a project or projects that restore, replace, or acquire the equivalent of natural resource services lost pending restoration to baseline.

(i) Use value is the economic value of the resources to the public attributable to the direct use of the services provided by the natural resources.

(ii) Nonuse value is the economic value the public derives from natural resources that is independent of any direct use of the services provided.

(iii) Restoration cost is the cost of a project or projects that restore, replace, or acquire the equivalent of natural resource services lost pending restoration to baseline.

(2) *Valuation methodologies*. The authorized official may choose among the

valuation methodologies listed in this section to estimate appropriate compensation for lost services or may choose other methodologies provided that the methodology can satisfy the acceptance criterion in paragraph (c)(3) of this section. Nothing in this section precludes the use of a combination of valuation methodologies so long as the authorized official does not double count or uses techniques that allow any double counting to be estimated and eliminated in the final damage calculation.

Type of Methodology	Description
(i) Market price	The authorized official may determine the compensable value of the injured resources using the diminution in the market price of the injured resources or the lost services. May be used only if: (A) The natural resources are traded in the market; and (B) The authorized official determines that the market for the resources, or the services provided by the resources, is reasonably competitive.
(ii) Appraisal	The measure of compensable value is the difference between the with- and without-injury appraisal value determined by the comparable sales approach as described in the Uniform Appraisal Standards. Must measure compensable value, to the extent possible, in accordance with the ''Uniform Appraisal Standards for Federal Land Acquisition,'' Interagency Land Acquisition Conference, Washington, DC, 1973 (incorporated by reference, see § 11.18).
(iii) Factor income (sometimes referred to as the ''reverse value added'' methodology).	May be used only if the injured resources are inputs to a production process, which has as an output a product with a well-defined market price. May be used to determine: (A) The economic rent associated with the use of resources in the production process; and (B) The in-place value of the resources.
(iv) Travel cost	May be used to determine a value for the use of a specific area. Uses an individual's incremental travel costs to an area to model the economic value of the services of that area. Compensable value of the area to the traveler is the difference between the value of the area with and without a discharge or release. Regional travel cost models may be used, if appropriate.
(v) Hedonic pricing	May be used to determine the value of nonmarketed resources by an analysis of private market choices. The demand for nonmarketed natural resources is thereby estimated indirectly by an analysis of commodities that are traded in a market.
(vi) Unit value/benefits transfer	Unit values are preassigned dollar values for various types of nonmarketed recreational or other experiences by the public. Where feasible, unit values in the region of the affected resources and unit values that closely resemble the recreational or other experience lost with the affected resources may be used.
(vii) Contingent valuation	Includes all techniques that set up hypothetical markets to directly elicit an individual's economic valuation of a natural resource. Can determine: (A) Use values and explicitly determine option and existence values; and (B) Lost use values of injured natural resources.
(viii) Conjoint Analysis	Like contingent valuation, conjoint analysis is a stated preference method. However, instead of seeking to value natural resource service losses in strictly economic terms, conjoint analysis compares natural resource service losses that arise from injury to natural resource service gains produced by restoration projects.
(ix) Habitat Equivalency Analysis.	May be used to compare the natural resource services produced by habitat or resource-based restoration actions to natural resource service losses.
(x) Resource Equivalency Analysis.	Similar to habitat equivalency analysis. This methodology may be used to compare the effects of restoration actions on specifically identified resources that are injured or destroyed.
(xi) Random Utility Model	Can be used to: (A) Compare restoration actions on the basis of equivalent resource services provided; and (B) Calculate the monetary value of lost recreational services to the public.

(3) *Other valuation methodologies.* Other methodologies that measure compensable value in accordance with the public's willingness to pay for the lost service, or with the cost of a project that restores, replaces, or acquires services equivalent of natural resource services lost pending restoration to baseline in a cost-effective manner, are acceptable methodologies to determine compensable value under this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5175, Feb. 22, 1988; 59 FR 14285, Mar. 25, 1994; 73 FR 57266, Oct. 2, 2008]

§ 11.84 Damage determination phase—implementation guidance.

(a) *Requirement.* The authorized official should use the cost estimating and valuation methodologies in § 11.83 of this part following the appropriate guidance in this section.

(b) *Determining uses.* (1) Before estimating damages for compensable value under § 11.83 of this part, the authorized official should determine the uses made of the resource services identified in the Quantification phase.

(2) Only committed uses, as that phrase is used in this part, of the resource or services over the recovery period will be used to measure the change from the baseline resulting from injury to a resource. The baseline uses must be reasonably probable, not just in the realm of possibility. Purely speculative uses of the injured resource are precluded from consideration in the estimation of damages.

(3)(i) When resources or resource services have mutually exclusive uses, the highest-and-best use of the injured resource or services, as determined by the authorized official, shall be used as the basis of the analyses required in this part. This determination of the highest-and-best use must be consistent with the requirements of paragraph (b)(2) of this section.

(ii) If the uses of the resource or service are not necessarily mutually exclusive, the sum of damages should be determined from individual services. However, the sum of the projected damages from individual services shall consider congestion or crowding out effects, if any, from the resulting projected total use of those services.

(c) *Double counting*. (1) Double counting of damages should be avoided. Double counting means that a benefit or cost has been counted more than once in the damage assessment.

(2) Natural resource damages are the residual to be determined by incorporating the effects, or anticipated effects, of any response actions. To avoid one aspect of double counting, the effects of response actions shall be factored into the analysis of damages. If response actions will not be completed until after the assessment has been initiated, the anticipated effects of such actions should be included in the assessment.

(d) *Uncertainty*. (1) When there are significant uncertainties concerning the assumptions made in all phases of the assessment process, reasonable alternative assumptions should be examined. In such cases, uncertainty should be handled explicitly in the analysis and documented. The uncertainty should be incorporated in the estimates of benefits and costs.

(2) To incorporate this uncertainty, the authorized official should derive a range of probability estimates for the important assumptions used to determine damages. In these instances, the damage estimate will be the net expected present value of the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources and, if relevant, compensable value.

(e) *Discounting*. (1) Where possible, damages should be estimated in the form of an expected present value dollar amount. In order to perform this calculation, a discount rate must be selected.

(2) The discount rate to be used is that specified in ''Office of Management and Budget (OMB) Circular A–94 Revised'' (dated March 27, 1972, available from the Executive Office of the President, Publications, 726 Jackson Place, NW., Washington, DC 20503; ph: (202) 395–7372).

(f) *Substitutability*. In calculating compensable value, the authorized official should incorporate estimates of the ability of the public to substitute resource services or uses for those of the injured resources. This substitutability should be estimated only if the potential benefits from an increase in accuracy are greater than the potential costs.

(g) *Compensable value during the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources*. (1) In determining the amount of damages, the authorized official has the discretion to compute compensable value for the period of time required to achieve the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(2) When calculating compensable value during the period of time required to achieve restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, the authorized official should follow the procedures described below. The procedures need not be followed in sequence.

(i) The ability of the injured resources to recover over the recovery period should be estimated. This estimate includes estimates of natural recovery rates as well as recovery rates

that reflect management actions or resource acquisitions to achieve restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(ii) A recovery rate should be selected for this analysis that is based upon cost-effective management actions or resource acquisitions, including a ''No Action-Natural Recovery'' alternative. After the recovery rate is estimated, compensable value should be estimated.

(iii) The rate at which the uses of the injured resources and their services will be restored through the restoration or replacement of the services should be estimated. This rate may be discontinuous, that is, no uses are restored until all, or some threshold level, of the services are restored, or continuous, that is, restoration or replacement of uses will be a function of the level and rate of restoration or replacement of the services. Where practicable, the supply of and demand for the restored services should be analyzed, rather than assuming that the services will be utilized at their full capacity at each period of time in the analysis. Compensable value should be discounted using the rate described in paragraph (e)(2) of this section. This estimate is the expected present value of uses obtained through restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(iv) The uses of the resource that would have occurred in the absence of the discharge or release should be estimated. This estimate should be done in accordance with the procedures in § 11.72 of this part. These uses should be estimated over the same time period using the same discount rate as that specified in paragraph (e)(2) of this section. This amount is the expected present value of uses forgone.

(v) Subtraction of the present value of uses obtained through restoration or replacement from the expected present value of uses forgone gives the amount of compensation that may be included, if positive, in a measure of damages.

(h) *Scope of the analysis.* (1) The authorized official must determine the scope of the analysis in order to estimate compensable value.

(2) In assessments where the scope of analysis is Federal, only the compensable value to the Nation as a whole should be counted.

(3) In assessments where the scope of analysis is at the State level, only the compensable value to the State should be counted.

(4) In assessments where the scope of analysis is at the tribal level, only the compensable value to the tribe should be counted.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5176, Feb. 22, 1988; 59 FR 14286, Mar. 25, 1994]

Subpart F—Post-Assessment Phase

§ 11.90 What documentation must the authorized official prepare after completing the assessment?

(a) At the conclusion of an assessment, the authorized official must prepare a Report of Assessment that consists of the Preassessment Screen Determination, the Assessment Plan, and the information specified in paragraphs (b) and (c) of this section as applicable.

(b) When the authorized official has used a type A procedure, the Report of Assessment must include the information specified in subpart D.

(c) When the authorized official has used type B procedures, the Report of Assessment must include all documentation supporting the determinations required in the Injury Determination phase, the Quantification phase, and the Damage Determination phase, and specifically including the test results of any and all methodologies performed in these phases. The preliminary estimate of damages shall be included in the Report of Assessment. The Restoration and Compensation Determination Plan, along with comments received during the public review of that Plan and responses to those comments, shall also be included in the Report of Assessment.

[51 FR 27725, Aug. 1, 1986, as amended at 59 FR 14287, Mar. 25, 1994; 61 FR 20612, May 7, 1996]

§ 11.91 How does the authorized official seek recovery of the assessed damages from the potentially responsible party?

(a) At the conclusion of the assessment, the authorized official must present to the potentially responsible

party a demand in writing for the damages determined in accordance with this part and the reasonable cost of the assessment. [See § 11.92(b) to determine how the authorized official must adjust damages if he or she plans to place recovered funds in a non-interest-bearing account.] The authorized official must deliver the demand in a manner that establishes the date of receipt. The demand shall adequately identify the Federal or State agency or Indian tribe asserting the claim, the general location and description of the injured resource, the type of discharge or release determined to have resulted in the injuries, and the damages sought from that party.

(b) *Report of assessment*. The demand letter shall include the Report of Assessment as an attachment.

(c) *Rebuttable presumption*. When performed by a Federal or State official in accordance with this part, the natural resource damage assessment and the resulting Damage Determination supported by a complete administrative record of the assessment including the Report of Assessment as described in § 11.90 of this part shall have the force and effect of a rebuttable presumption on behalf of any Federal or State claimant in any judicial or adjudicatory administrative proceeding under CERCLA, or section 311 of the CWA.

(d) *Potentially responsible party response*. The authorized official should allow at least 60 days from receipt of the demand by the potentially responsible party, with reasonable extensions granted as appropriate, for the potentially responsible party to acknowledge and respond to the demand, prior to filing suit. In cases governed by section 113(g) of CERCLA, the authorized official may include a notice of intent to file suit and must allow at least 60 days from receipt of the demand by the potentially responsible party, with reasonable extensions granted as appropriate, for the potentially responsible party to acknowledge and respond to the demand, prior to filing suit.

[53 FR 5176, Feb. 22, 1988, as amended at 59 FR 14287, Mar. 25, 1994; 61 FR 20612, May 7, 1996; 73 FR 57268, Oct. 2, 2008]

§ 11.92 Post-assessment phase—restoration account.

(a) *Disposition of recoveries*. (1) All sums (damage claim and assessment costs) recovered pursuant to section 107(f) of CERCLA or sections 311(f)(4) and (5) of the CWA by the Federal government acting as trustee shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury.

(2) All sums (damage claim and assessment costs) recovered pursuant to section 107(f) of CERCLA, or sections 311(f)(4) and (5) of the CWA by a State government acting as trustee shall either:

(i) Be placed in a separate account in the State treasury; or

(ii) Be placed by the responsible party or parties in an interest bearing account payable in trust to the State agency acting as trustee.

(3) All sums (damage claim and assessment costs) recovered pursuant to section 107(f) of CERCLA or sections 311(f)(4) and (5) of the CWA by an Indian tribe shall either:

(i) Be placed in an account in the tribal treasury; or

(ii) Be placed by the responsible party or parties in an interest bearing account payable in trust to the Indian tribe.

(b) *Adjustments*. (1) In establishing the account pursuant to paragraph (a) of this section, the calculation of the expected present value of the damage amount should be adjusted, as appropriate, whenever monies are to be placed in a non-interest bearing account. This adjustment should correct for the anticipated effects of inflation over the time estimated to complete expenditures for the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(2) In order to make the adjustment in paragraph (b)(1) of this section, the authorized official should adjust the damage amount by the rate payable on notes or bonds issued by the United States Treasury with a maturity date that approximates the length of time estimated to complete expenditures for the restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

(c) *Payments from the account.* Monies that constitute the damage claim amount shall be paid out of the account established pursuant to paragraph (a) of this section only for those actions described in the Restoration Plan required by § 11.93 of this part.

[53 FR 5176, Feb. 22, 1988, as amended at 59 FR 14287, Mar. 25, 1994]

§ 11.93 Post-assessment phase—restoration plan.

(a) Upon determination of the amount of the award of a natural resource damage claim as authorized by section 107(a)(4)(C) of CERCLA, or sections 311(f)(4) and 311(f)(5) of the CWA, the authorized official shall prepare a Restoration Plan as provided in section 111(i) of CERCLA. The plan shall be based upon the Restoration and Compensation Determination Plan described in §§ 11.81 of this part. The Plan shall describe how the monies will be used to address natural resources, specifically what restoration, rehabilitation, replacement, or acquisition of the equivalent resources will occur. When damages for compensable value have been awarded, the Plan shall also describe how monies will be used to address the services that are lost to the public until restoration, rehabilitation, replacement, and/or acquisition of equivalent resources is completed. The Restoration Plan shall be prepared in accordance with the guidance set forth in § 11.81 of this part.

(b) No restoration activities shall be conducted by Federal agencies that would incur ongoing expenses in excess of those that would have been incurred under baseline conditions and that cannot be funded by the amount included in the separate account established pursuant to § 11.92(a) of this part unless such additional monies are appropriated through the normal appropriations process.

(c) Modifications may be made to the Restoration Plan as become necessary as the restoration proceeds. Significant modifications shall be made available for review by any responsible party, any affected natural resource trustees, other affected Federal or State agencies or Indian tribes, and any other interested members of the public for a period of at least 30 days, with reasonable extensions granted as appropriate, before tasks called for in the modified plan are begun.

(d) If the measure of damages was determined in accordance with subpart D, the restoration plan may describe actions to be taken that are to be financed from more than one damage award, so long as the actions are intended to address the same or similar resource injuries as those identified in each of the subpart D assessment procedures that were the basis of the awards.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9100, Mar. 20, 1987; 53 FR 5176, Feb. 22, 1988; 59 FR 14287, Mar. 25, 1994]

APPENDIX I TO PART 11—METHODS FOR ESTIMATING THE AREAS OF GROUND WATER AND SURFACE WATER EXPOSURE DURING THE PREASSESSMENT SCREEN

This appendix provides methods for estimating, as required in § 11.25 of this part, the areas where exposure of ground water or surface water resources may have occurred or are likely to occur. These methods may be used in the absence of more complete information on the ground water or surface water resources.

Ground Water

The longitudinal path length (LPL) factors in table 1 are to be applied in estimating the area potentially exposed downgradient of the known limit of exposure or of the boundary of the site. Estimates of lateral path width (LPW) are to be used when the LPW exceeds the width of the plume as determined from available data, or when the width of the plume at the boundary of the site is estimated as less than the LPW. In the absence of data to the contrary, the largest values of LPL and LPW consistent with the geohydrologic data available shall be used to make the estimates required in the preassessment screen. An example computation using the LPL and LPW factors follows table 1.

TABLE 1—FACTORS FOR ESTIMATION OF AREAS POTENTIALLY EXPOSED VIA THE GROUND WATER PATHWAY

Aquifer type	Hyd. conductivity/porosity factor (miles/year)	Hydraulic gradient estimate (feet/mile)	Time since release began (in years)	Longitudinal path length (in feet)	Lateral path width (in feet)
Sand	50	×	×	=	LPW=0.2LPL
Sand+silt	0.5	×	×	=	LPW=0.3LPL
Gravel	6000	×	×	=	LPW=0.2LPL
Sandstone	0.01	×	×	=	LPW=0.4LPL
Shale	3×10^{-6}	×	×	=	LPW=0.8LPL
Karst Limestone or Dolomite	10	×	×	=	LPW=0.2LPL
Limestone or Dolomite	0.01	×	×	=	LPW=0.4LPL
Fractured Crystalline Rocks	0.3	×	×	=	LPW=0.3LPL
Dense Crystalline Rocks	1×10^{-5}	×	×	=	LPW=0.8LPL

EXAMPLE OF COMPUTATION FOR ESTIMATING THE AREA POTENTIALLY EXPOSED VIA GROUND WATER PATHWAY

A release of hazardous substances occurs from a facility located in a glacial valley. Available data indicate the release may have occurred intermittently over a period of almost 1 year, although only one well about 300 feet downgradient of the facility boundary had detectable quantities of contaminants. The contaminated well is screened in the water table aquifer composed of gravelly sands. The facility boundary nearest the contaminated well is almost 3,000 feet in length, but a review of available data determined the release is probably localized along a 500-foot section of the boundary where a stream leaves the facility. Available water table data indicate hydraulic gradients in the valley range from 0.005 feet/mile up to 0.25 feet/mile near pumping wells. No pumping wells are known to be located near the release, and a mean hydraulic gradient of 0.1 feet/mile is estimated in the vicinity of the release site. Using the gravel factor from table 1, the LPL and LPW are estimated:

6000×0.1×1=600 feet (LPL)

and

600×0.2=120 feet (LPW).

Since the estimated LPW (120 feet) is less than the plume width (500 feet) determined from other available data, the greater number is used to compute the area potentially exposed:

(1) 600 feet×500 feet=300,000 square feet (about 6.9 acres). The available information allows an initial determination of area potentially exposed via the ground water pathway to be estimated:

(2) 300 feet×500 feet=150,000 square feet (about 3.5 acres).

The total area potentially exposed is the sum of (1) and (2):

6.9+3.5=10.4 acres.

Surface Water

The area of surface water resources potentially exposed should be estimated by applying the principles included in the examples provided below.

Example 1: A release occurs and most of the oil or hazardous substance enters a creek, stream, or river instantaneously or over a short time interval (pulse input is assumed). The maximum concentration at any downstream location, past the initial mixing distance, is estimated by:

$C_p=25(W_i)/(T^{0.7}\ Q)$

where C_p is the peak concentration, in milligrams/liter (mg/L),

W_i is the total reported (or estimated) weight of the undiluted substance released, in pounds,

Q is the discharge of the creek, stream, or river, in cubic feet/second, and

T is the time, in hours, when the peak concentration is estimated to reach a downstream location L, in miles from the entry point.

The time T may be estimated from:

$T=1.5(L)/V_s$

where T and L are defined as above and

V_s is the mean stream velocity, in feet per second.

The mean stream velocity may be estimated from available discharge measurements or from estimates of slope of the water surface S (foot drop per foot distance downstream) and estimates of discharge Q (defined above) using the following equations:

for pool and riffle reaches $V_s=0.38(Q^{0.40})(S^{0.20})$, or

for channel-controlled reaches $V_s=2.69(Q^{0.26})(S^{0.28})$.

Estimates of S may be made from the slope of the channel, if necessary.

As the peak concentrations become attenuated by downstream transport, the plume containing the released substance becomes

elongated. The time the plume might take to pass a particular point downstream may be estimated using the following equation:

$T_p=9.25\times10^6\ W_i/(QC_p)$

where

T_p is the time estimate, in hours, and W_i, C_p, and Q are defined above.

Example 2: A release occurs and most of the oil or hazardous substance enters a creek, stream, or river very slowly or over a long time period (sustained input assumed). The maximum concentration at any downstream location, past the initial mixing distance, is estimated by:

$C_p=C(q)/(Q+$

where C_p and Q are defined above,

C is the average concentration of the released substance during the period of release, in mg/L, and

q is the discharge rate of the release into the streamflow, in cubic feet/second.

For the above computations, the initial mixing distance may be estimated by:

$L_m=(1.7\times10^{-5})V_s\ B^2/(D^{1.5}\ S^{0.5})$

where

L_m is the initial mixing distance, in miles,

V_s is defined above,

B is the average stream surface width, in ft,

D is the mean depth of the stream, in ft, and

S is the estimated water-surface slope, in ft/ft.

Example 3: A release occurs and the oil or hazardous substance enters a pond, lake, reservoir, or coastal body of water. The concentration of soluble released substance in the surface water body may be estimated by:

$C_p=CV_c/(V_w+V_c)$

where

C_p and C are defined above,

V_c is the estimated total volume of substance released, in volumetric units, and

V_w is the estimated volume of the surface water body, in the same volumetric units used for V_c.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9100, Mar. 20, 1987]

APPENDIX II TO PART 11—FORMAT FOR DATA INPUTS AND MODIFICATIONS TO THE NRDAM/CME

This appendix specifies the format for data inputs and modifications to the NRDAM/CME under §11.41. Consult the back of this appendix for definitions.

Starting Point for the NRDAM/CME

The NRDAM/CME begins its calculations at the point that the released substance entered water in an area represented by its geographic database. Any water within the geographic boundaries of the NRDAM/CME is a ''coastal or marine environment.'' The authorized official must determine all data inputs and modifications as of the time and location that the released substance entered a coastal or marine environment. In the case of a release that began in water in an area within the boundaries of the NRDAM/CME, this point will be the same as the point of the release. However, for releases that begin on land or that begin outside the boundaries of the NRDAM/CME, this point will not be the point of the release but rather the point at which the released substance migrates into a coastal or marine environment.

Required Data Inputs

Documentation of the source of the data inputs; and

Identity of Substance

For release of single substance:

Name of the substance that entered a coastal or marine environment as it appears in Table 7.1, Volume I of the NRDAM/CME technical document (incorporated by reference, see §11.18).

For releases of two or more substances or a release of a mixture of two or more substances:

Name of only one of the substances that entered a coastal or marine environment as it appears in Table 7.1, Volume I of the NRDAM/CME technical document.

Mass or Volume

For release of single substance:

Mass or volume of identified substance that entered a coastal or marine environment stated in tonnes, barrels, gallons, liters, pounds, or kilograms.

For releases of two or more substances or a release of a mixture of two or more substances:

Mass or volume of the one identified substance (rather than total mass) that entered a coastal or marine environment stated in tonnes, barrels, gallons, liters, pounds, or kilograms.

Duration

Length of time over which the identified substance entered a coastal or marine environment stated in hours.

Time

Year, month, day, and hour when the identified substance first entered a coastal or marine environment.

Location

Latitude and longitude, stated in degrees and decimal minutes, where the identified substance entered a coastal or marine environment.

Winds

At least one set of data on prevailing wind conditions for each day of the 30-day period beginning 24 hours before the identified substance entered a coastal or marine environment. Each set must include:

Wind velocity stated in knots or meters per second; and

Corresponding wind direction stated in the degree angle of the wind's origin.

[One possible source of information is the National Climatic Data Center, Asheville, NC (703) 271–4800.]

Response Actions

If removed from water surface:

A rectangular geographic area encompassing the surface water area over which the released substance was likely to have spread, stated in terms of the northern- and southern-most latitude, and the eastern- and western-most longitude;

One or more time frames for removal stated in terms of the number of days and hours after the identified substance entered a coastal or marine environment that removal began and ended; and

For each time frame, volume of the identified substance removed from the water surface (not the total volume of contaminated water or sediments removed) stated in barrels, gallons, or cubic meters.

If removed from shoreline:

A rectangular geographic area encompassing the shoreline area over which the released substance was likely to have spread, stated in terms of the northern- and southern-most latitude, and the eastern- and western-most longitude;

One or more time frames for removal stated in terms of the number of days and hours after the identified substance entered a coastal or marine environment that removal began and ended; and

For each time frame, volume of the identified substance removed (not the total volume of contaminated water or sediments removed) stated in barrels, gallons, or cubic meters.

Closures

Documentation that the closure was ordered by an appropriate agency as a result of the release;

Province(s) in which closure occurred; and

For beaches:

Whether the beach was Federal or State (including municipal or county);

Number of days of closure stated by calendar month; and

Length of shoreline closed, stated in kilometers, for each month in which closure occurred.

For fisheries and shellfish harvest areas:

Whether area closed was seaward open water, landward open water, or structured;

Number of days of closure; and

Area closed stated in square kilometers.

For furbearer hunting or trapping areas and waterfowl hunting areas:

Number of days of closure; and

Area closed stated in square kilometers.

Implicit Price Deflator

Quarterly implicit price deflator for the Gross National Product (base year 1992) for the quarter in which the identified substance entered a coastal or marine environment. [See the Survey of Current Business, published by the U.S. Department of Commerce/Bureau of Economic Analysis, 1441 L Street, NW, Washington, D.C., 20230, (202) 606–9900.]

Currents

For a rectangular geographic area encompassing the area affected by the release stated in terms of the northern- and southern-most latitude, and the eastern- and western-most longitude:

At least one set of data concerning background (mean) current consisting of—

An east-west (U) velocity stated in centimeters per second or knots;

A north-south (V) velocity stated in centimeters per second or knots; and

Latitude and longitude of the origin of the U and V velocity components.

At least one set of data concerning tidal current at time of flood stage (i.e., rising tide) consisting of—

An east-west (U) velocity stated in centimeters per second or knots;

A north-south (V) velocity stated in centimeters per second or knots; and

Latitude and longitude of the origin of the U and V velocity components.

[Possible sources of information are: the National Ocean Service, U.S. Department of Commerce, Riverdale, MD (310) 436–6990; and the Eldridge Tide and Pilot Book, Robert Eldridge White Publisher, Boston, MA (617) 742–3045.]

Tides

Hour of high tide on the day that the identified substance entered a coastal or marine environment;

Tidal range at point that the identified substance entered a coastal or marine environment stated in meters; and

Whether the tide in the area affected by the release is diurnal (i.e., completes one full cycle every day) or semi-diurnal (i.e., completes two full cycles every day).

Modifications to the NRDAM/CME Databases (if Any)

Documentation of the source of the modification; and

For air temperature:

Air temperature, stated in degrees Celsius, assigned by the NRDAM/CME at the point

that the identified substance entered a coastal or marine environment (see Table III.3.2, Volume III of the NRDAM/CME technical document); and

Substitute air temperature stated in degrees Celsius.

For water temperature at the surface:

Water temperature at the surface, stated in degrees Celsius, assigned by the NRDAM/CME at the point that the identified substance entered a coastal or marine environment (see Table III.3.3, Volume III of the NRDAM/CME technical document); and

Substitute water temperature stated in degrees Celsius.

For total suspended sediment concentration:

Total suspended sediment concentration, stated in milligrams per liter, assigned by the NRDAM/CME at the point that the identified substance entered a coastal or marine environment (see Section 3, Volume I of the NRDAM/CME technical document); and

Substitute suspended sediment concentration stated in milligrams per liter.

For mean settling velocity of suspended solids:

Mean settling velocity of suspended sediments, stated in meters per day, assigned by the NRDAM/CME at the point that the identified substance entered a coastal or marine environment (see Section 3, Volume I of the NRDAM/CME technical document); and

Substitute suspended sediment concentration stated in milligrams per liter.

For habitat type:

Latitude and longitude bounds of area for which the habitat type is being modified;

Habitat type assigned by the NRDAM/CME (see Section 3.4, Volume III of the NRDAM/CME technical document); and

Substitute habitat type.

For releases in Alaska, if the authorized official leaves the ice modeling function off, he or she must provide documentation that ice was absent at the site of the release.

Definitions

Background (mean) current—net long-term current flow (i.e., one direction only), attributable to forces such as winds, river flow, water density, and tides, that remains when all the oscillatory (tidal) components have been removed either mathematically or by measurement techniques.

Landward open water—a body of water that does not contain vegetation (e.g., wetland, seagrass, or kelp) or invertebrate reef (e.g., coral reef) and is classified as ''landward'' in Table 6.2, Volume I of the NRDAM/CME technical document.

Province—one of the geographic areas delineated in Table 6.1, Volume I of the NRDAM/CME technical document.

Seaward open water—a body of water that does not contain vegetation (e.g., wetlands, seagrass, or kelp) or invertebrate reef (e.g., coral reef) and is classified as ''seaward'' in Table 6.2, Volume I of the NRDAM/CME technical document.

Structured—in an area that contains vegetation (e.g., wetlands, seagrass, or kelp) or invertebrate reef (e.g., coral reef).

Tidal current—currents caused by alternating rise and fall of the sea level due to the gravitational forces between the earth, moon, and sun.

Tidal range—difference between the highest and lowest height of the tide.

[61 FR 20612, May 7, 1996]

APPENDIX III TO PART 11—FORMAT FOR DATA INPUTS AND MODIFICATIONS TO THE NRDAM/GLE

This appendix specifies the format for data inputs and modifications to the NRDAM/GLE under §11.41. Consult the back of this appendix for definitions.

Point of Analysis

The NRDAM/GLE begins its calculations at the point that the released substance entered water in an area represented by its geographic database. Any water within the geographic boundaries of the NRDAM/GLE is a ''Great Lakes environment.'' The authorized official must determine all data inputs and modifications as of the time and location that the released substance entered a Great Lakes environment. In the case of a release that began in water in an area within the boundaries of the NRDAM/GLE, this point will be the same as the point of the release. However, for releases that begin on land or that begin outside the boundaries of the NRDAM/GLE, this point will not be the point of the release but rather the point at which the released substance migrates into a Great Lakes environment.

Required Data Inputs

Documentation of source of data inputs; and

Identity of Substance

For release of single substance:

Name of the released substance that entered a Great Lakes environment as it appears in Table 7.1, Volume I of the NRDAM/GLE technical document (incorporated by reference, see §11.18).

For releases of two or more substances or a release of a mixture of two or more substances:

Name of only one of the released substances that entered a Great Lakes environment as it appears in Table 7.1, Volume I of the NRDAM/GLE technical document.

Mass or Volume

For releases of single substance:

Mass or volume of identified substance that entered a Great Lakes environment stated in tonnes, barrels, gallons, liters, pounds, or kilograms.

For releases of two or more substances or a release of a mixture of two or more substances:

Mass or volume of the one identified substance (rather than total mass) that entered a Great Lakes environment stated in tonnes, barrels, gallons, liters, pounds, or kilograms.

Duration

Length of time over which the identified substance entered a Great Lakes environment stated in hours.

Time

Year, month, day, and hour when the identified substance first entered a Great Lakes environment.

Location

Latitude and longitude, stated in degrees and decimal minutes, where the identified substance entered a Great Lakes environment.

Winds

At least one set of data on prevailing wind conditions for each day of the 30-day period beginning 24 hours before the identified substance entered a Great Lakes environment. Each set must include:

Wind velocity stated in knots or meters per second; and Corresponding wind direction stated in the degree angle of the wind's origin.

[One possible source of information is the National Climatic Data Center, Asheville, NC (703) 271–4800.]

Response Actions

Percentage of identified substance removed from water surface, bottom sediments, and shoreline; and

For each medium cleaned (water surface, bottom sediments, or shoreline), the number of days after the identified substance entered a Great Lakes environment that removal began and ended.

Closures

Documentation that the closure was ordered by an appropriate agency as a result of the release; and

For boating areas:

Number of weekend days of closure stated by calendar month;

Number of weekday days of closure stated by calendar month; and

Area closed stated in square kilometers.

For beaches:

Whether the beach was Federal or State (including municipal or county);

Number of days of closure stated by calendar month; and

Length of shoreline closed stated in meters.

For fisheries:

Whether area closed was an offshore, nearshore, or wetland fishery;

Number of days of closure; and

Area closed stated in square kilometers.

For furbearer hunting or trapping areas and waterfowl hunting areas:

Number of days of closure; and

Area closed stated in square kilometers.

Implicit Price Deflator

Quarterly implicit price deflator for the Gross National Product (base year 1992) for the quarter in which the identified substance entered a Great Lakes environment. [See the Survey of Current Business, published by the U.S. Department of Commerce/Bureau of Economic Analysis, 1441 L Street, NW, Washington, D.C., 20230, (202) 606–9900.]

MODIFICATIONS TO THE NRDAM/GLE DATABASES (IF ANY)

Documentation of the source of the modifications; and

For air temperature:

Air temperature, stated in degrees Celsius, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Table III.6.1, Volume III of the NRDAM/GLE technical document); and

Substitute air temperature stated in degrees Celsius.

For water temperature at the surface:

Water temperature at the surface, stated in degrees Celsius, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Table III.6.2.6, Volume III of the NRDAM/GLE technical document); and

Substitute water temperature stated in degrees Celsius.

For total suspended sediment concentration:

Total suspended sediment concentration, stated in milligrams per liter, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Section 3, Volume I of the NRDAM/GLE technical document); and

Substitute suspended sediment concentration stated in milligrams per liter.

For mean settling velocity of suspended solids:

Mean settling velocity of suspended sediments, stated in meters per day, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Section 3, Volume I of the NRDAM/GLE technical document); and

Substitute suspended sediment concentration stated in milligrams per liter.

For habitat type:

Latitude and longitude bounds of area for which the habitat type is being modified;

Habitat type assigned by the NRDAM/GLE (see Section 6.2, Volume III of the NRDAM/GLE technical document); and

Substitute habitat type.

If the authorized official turns off the ice modeling function, then he or she must provide documentation that ice was absent from the site of the release.

Definitions

Nearshore fishery—fishery in an open water area that is less than 30 feet in depth or is in a connecting channel.

Offshore fishery—fishery in an open water area that is 30 feet or more in depth.

Wetland fishery—fishery that is not in an open water area.

[61 FR 20614, May 7, 1996]

PART 12—ADMINISTRATIVE AND AUDIT REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

Subpart A—Administrative and Audit Requirements and Cost Principles for Assistance Programs

Sec.

12.1 Scope of part.
12.2 What policies are financial assistance awards and subawards in the form of grants and cooperative agreements subject to?
12.3 Effect on prior issuances.
12.4 Information collection requirements.
12.5 Waiver.

Subpart B [Reserved]

Subpart C—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

GENERAL

12.41 Purpose and scope of this part.
12.42 Scope of subpart.
12.43 Definitions.
12.44 Applicability.
12.45 Effect on other issuances.
12.46 Additions and exceptions.

PRE-AWARD REQUIREMENTS

12.50 Forms for applying for grants.
12.51 State plans.
12.52 Special grant or subgrant conditions for ''high-risk'' grantees.

POST-AWARD REQUIREMENTS

Financial Administration

12.60 Standards for financial management systems.
12.61 Payment.
12.62 Allowable costs.
12.63 Period of availability of funds.
12.64 Matching or cost sharing.
12.65 Program income.
12.66 Non-Federal audit.

CHANGES, PROPERTY, AND SUBAWARDS

12.70 Changes.
12.71 Real property.
12.72 Equipment.
12.73 Supplies.
12.74 Copyrights.
12.76 Procurement.
12.77 Subgrants.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

12.80 Monitoring and reporting program performance.
12.81 Financial reporting.
12.82 Retention and access requirements for records.
12.83 Enforcement.
12.84 Termination for convenience.

AFTER-THE-GRANT REQUIREMENTS

12.90 Closeout.
12.91 Later disallowances and adjustments.
12.92 Collection of amounts due.

ENTITLEMENTS [RESERVED]

Subpart D [Reserved]

Subpart E—Buy American Requirements for Assistance Programs

BUY AMERICAN ACT—SUPPLIES

12.700 Scope.
12.705 Definitions.
12.710 Policy.
12.715 Evaluating offers.
12.720 Excepted articles, materials, and supplies.
12.725 Solicitation provisions and contract clause.
12.730 Buy American Act—Supplies.

BUY AMERICAN ACT—CONSTRUCTION MATERIALS

12.800 Scope.
12.805 Definitions.
12.810 Policy.
12.815 Evaluating offers.
12.820 Violations.
12.825 Solicitation provision and contract clause.

12.830 Buy American Act—Construction materials.

Subpart F—Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

GENERAL

12.901 Purpose.
12.902 Definitions.
12.903 Effect on other issuances.
12.904 Deviations.
12.905 Subawards.

PRE-AWARD REQUIREMENTS

12.910 Purpose.
12.911 Pre-award policies.
12.912 Forms for applying for Federal assistance.
12.914 Special award conditions.
12.915 Metric system of measurement.
12.916 Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C. 6962).
12.917 Certifications and representations.

POST-AWARD REQUIREMENTS

Financial and Program Management

12.920 Purpose of financial and program management.
12.921 Standards for financial management systems.
12.922 Payment.
12.923 Cost sharing or matching.
12.924 Program income.
12.925 Revision of budget and program plans.
12.926 Non-Federal audits.
12.927 Allowable costs.
12.928 Period of availability of funds.

Property Standards

12.930 Purpose of property standards.
12.931 Insurance coverage.
12.932 Real property.
12.933 Federally owned and exempt property.
12.934 Equipment.
12.935 Supplies and other expendable property.
12.936 Intangible property.
12.937 Property trust relationship.

Procurement Standards

12.940 Purpose of procurement standards.
12.941 Recipient responsibilities.
12.942 Codes of conduct.
12.943 Competition.
12.944 Procurement procedures.
12.945 Cost and price analysis.
12.946 Procurement records.
12.947 Contract administration.
12.948 Contract provisions.

Reports and Records

12.950 Purpose of reports and records.
12.951 Monitoring and reporting program performance.
12.952 Financial reporting.
12.953 Retention and access requirements for records.

Termination and Enforcement

12.960 Purpose of termination and enforcement.
12.961 Termination.
12.962 Enforcement.

AFTER-THE-AWARD REQUIREMENTS

12.970 Purpose.
12.971 Closeout procedures.
12.972 Subsequent adjustments and continuing responsibilities.
12.973 Collection of amounts due.

APPENDIX A TO SUBPART F OF PART 12—CONTRACT PROVISIONS

AUTHORITY: E.O 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); 5 U.S.C. 301; U.S.C 6101 note.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990, and 60 FR 33036, June 26, 1995.

EDITORIAL NOTE: For additional information, see related documents published at 49 FR 24958, June 18, 1984; 52 FR 20178 and 20360, May 29, 1987; 53 FR 8028, Mar. 11, 1988; 53 FR 19160, May 26, 1988; and 53 FR 34474, Sept. 6, 1988.

Subpart A—Administrative and Audit Requirements and Cost Principles for Assistance Programs

SOURCE: 50 FR 6176, Feb. 14, 1985; 56 FR 45898, Sept. 9, 1991, unless otherwise noted.

§ 12.1 Scope of part.

This part prescribes administrative requirements and cost principles for grants and cooperative agreements entered into by the Department.

§ 12.2 What policies are financial assistance awards and subawards in the form of grants and cooperative agreements subject to?

(a) All financial assistance awards and subawards, in the form of grants

and cooperative agreements, in accordance with paragraph (b) of this section, are subject to subparts C, D, E, and F of this part, OMB Circulars A–102, ''Grants and Cooperative Agreements with State and Local Governments,'' A–110, ''Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' A–87, ''Cost Principles for State and Local Governments,'' A–21, ''Cost Principles for Educational Institutions,'' A–122, ''Cost Principles for Non-Profit Organizations,'' and A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b)(1) Governmental recipients and subrecipients are subject to subparts C, D, and E of this part, Circulars A–87 and A–133.

(2) Institutions of higher education which are recipients or subrecipients are subject to subparts D, E, and F of this part, Circulars A–110, A–21, and A–133.

(3) Non-profit organizations which are recipients or subrecipients are subject to subparts D, E, and F of this part, Circulars A–110, A–122, and A–133.

(c) The circulars prescribed by this part published in the FEDERAL REGISTER are made a part of this regulation and include changes published in the FEDERAL REGISTER by OMB.

(d)(1) Federal ethics and conduct regulations contained in 5 CFR part 2635 implement Executive Order 12674, 3 CFR, 1989 Comp., p. 215 (as modified by Executive Order 12731, 3 CFR, 1990 Comp., p. 306), ''Principles of Ethical Conduct for Government Officers and Employees,'' by prohibiting employees from endorsing in an official capacity the proprietary products or processes of manufacturers or the services of commercial firms for advertising, publicity, or sales purposes. The Department's use of materials, products, or services does not constitute official endorsement.

(2) The policy in paragraph (d)(1) of this section applies to a grant/cooperative agreement whose principal purpose is a partnership where the recipient/partner contributes resources to promote agency programs, publicize agency activities, assists in fundraising, or provides assistance to the agency. In the event that such a grant/cooperative agreement is awarded to a recipient, other than a State government, a local government, or a Federally-recognized Indian tribal government, and authorizes joint dissemination of information and promotion of activities being supported, the following provision shall be made a term and condition of the award:

GRANT/COOPERATIVE AGREEMENT PROVISION

Recipient shall not publicize or otherwise circulate, promotional material (such as advertisements, sales brochures, press releases, speeches, still and motion pictures, articles, manuscripts or other publications) which states or implies governmental, Departmental, bureau, or government employee endorsement of a product, service, or position which the recipient represents. No release of information relating to this award may state or imply that the Government approves of the recipient's work products, or considers the recipient's work product to be superior to other products or services.

All information submitted for publication or other public releases of information regarding this project shall carry the following disclaimer:

The views and conclusions contained in this document are those of the authors and should not be interpreted as representing the opinions or policies of the U.S. Government. Mention of trade names or commercial products does not constitute their endorsement by the U.S. Government.

Recipient must obtain prior Government approval for any public information releases concerning this award which refer to the Department of the Interior or any bureau or employee (by name or title). The specific text, layout photographs, etc. of the proposed release must be submitted with the request for approval.

A recipient further agrees to include this provision in a subaward to any subrecipient, except for a subaward to a State government, a local government, or to a Federally-recognized Indian tribal government.

(End of provision)

(3) Recipient requests for clearance of public releases will be reviewed using existing public information mechanisms through the appropriate Public Affairs Office and with consultation with the cognizant Ethics Officer.

(e) (1) What does Executive Order 13043, ''Increasing Seat Belt Use in the United States,'' dated April 16, 1997, do?

(i) If you are a Federal grantee, you are encouraged to—

(A) Adopt and enforce on-the-job seat belt use policies and programs for your employees when operating company-owned, rented, or personally owned vehicles.

(B) Conduct education, awareness, and other appropriate programs for your employees about the importance of wearing seat belts and the consequences of not wearing them.

(ii) [Reserved]

(2) When does the policy apply?

(i) If a grant/cooperative agreement is being awarded by the bureau/office of the Department—The policy applies.

(ii) If the recipient awards a grant or cooperative agreement to a sub-recipient—The policy applies.

(3) What terms and conditions will be incorporated into the grant/cooperative agreement or sub-award, if use of a specific provision is desired and general applicability to 43 CFR Part 12 is not used instead?

(i) The following provision will be incorporated into the grant/cooperative agreement or sub-award:

THE SEAT BELT PROVISION

Recipients of grants/cooperative agreements and/or sub-awards are encouraged to adopt and enforce on-the-job seat belt use policies and programs for their employees when operating company-owned, rented, or personally owned vehicles. These measures include, but are not limited to, conducting education, awareness, and other appropriate programs for their employees about the importance of wearing seat belts and the consequences of not wearing them.

(End of provision)

(ii) [Reserved]

[50 FR 6176, Feb. 14, 1985, as amended at 53 FR 8077, Mar. 11, 1988; 56 FR 45898, Sept. 9, 1991; 59 FR 17712, Apr. 14, 1994; 62 FR 45944, Aug. 29, 1997; 65 FR 39822, June 28, 2000]

§ 12.3 Effect on prior issuances.

(a) All provisions of Department of the Interior nonregulatory program manuals, handbooks and other materials which are inconsistent with the above OMB Circulars are superseded, except to the extent that they are (1) required by statute, or (2) authorized in accordance with the exceptions provisions of each circular.

(b) Except to the extent inconsistent with the regulations in 43 CFR part 12, subpart C, all existing Department of the Interior regulations in 25 CFR parts 23, 27, 39, 40, 41, 256, 272, 278, and 276; 30 CFR parts 725, 735, 884, 886, and 890; 36 CFR parts 60, 61, 63, 65, 67, 72, and 800; 43 CFR parts 26 and 32; and 50 CFR parts 80, 81, 82, 83, and 401 are not superseded by these regulations nor are any paperwork approvals under the Paperwork Reduction Act.

[50 FR 6176, Feb. 14, 1985, as amended at 53 FR 8077, Mar. 11, 1988]

§ 12.4 Information collection requirements.

Information collections in addition to those required by applicable OMB Circulars will be cleared by responsible bureaus and offices on an individual basis.

§ 12.5 Waiver.

Only OMB can grant exceptions from the requirements of these Circulars when exceptions are not prohibited under existing laws.

Subpart B [Reserved]

Subpart C—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

SOURCE: 53 FR 8077, 8087, Mar. 11, 1988, unless otherwise noted.

GENERAL

§ 12.41 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 12.42 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 12.43 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from ''programmatic'' requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for ''grant'' and ''subgrant'' in this section and except where qualified by ''Federal'') a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a Federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF–269 ''Financial Status Report'' (or other equivalent report); (2) for construction grants, the SF–271 ''Outlay Report and Request for Reimbursement'' (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a Federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form

of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the U.S. Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of ''grant'' in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than ''equipment'' as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action

by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. ''Termination'' does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a Federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 12.44 Applicability.

(a) *General.* Subparts A–D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 12.46, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section.

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits.

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 12.44(a)(3) through (8) are subject to subpart E.

§ 12.45 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 12.46.

§ 12.46 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

PRE-AWARD REQUIREMENTS

§ 12.50 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet,

Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 12.51 State plans.

(a) *Scope*. The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements*. A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances*. In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments*. A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 12.52 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered ''high risk'' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

POST-AWARD REQUIREMENTS

Financial Administration

§ 12.60 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 12.61 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions, or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 12.83(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 12.62 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A–87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular.	OBM Circular A–122.
Educational institutions.	OMB Circular A–21.
For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 12.63 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§ 12.64 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 12.65, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 12.65(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts

earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be 6valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 12.62, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition*. If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property*. In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 12.65 Program income.

(a) *General*. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income*. Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. ''During the grant period'' is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income*. If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues*. Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties*. Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 12.74.)

(f) *Property*. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 12.71 and 12.72.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 12.66 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 12.36 shall be followed.

[53 FR 8077, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45945, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§ 12.70 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 12.62) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 12.76 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 12.62) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms

and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 12.71 Real property.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use*. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition*. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title*. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property*. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title*. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 12.72 Equipment.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States*. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use*. (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 12.65(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services,

unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided Federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 12.72(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 12.73 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition*. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other Federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 12.74 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 12.76 Procurement.

(a) *States*. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards*. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 12.76. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves

an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 12.76(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-

reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular

procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §12.62). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the

awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

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§ 12.77 Subgrants.

(a) *States*. States shall follow State law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 12.82 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees*. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions*. By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 12.50;

(2) Section 12.51;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 12.61; and

(4) Section 12.90.

Reports, Records Retention, and Enforcement

§ 12.80 Monitoring and reporting program performance.

(a) *Monitoring by grantees*. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports*. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding

agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 12.81 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that

the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 12.81(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the ''Remarks'' section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction

grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 12.81(b)(3).

(e) *Outlay report and request for reimbursement for construction programs*—(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 12.81(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 12.81(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 12.81(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 12.81(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 12.81(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 12.81(b)(2).

§ 12.82 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 12.76(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its

final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 12.83 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an

award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to ''Debarment and Suspension'' under E.O. 12549 (see § 12.75).

§ 12.84 Termination for convenience.

Except as provided in § 12.83 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 12.83 or paragraph (a) of this section.

AFTER-THE-GRANT REQUIREMENTS

§ 12.90 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable.)

(3) Final request for payment (SF–270) (if applicable).

(4) Invention disclosure (if applicable).

(5) *Federally-owned property report:* In accordance with § 12.72(f), a grantee must submit an inventory of all Federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 12.91 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 12.82;

(d) Property management requirements in §§ 12.71 and 12.72; and

(e) Audit requirements in § 12.66.

§ 12.92 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

ENTITLEMENTS [RESERVED]

Subpart D [Reserved]

Subpart E—Buy American Requirements for Assistance Programs

SOURCE: 59 FR 36715, July 19, 1994, unless otherwise noted.

BUY AMERICAN ACT—SUPPLIES

§ 12.700 Scope.

This subpart implements section 307 of the Omnibus Consolidated Appropriations Act of 1997 (Public Law 104–208, 110 Stat. 3009) and section 501 of the Energy and Water Development Appropriations Act, 1997 (Public Law 104–206, 110 Stat. 2984). For awards made under the authority of section 307(a) of Public Law 104–208, this subpart requires that no funds made available in the Act may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a–10c; popularly known as the ''Buy American Act''). It applies to procurement contracts under grants and cooperative agreements which provide for the purchase of equipment and products. Section 501 of Public Law 104–206, 110 Stat. 2984, only applies to awards made by the Bureau of Reclamation. In addition, for these awards, there is only a requirement that in providing financial assistance to, or entering into any contract with, any entity using funds made available in this Act, the Secretary, to the greatest extent practicable, will provide to the entity a notice describing a statement within the Act made by Congress. This statement concerns the sense of the Congress that to the greatest extent practicable, all equipment and products purchased with funds made available in the Act, should be American-made. Therefore, for Fiscal Year 1997 awards, only the requirements in Section 12.700 and 12.710 will apply to awards made by the Bureau of Reclamation.

[61 FR 68667, Dec. 30, 1996]

§ 12.705 Definitions.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into the end products.

Concern, as used in this subpart, means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, to an individual, partnership, corporation, joint venture, association, or cooperative.

Domestic end product, as used in this subpart, means (a) an unmanufactured end product mined or produced in the United States; or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty

(whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with Section 12.710(d) (3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic. On acquisitions above $25,000 in value, components of Canadian origin are treated as domestic.

Domestic offer, as used in this subpart, means an offered price for a domestic end product, including transportation to destination.

End product, as used in this subpart, means those articles, materials, and supplies to be acquired for public use under the grant, cooperative agreement, or procurement contract awarded under the grant or cooperative agreement.

Foreign end product, as used in this subpart, means an end product other than a domestic end product.

Foreign offer, as used in this subpart, means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

Instrumentality, as used in this subpart, does not include an agency or division of the government of a country.

Labor surplus area, as used in this subpart, means a geographical area identified by the Department of Labor in accordance with 20 CFR part 654, subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

Labor surplus area concern, as used in this subpart, means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

United States, as used in this subpart, means the states thereof, the District of Columbia, and the territories and possessions of the United States.

[59 FR 36715, July 19, 1994, as amended at 61 FR 68668, Dec. 30, 1996]

§ 12.710 Policy.

(a) In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available under Public Law 104–208, it is the sense of Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(b) In awarding financial assistance under Public Law 104–208, 110 Stat. 3009, bureaus and offices excluding the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

NOTICE: Pursuant to sec. 307 of the Omnibus Consolidated Appropriations Act of 1997, Public Law 104–208, 110 Stat. 3009, please be advised of the following:

In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available in this act, it is the sense of the Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(c) In awarding financial assistance using funds made available under Public Law 104–206, to the greatest extent practicable, the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

NOTICE: Pursuant to sec. 501 of the Energy and Water Development Appropriations Act, 1997, Public Law 104–206, 110 Stat. 2984, please be advised of the following:

It is the sense of the Congress, that to the greatest extent practicable, all equipment and products purchased with funds made available in this act should be American-made.

(d) The Buy American Act requires that only domestic end products be acquired for public use, except articles, materials, and supplies—

(1) For use outside the United States;

(2) For which the cost would be unreasonable, as determined in accordance with § 12.715;

(3) For which the agency head determines that domestic preference would be inconsistent with the public interest; or

(4) That are not mined, produced, or manufactured in the United States in sufficient and reasonable available

commercial quantities, of a satisfactory quality (see § 12.720).

(e) The grantee's contracting officer may make a nonavailability determination under § 12.710(d)(4) for a procurement contract awarded under the grant or cooperative agreement if—

(1) The procurement action was conducted by full and open competition;

(2) The procurement action was publicly advertised; and

(3) No offer for a domestic end product was received; or

(f) The head of the grantee's contracting activity or designee may make a nonavailability determination under § 12.710(d)(4) for any circumstance other than specified in paragraph (e) of this section.

[59 FR 36715, July 19, 1994, as amended at 59 FR 65500, Dec. 20, 1994; 61 FR 39084, July 26, 1996; 61 FR 68668, Dec. 30, 1996]

§ 12.715 Evaluating offers.

(a) Unless the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines otherwise, the offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer (see § 12.705), inclusive of duty, by—

(1) More than 6 percent, if the domestic offer is from a large business that is not a labor surplus area concern; or

(2) More than 12 percent, if the domestic offer is from a small business concern or any labor surplus area concern.

(b) The evaluation in paragraph (a) of this section shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation.

(c) If an award of more than $250,000 would be made to a domestic concern if the 12-percent factor were applied, but not if the 6-percent factor were applied, the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official shall decide whether award to the domestic concern would involve unreasonable cost.

§ 12.720 Excepted articles, materials, and supplies.

(a) As indicated in the Federal Acquisition Regulation (FAR), one or more agencies have determined that the articles, materials, and supplies on the list referred to in paragraph (b) of this section are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. This referenced list in paragraph (b) of this section is furnished for information only; an article, material or supply listed therein may be treated as domestic only when the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official has made a determination that it is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.

(b) Refer to the current list of excepted articles, materials, and supplies in FAR 25.108 (48 CFR 25.108).

§ 12.725 Solicitation provisions and contract clause.

(a) When quotations are obtained orally, vendors shall be informed that only domestic end products, other than end products excepted on a blanket or individual basis (see § 12.720), shall be acceptable, unless the price for an offered domestic end product is unreasonable (see § 12.715).

(b) The grantee awarding officer shall insert the clause at § 12.730, Buy American Act—Supplies, in solicitations for procurement contracts awarded under the grant or cooperative agreement for the purchase of supplies, or for services involving the furnishing of supplies, for use within the United States.

§ 12.730 Buy American Act—Supplies.

As prescribed in § 12.725, insert the following clause:

BUY AMERICAN ACT—SUPPLIES

(a) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic end products.

Components, as used in this clause, means those articles, materials, and supplies incorporated directly into the end products.

Domestic end product, as used in this clause, means an unmanufactured end product mined or produced in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in paragraphs (b)(2) or (3) of this clause shall be treated as domestic.

End products, as used in this clause, means those articles, materials, and supplies to be acquired for public use under this contract.

(b) The contractor shall deliver only domestic end products, except those—

(1) For use outside the United States;

(2) That the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;

(3) For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that domestic preference would be inconsistent with the public interest; or

(4) For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the cost to be unreasonable (see § 12.715).

(End of clause)

BUY AMERICAN ACT—CONSTRUCTION MATERIALS

§ 12.800 Scope.

This subpart implements the Buy American Act (41 U.S.C. 10). It applies to procurement contracts awarded under a grant or cooperative agreement for the construction, alteration, or repair of any public building or public work in the United States.

§ 12.805 Definitions.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into construction materials.

Construction, as used in this subpart, means construction, alteration, or repair of any public building or public work in the United States.

Construction materials, as used in this subpart, means an article, material, and supply brought to the construction site for incorporation into the building or work.

Construction material also includes an item brought to the site pre-assembled from articles, materials, and supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

Domestic construction material, as used in this section, means: (a) An unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the construction material and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with § 12.810(a)(3) are treated as domestic.

Foreign construction material, as used in this section, means as construction material other than a domestic construction material.

United States (see § 12.705).

§ 12.810 Policy.

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when—

(1) The cost would be unreasonable as determined in accordance with § 12.815;

(2) The head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that use of a particular domestic construction material would be impracticable; or

(3) The head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the construction material is not mined, produced, or

manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (see § 12.720).

(b) When it is determined for any reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the agreement. Findings justifying the exception shall be available for public inspection.

§ 12.815 Evaluating offers.

(a) The restrictions of the Buy American Act do not apply when the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that using a particular domestic construction material would unreasonably increase the cost or would be impracticable.

(b) When proposed awards are submitted to the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official for approval, each submission shall include a description of the materials, including unit and quantity, estimated costs, location of the construction project, name and address of the proposed contractor, and a detailed justification of the impracticability of using domestic materials.

§ 12.820 Violations.

Violation of the Buy American Act in the performance of a procurement construction contract under a grant or cooperative agreement is a cause for debarment. Information concerning a failure to comply with the clause at § 12.830, Buy American Act—Construction Materials, shall be promptly reported, investigated, and referred, when appropriate to the appropriate U.S. Department of the Interior employee responsible for administering the grant or cooperative agreement. (For debarment procedures, see subpart D of this part).

§ 12.825 Solicitation provision and contract clause.

The grantee awarding official shall insert the clause at § 12.830, Buy American Act—Construction Materials, in solicitations for procurement contracts awarded under a grant or cooperative agreement for construction inside the United States.

§ 12.830 Buy American Act—Construction materials.

As prescribed in § 12.825, insert the following clause in solicitations for procurement contracts awarded under a grant or cooperative agreement for construction inside the United States:

BUY AMERICAN ACT—CONSTRUCTION MATERIALS

(a) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic construction material.

Components, used in this clause, means those articles, materials, and supplies incorporated directly into construction materials.

Construction material, as used in this clause, means an article, material, or supply brought to the construction site for incorporation into the building or work. Construction material also includes an item brought to the site pre-assembled from articles, materials or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

Domestic construction material, as used in this clause, means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the construction materials determined to be unavailable pursuant to § 12.810(a)(3) of 43 CFR part 12, subpart E shall be treated as domestic.

(b) The contractor agrees that only domestic construction material will be used by the contractor, subcontractors, materialmen, and suppliers in the performance of this agreement, except for foreign construction materials, if any, listed in this agreement.

(End of clause)

Subpart F—Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

SOURCE: 60 FR 17238, Apr. 5, 1995, unless otherwise noted.

GENERAL

§ 12.901 Purpose.

This subpart establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations.

§ 12.902 Definitions.

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of:

(1) Earnings during a given period from:

(i) Services performed by the recipient, and

(ii) Goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which a Federal agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Federal awarding agency.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

Disallowed costs means those charges to an award that the Federal awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of

$5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of any Federal awarding agency that, as determined by the Secretary, is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Funding period means the period of time when Federal funding is available for obligation by the recipient.

Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of: cash disbursements for direct charges for goods and services; the amount of indirect expense incurred; the value of in-kind contributions applied; and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Prior approval means written approval by an authorized official evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in § 12.924 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under Federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patients and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a

recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which Federal sponsorship begins and ends.

Property means, unless otherwise stated, real property, equipment, supplies, intangible property and debt instruments.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include, at the discretion of the Federal awarding agency, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as Federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions.

(1) *Research* is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied.

(2) *Development* is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

Small awards means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $100,000).

Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of ''award'' in this section.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (''subject inventions''), as defined in 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.''

Suspension means an action by a Federal awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under the Department of the Interior Regulations implementing E.O.'s 12549 and 12689, ''Debarment and Suspension.'' See subpart D of 43 CFR part 12.

Termination means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of noncash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by Federal awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 12.903 Effect on other issuances.

For awards subject to this subpart, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this subpart shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in Section 12.904.

§ 12.904 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this subpart when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this subpart shall be permitted only in unusual circumstances. Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB. All requests for class deviations shall be processed through the Assistant Secretary-Policy, Management, and Budget. Federal awarding agencies may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by Federal awarding agencies. Bureau/office application of less restrictive requirements when awarding small awards, except for those requirements which are statutory, as well as exceptions on a case-by-case basis, will be handled by designated officials identified in bureau/office procedures.

§ 12.905 Subawards.

Unless sections of this subpart specifically exclude subrecipients from coverage, the provisions of this subpart shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals, or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,'' 43 CFR part 12.

PRE-AWARD REQUIREMENTS

§ 12.910 Purpose.

Sections 12.011 through 12.917 prescribe forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 12.911 Pre-award policies.

(a) *Use of Grants and Cooperative Agreements, and Contracts.* In each instance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act

(31 U.S.C. 6301–6308) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, ''substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public Notice and Priority Setting.* Federal awarding agencies shall notify the public of their funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 12.912 Forms for applying for Federal assistance.

(a) Federal awarding agencies shall comply with the applicable report clearance requirements of 5 CFR part 1320, ''Controlling Paperwork Burdens on the Public,'' with regard to all forms used by the Federal awarding agency in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by the Federal awarding agency.

(c) For Federal programs covered by E.O. 12372, ''Intergovernmental Review of Federal Programs,'' the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the *Catalog of Federal Domestic Assistance.* The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review. (See also 43 CFR part 9).

(d) Federal awarding agencies that do not use the SF–424 form will indicate whether the application is subject to review by the State under E.O. 12372.

§ 12.914 Special award conditions.

(a) Federal awarding agencies may impose additional requirements as needed, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Additional requirements may only be imposed provided that the applicant or recipient is notified in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 12.915 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of Federally-funded activities. Federal awarding agencies will follow the provisions of E.O. 12770, ''Metric

usage in Federal Government Programs.'' When applicable, the awarding agency shall request that measurement-sensitive information to be included as part of the application, be expressed in metric units. When required by the awarding agency, for grants to recipients, the following term and condition will be incorporated into the grant:

PROVISION

All progress and final reports, other reports, or

All progress and final reports, other reports, or publications produced under this award shall employ the metric system of measurements to the maximum extent practicable. Both metric and inch-pound units (dual units) may be used if necessary during any transition period(s). However, the recipient may use non-metric measurements to the extent that the recipient has supporting documentation that the use of metric measurements is impracticable or is likely to cause significant inefficiencies or loss of markets to the recipient, such as when foreign competitors are producing competing products in non-metric units.

(End of provision)

§ 12.916 Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C. 6962).

Under the Act, any State agency or agency of a political subdivision of a State that is using appropriated Federal funds must comply with section 6002 of RCRA. Section 6002 of RCRA requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education and hospitals that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 12.917 Certifications and representations.

Unless prohibited by statute or codified regulation, each Federal awarding agency is authorized and encouraged to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

POST-AWARD REQUIREMENTS

Financial and Program Management

§ 12.920 Purpose of financial and program management.

Sections 12.921 through 12.928 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 12.921 Standards for financial management systems.

(a) Federal awarding agencies shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following:

(1) Accurate, current and complete disclosure of the financial results of each Federally-sponsored project or program in accordance with the reporting requirements set forth in § 12.952. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for Federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and

other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (31 U.S.C. 6501 note) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, ''Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.''

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records, including cost accounting records, that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Federal awarding agency may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above in § 12.921 (c) and (d), the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

§ 12.922 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain or demonstrate written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and financial management systems that meet the standards for fund control and accountability as established in § 12.921. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purposes of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances will be consolidated to cover anticipated cash needs for all awards made by the Federal awarding agency to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, ''Request for Advance or Reimbursement,'' or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special Federal awarding

agency instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. Federal awarding agencies may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Federal awarding agency shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit a request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Federal awarding agency has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Federal awarding agency may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Federal awarding agency shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, Federal awarding agencies shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (h)(1) or (h)(2) of this section apply:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Managing Federal Credit Programs.'' Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, Federal awarding agencies shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k)(1), (2) or (3) apply:

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal

advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. In keeping with Electronic Funds Transfer rules, (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit system. Recipients which do not have this capability should use a check. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this subpart, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) SF–270, Request for Advance or Reimbursement. Each Federal awarding agency shall adopt the SF–270 as a standard form for all nonconstruction programs where electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using this form for construction programs in lieu of the SF–271, ''Outlay Report and Request for Reimbursement for Construction Programs.''

(2) SF–271, Outlay Report and Request for Reimbursement for Construction Programs. Each Federal awarding agency shall adopt the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF–270 when the Federal awarding agency determines that it provides adequate information to meet Federal needs.

§ 12.923 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other Federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Federal awarding agency.

(7) Conform to other provisions of this subpart, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a Federal awarding agency authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraph (c) (1) or (2) of this section:

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the

recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if paragraph (g) (1) or (2) of this section apply:

(1) If the purpose of the award is to assist the recipient to acquire equipment, buildings, or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed their fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 12.924 Program income.

(a) Federal awarding agencies shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with Federal awarding agency regulations or the terms and conditions of the award, shall be used in one or more of the following ways:

(1) Added to funds committed to the project or program by the Federal awarding agency and recipient and used to further eligible project or program objectives;

(2) Used to finance the non-Federal share of the project or program; or

(3) Deducted from the total project or program allowable cost in determining the net allowable costs upon which the Federal share of costs is based.

(c) When an agency authorizes the disposition of program income as described in paragraph (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) If the Federal awarding agency does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the awarding agency indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in § 12.914.

(e) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by Federal awarding agency regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 12.930 through 12.937).

(h) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 12.925 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Federal awarding agency requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A–21, ''Cost Principles for Institutions of Higher Education,'' OMB Circular A–122, ''Cost Principles for Non-Profit Organizations,'' or 45 CFR part 74, appendix E, ''Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,'' or 48 CFR part 31, ''Contract Cost Principles and Procedures,'' as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved award, the subaward, transfer or contracting out of any work under an award. This

provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraph (c)(1) and (c)(4) of this section, Federal awarding agencies are authorized, at their option, to waive cost-related and administrative prior written approvals required by this subpart and OMB Circulars A–21 and A–122. Such waivers may include authorizating recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient's risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing, with the supporting reasons and revised expiration date, at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances. The conditions that prevent issuance of a one-time extension are:

(i) The terms and conditions of award prohibit the extension;

(ii) The extension requires additional Federal funds; or

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Federal awarding agency provides otherwise in the award or in the agency's regulations, the prior approval requirements described in paragraph (e)(1) through (3) of this section are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of the transfer exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. No Federal awarding agency shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) No other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from Federal awarding agencies for budget revisions whenever paragraph (h) (1), (2) or (3) of this section apply:

(1) the revision results from changes in the scope or the objective of the project or program;

(2) additional Federal funds are needed to complete the project; or

(3) the recipient requests a revision that involves specific costs for which prior written approval requirements may be imposed under § 12.927.

(i) No other prior approval requirements for specific items will be imposed unless OMB approves a deviation.

(j) When a Federal awarding agency makes an award that provides support for both construction and nonconstruction work, the Federal awarding agency may require the recipient to request prior approval before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, Federal awarding agencies shall require recipients to notify the Federal awarding agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5,000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application

for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Federal awarding agency indicates that a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Federal awarding agencies shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 12.926 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.

[60 FR 17238, Apr. 5, 1995, as amended at 62 FR 45939, 45945, Aug. 29, 1997]

§ 12.927 Allowable costs.

Federal awarding agencies shall determine allowable costs in accordance with the type of entity incurring the costs, using the appropriate directive from the table below.

Entity incurring costs	Applicable directive
State, local, or Federally recognized Indian Tribe.	OMB Circular A–87, Cost Principles for State and Local Governments.
Non-profit organization	OMB Circular A–122, Cost Principles for Non-profit Organizations and 43 CFR 12.927(b).
Institution of Higher Education	OMB Circular A–21, Cost Principles for Educational Institutions.
Hospital	45 CFR part 74, appendix E, Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.
Commercial organization or non-profit organization listed in Attachment C of OMB Circular A–122.	48 CFR part 31, Contract Principles and Procedures or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 12.928 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Federal awarding agency.

Property Standards

§ 12.930 Purpose of property standards.

Sections 12.931 through 12.937 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. Federal awarding agencies shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 12.931 through 12.937.

§ 12.931 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient.

Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 12.932 Real property.

Each Federal awarding agency shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the awarding agency.

(b) The recipient shall obtain written approval by the Federal awarding agency for the use of real property in other Federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under Federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by the Department of the Interior.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the Federal awarding agency or its successor. The Federal awarding agency will give one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Federal awarding agency and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 12.933 Federally owned and exempt property.

(a) *Federally-owned property*. (1) Title to Federally-owned property remains vested in the Federal Government. Recipients shall submit annually to the Federal awarding agency an inventory listing of Federally-owned property in their custody. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Federal awarding agency for further utilization.

(2) If the Federal awarding agency has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, ''Improving Mathematics and Science Education in Support of the National Education Goals.'') Appropriate instructions shall be issued to the recipient by the Federal awarding agency.

(b) *Exempt property*. Exempt property. When statutory authority exists, the Federal awarding agency has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Federal awarding agency considers appropriate. Such property is ''exempt property.'' Should a Federal awarding agency not establish conditions, title to exempt property upon acquisition

shall vest in the recipient without further obligation to the Federal Government.

§ 12.934 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds, and shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other Federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by the Federal awarding agency, then

(2) Activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Federal awarding agency.

(f) The recipient's property management standards for equipment acquired with Federal funds and Federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal awarding agency for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft

of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5,000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Federal awarding agency. The Federal awarding agency shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be reported to the General Services Administration by the Federal awarding agency to determine whether a requirement for the equipment exists in other Federal agencies. The Federal awarding agency shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the Federal awarding agency an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient will be reimbursed by the Federal awarding agency for such costs incurred in its disposition.

(h) The Federal awarding agency may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when the third party is otherwise eligible under existing statutes. The transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(2) The Federal awarding agency shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with Federal funds and Federally-owned equipment. If the Federal awarding agency fails to issue disposition instructions within the 120-calendar-day period, the recipient shall apply the standards of this section, as appropriate.

(3) When the Federal awarding agency exercises its right to take title, the equipment shall be subject to the provisions for Federally-owned equipment.

§ 12.935 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other Federally-sponsored project or program,

the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 12.936 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient

shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 12.934(g).

[63 FR 12188, Mar. 12, 1998, as amended at 65 FR 14407, 14418, Mar. 16, 2000]

§ 12.937 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

Procurement Standards

§ 12.940 Purpose of procurement standards.

Sections 12.941 through 12.948 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by the Federal awarding agencies upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 12.941 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Federal awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 12.942 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 12.943 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall

be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bids or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 12.944 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government; and

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of ''brand name or equal'' descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to use small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The ''cost-plus-a-percentage-of-cost'' or ''percentage of construction cost'' methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to

other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, ''Debarment and Suspension.'' See 43 CFR part 12.

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review of procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $100,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a ''brand name'' product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 12.945 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 12.946 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection;

(b) Justification for lack of competition when competitive bids or offers are not obtained; and

(c) Basis for award cost or price.

§ 12.947 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and documents, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 12.948 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the provisions below in all contracts and subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the Federal awarding agency may accept the bonding policy and requirements of the

recipient, provided the Federal awarding agency has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, the Federal awarding agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of appendix A to this subpart, as applicable.

Reports and Records

§ 12.950 Purpose of reports and records.

Sections 12.951 through 12.953 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 12.951 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 12.926.

(b) The Federal awarding agency shall prescribe the frequency of submission for performance reports. Except as provided in § 12.951(f), performance reports will not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semi-annual reports shall be due 30 days after the reporting period. The Federal awarding agency may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) A final technical or performance report shall be required after completion of the project only if the awarding agency determines this to be appropriate.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Federal awarding agency of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) Federal awarding agencies may make site visits, as needed.

(h) Federal awarding agencies shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 12.952 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) *SF–269 or SF–269A, Financial Status Report.* (i) Each Federal awarding agency will require recipients to use either the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs. A Federal awarding agency may, however, have the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) The Federal awarding agency shall prescribe whether the report shall be on a cash or accrual basis. If the Federal awarding agency requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop accrual information through best estimates based upon an analysis of the documentation on hand.

(iii) The Federal awarding agency shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) The Federal awarding agency shall require recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semiannual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Federal awarding agency upon request by the recipient.

(2) *SF–272, Report of Federal Cash Transactions.* (i) When funds are advanced to recipients, the Federal awarding agency shall require each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272a. The Federal awarding agency shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) Federal awarding agencies may require forecasts of Federal cash requirements in the ''Remarks'' section of the report.

(iii) When practical and deemed necessary, Federal awarding agencies may require recipients to report in the ''Remarks'' section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. The Federal awarding agencies may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) Federal awarding agencies may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the Federal awarding agency's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Federal awarding agency needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, Federal awarding agencies shall issue instructions to require recipients to submit such information under the ''Remarks'' section of the reports.

(2) When a Federal awarding agency determines that a recipient's accounting system does not meet the standards in § 12.921, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. The Federal awarding agency, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Federal awarding agencies are encouraged to shade out any line item on any report if not necessary.

(4) Federal awarding agencies may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Federal awarding agencies may provide computer or electronic outputs to recipients when such action expedites or contributes to the accuracy or reporting.

§ 12.953 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. Federal awarding agencies shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the Federal awarding agency, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocation plans, etc., as specified in § 12.953(g).

(c) Copies of original records may be substituted for the original records if authorized by the Federal awarding agency.

(d) The Federal awarding agency will request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a Federal awarding agency may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Federal awarding agency, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period,

but shall last as long as records are retained.

(f) Unless required by statute, no Federal awarding agency shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Federal awarding agency can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the Federal awarding agency.

(g) *Indirect cost rate proposals, cost allocation plans, etc.* Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of the submission.

(2) *If not submitted for negotiation.* If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

Termination and Enforcement

§ 12.960 Purpose of termination and enforcement.

Sections 12.961 and 12.962 set forth uniform suspension, termination and enforcement procedures.

§ 12.961 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (a)(2) or (a)(3) of this section applies.

(1) By the Federal awarding agency, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the Federal awarding agency with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the Federal awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraph (a) (1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 12.971(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 12.962 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Federal awarding agency may, in addition to imposing any of the special conditions outlined in § 12.914, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Federal awarding agency.

(2) Disallow (that is, deny both use of funds and any applicable matching

credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals*. In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination*. Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the Federal awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraphs (c) (1) and (2) of this section apply:

(1) The costs result from obligations which are properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension*. The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.s 12549 and 12689 and the Federal awarding agency implementing regulations (see 43 CFR part 12).

AFTER-THE-AWARD REQUIREMENTS

§ 12.970 Purpose.

Sections 12.971 through 12.973 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 12.971 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Federal awarding agency may approve extensions when requested by the recipient.

(b) Unless the Federal awarding agency authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The Federal awarding agency shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the Federal awarding agency has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Federal awarding agency shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 12.931 through 12.937.

(g) If a final audit has not been performed prior to the closeout of an award, the Federal awarding agency shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 12.972 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of the Federal awarding agency to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 12.926.

(4) Property management requirements in §§ 12.931 through 12.937.

(5) Records retention as required in § 12.953.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Federal awarding agency and the recipient, provided the responsibilities of the recipient referred to in § 12.973(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 12.973 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Federal awarding agency may reduce the debt by paragraph (*a*)(1), (2) or (3) of this section:

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR chapter II, ''Federal Claims Collection Standards.''

APPENDIX A TO SUBPART F OF PART 12—CONTRACT PROVISIONS

All contracts awarded by a recipient, including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, ''Equal Employment Opportunity,'' as amended by E.O. 11375, ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR part 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of $100,000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction''). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of $100,000 for construction contracts and for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to

construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,'' and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended*—Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of more than $100,000 shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*—No contracts shall be made to parties listed on the General Services Administration's ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs'' in accordance with E.O.s 12549 and 12689, ''Debarment and Suspension.'' This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding their exclusion status and that of their principals.

PART 13—VENDING FACILITIES OPERATED BY BLIND PERSONS

Sec.
13.1 Authority and purpose.
13.2 Application for permit.
13.3 Cooperation in selection of facilities.
13.4 Terms of permit.
13.5 Protection from competition.
13.6 Appeals.

AUTHORITY: Sec. 4, 68 Stat. 663; 20 U.S.C. 107.

SOURCE: 22 FR 9476, Nov. 27, 1957, unless otherwise noted.

§ 13.1 Authority and purpose.

The Randolph-Sheppard Vending Stand Act of June 20, 1936, as amended by section 4 of the Act of August 3, 1954 (68 Stat. 663; 20 U.S.C. 107), directs that, insofar as practicable, preference shall be given to blind persons in the operation of vending stands and machines on any Federal property. The regulations in this part prescribe the policies and procedures to achieve and protect that preference on property, including land, owned or leased by the United States and controlled by the Department of the Interior.

§ 13.2 Application for permit.

(a) State licensing agencies designated by the Department of Health, Education, and Welfare under the Randolph-Sheppard Vending Stand Act may apply for permits to establish and maintain vending facilities, including both vending stands and machines, to be operated by blind persons licensed by the State agencies. Application for a permit shall be made, in writing, by the State licensing agency to the head of the Interior bureau or office having control of the property in question. In the regulations in this part the term ''head of the Interior bureau or office'' includes the authorized representatives of that bureau or office.

(b) The head of the Interior bureau or office may deny an application if he determines that the issuance of a permit would unduly inconvenience the bureau or office or adversely affect the interests of the United States. Such determination shall be in writing and shall

state the reasons on which it is based. The fact that a permit will be without charge for rent shall not constitute a basis for denying an application.

(c) In considering applications for permits, due regard shall be given to the terms of any existing contractual arrangements.

§ 13.3 Cooperation in selection of facilities.

Upon request from a State licensing agency, the Interior bureau or office shall cooperate in selecting locations and arranging accommodations for vending facilities to be operated by blind persons. In making such selection, due consideration shall be given to the requirements of occupant agencies, availability of suitable space, and requirements for preparation and maintenance of the space.

§ 13.4 Terms of permit.

Every permit shall describe the location of the vending facilities and shall be subject to the following provisions:

(a) The permit shall be issued in the name of the applicant State licensing agency.

(b) The permit shall be for a definite term, not to exceed five years, and shall be without charge for rent.

(c) The permit may be revoked at any time upon not less than 30 days written notice to the permittee from the head of the Interior bureau or office having control of the property where the vending facilities are located. Such notice shall state the reasons on which it is based.

(d) Items sold at the vending facilities shall be limited to newspapers, periodicals, pre-packaged confections, tobacco products, articles dispensed automatically or in containers or wrappings in which they are placed before receipt by the vendor, and such other articles as may be approved by the head of the Interior bureau or office for each location. The head of the Interior bureau or office may require discontinuance of sale of any type of article, upon not less than 15 days' notice in writing.

(e) Vending facilities shall be operated in compliance with such standards of appearance, safety, health, sanitation, and efficiency as may be prescribed by the head of the Interior bureau or office. Such standards shall conform, so far as practicable with the provisions of State laws and regulations, whether or not the property is under the exclusive jurisdiction of the United States.

(f) The permittee shall arrange for the modification or relocation of the vending facilities when in the opinion of the head of the Interior bureau or office such action is essential to the satisfactory maintenance, operation, or use of the property concerned and shall not modify or relocate such facilities without such approval. Installation, modification, relocation, or removal of vending facilities shall be made only under the supervision of the head of the Interior bureau or office and without cost to the Department of the Interior. The permittee may be required to remove any vending device deemed undesirable by the head of the Interior bureau or office. Ownership of vending devices installed by the permittee or operator shall remain vested with the installer. All extra identifiable costs incurred by the Department of the Interior in restoring to its original condition any space vacated by removal or relocation of vending facilities shall be reimbursed by the permittee or the operator.

(g) In the event a vending facility is being operated in a manner unsatisfactory to the Interior bureau or office, the permittee will be notified in writing and required to take appropriate action to rectify the situation.

(h) The operator of the vending facility shall carry such insurance against losses by fire, public liability, employer's liability, or other hazards as is customary among prudent operators of similar businesses under comparable circumstances.

§ 13.5 Protection from competition.

(a) The head of the Interior bureau or office shall protect the blind operator of the vending facility against direct competition from other vendors or vending machines on property which the head of the Interior bureau or office controls. Other vendors or vending machines shall be considered in direct competition with vending facilities permitted under the regulations in this

part if they sell or dispense articles which are similar or identical to those on sale at the vending facilities in such proximity to the vending facility as to attract customers who might otherwise patronize the vending facilities.

(b) After a permit has been issued under the regulations in this part to a State licensing agency for operation of a vending facility, the head of the Interior bureau or office, except as provided in paragraphs (c) and (d) of this section, shall take action to terminate, as soon as possible and with minimum interruption to the service afforded customers, any existing competitive arrangement for the sale of any articles similar to or identical to those sold or to be sold under the permit. Notice of such termination shall be given as required under the terms of the existing arrangement, or if none is provided, a notice of not less than 30 days shall be given in writing.

(c) Existing arrangements with respect to vending machines need not be terminated if such vending machines are moved at the expense of their operators to locations elsewhere on the property which are noncompetitive with a blind-operated vending facility, or if the income from such machines is assigned to the blind operator.

(d) This section shall not apply to the sale and service of food and other articles considered as food and usually sold in connection with meals by cafeterias, restaurants, or similar food dispensing establishments.

§ 13.6 Appeals.

When the head of an Interior bureau or office has designated a representative to act for him under these regulations, he shall provide for the review of any matter in dispute between such representatives and the State licensing agency. In the event that they fail to reach agreement concerning the granting of a permit for the vending stand, the modification or revocation of a permit, the suitability of the stand location, the assignment of vending proceeds, the methods of operation of the stand, or other terms of the permit (including articles which may be sold) the State licensing agency shall have the right of appeal to the Director, Office of Hearings and Appeals. Such appeals shall be made in writing and shall be filed in the Office of the Director (address: Director, Office of Hearings and Appeals, 801 North Quincy Street, Arlington, VA 22203) within 15 days from the date of notice of the decision from which the appeal is taken. Such appeals shall comply otherwise with the general rules of the Office of Hearings and Appeals in subpart B of part 4 of this title and with the special regulations set forth in subpart G of part 4 of this title applicable to proceedings in appeals cases which do not lie within the appellate jurisdiction of an established Appeals Board of the Office of Hearings and Appeals. Upon appeal, full investigation shall be undertaken. A full report shall be obtained from the Interior representative from whose decision the appeal is being taken. The State licensing agency shall be given opportunity to present information. The Department of Health, Education, and Welfare shall be available for general advice on program activities and objectives. A final decision of the Director, Office f Hearings and Appeals, or of an Ad Hoc Appeals Board appointed by him to consider the appeal and to issue decision thereon, shall be rendered within ninety days of the filing of the appeal. Notification of the decision on appeal and the action taken thereon shall be given to the State licensing agency and to the Department of Health, Education, and Welfare. The decision of the Director, Office of Hearings and Appeals, or of an Ad Hoc Appeals Board appointed by him, shall be final. At the end of each fiscal year the Office of the Secretary shall report to the Department of Health, Education, and Welfare the total number of applications for vending stand locations received from State licensing agencies, the number accepted, the number denied, and the number still pending.

[36 FR 7206, Apr. 15, 1971, as amended at 67 FR 4368, Jan. 30, 2002]

PART 14—PETITIONS FOR RULEMAKING

Sec.
14.1 Scope.
14.2 Filing of petitions.
14.3 Consideration of petitions.

14.4 Publication of petitions.

AUTHORITY: 5 U.S.C. 553(e).

SOURCE: 46 FR 47789, Sept. 30, 1981, unless otherwise noted.

§ 14.1 Scope.

This part prescribes procedures for the filing and consideration of petitions for rulemaking.

§ 14.2 Filing of petitions.

Under the Administrative Procedure Act, any person may petition for the issuance, amendment, or repeal of a rule (5 U.S.C. 553(e)). The petition will be addressed to the Secretary of the Interior, U.S. Department of the Interior, Washington, DC 20240. It will identify the rule requested to be repealed or provide the text of a proposed rule or amendment and include reasons in support of the petition.

§ 14.3 Consideration of petitions.

The petition will be given prompt consideration and the petitioner will be notified promptly of action taken.

§ 14.4 Publication of petitions.

A petition for rulemaking may be published in the FEDERAL REGISTER if the official responsible for acting on the petition determines that public comment may aid in consideration of the petition.

PART 15—KEY LARGO CORAL REEF PRESERVE

Sec.

15.1 Scope.
15.2 Removal or destruction of natural features and marine life.
15.3 Dredging, filling, excavating and building activities.
15.4 Refuse and polluting substances.
15.5 Wrecks.
15.6 Markers.
15.7 Fishing.
15.8 Skin diving.
15.9 Collection of scientific specimens.
15.10 Operation of watercraft.
15.11 Explosives and dangerous weapons.
15.12 Closing of Preserve.
15.13 Report of accidents.
15.14 Applicability of laws.

AUTHORITY: Sec. 5, 67 Stat. 464; 43 U.S.C. 1334; Proc. 3339, 25 FR 2352.

SOURCE: 25 FR 8948, Sept. 17, 1960, unless otherwise noted.

§ 15.1 Scope.

The State of Florida has established a similar coral reef preserve on an area situated shoreward of a line three geographic miles from Key Largo and contiguous to the Key Largo Coral Reef Preserve. It is the policy of the Department of the Interior to cooperate with the State of Florida and its conservation agencies in the preservation of the reef.

§ 15.2 Removal or destruction of natural features and marine life.

No person shall destroy, injure, deface, mar, move, dig, harmfully disturb or remove from the Preserve any beach sand, gravel or minerals, corals, sea feathers and fans, shells and shell fish starfishes or other marine invertebrates, seaweeds, grasses, or any soil, rock, artifacts, stones or other materials. No person shall cut, carve, injure, mutilate, move, displace or break off any bottom formation or growth. Nor shall any person dig in, or in any other way injure or impair the natural beauty or usefulness of this Preserve. No rope, wire or other contrivance shall be attached to any coral, rock or other formation, whether temporary or permanent in character or use.

§ 15.3 Dredging, filling, excavating and building activities.

No dredging, excavating, or filling operations of any kind are permitted in the Preserve and no materials of any sort may be deposited in or on the waters thereof. No building or structure of any kind, whether permanent or temporary, may be constructed or built, and no public service facility may be constructed or extended into, upon or across the Preserve.

§ 15.4 Refuse and polluting substances.

No person shall dump or deposit in or on the waters of this Preserve any oily liquids or wastes, acids or other deleterious chemicals, bottles, broken glass paper, boxes, cans, dirt, rubbish, waste garbage, refuse or other debris or polluting substance.

§ 15.5 Wrecks.

No person shall willfully destroy molest, remove, deface, displace, or tamper with any wrecks, parts of wrecks or

any cargo pertaining to such wrecks within the Preserve in such manner as to injure or destroy any coral formation.

§ 15.6 Markers.

No person shall willfully mark, deface or injure in any way, or displace, remove or tamper with any Preserve signs, notices or placards, whether temporary or permanent, or with any monuments, stakes, posts or other boundary markers.

§ 15.7 Fishing.

(a) Spear fishing within the boundaries or confines of this Preserve is prohibited.

(b) The use of poisons, electric charges, or other such methods is prohibited.

§ 15.8 Skin diving.

Diving with camera, or diving for observation and pleasure is permitted and encouraged within the Preserve.

§ 15.9 Collection of scientific specimens.

Collection of natural objects and marine life for educational purposes and for scientific and industrial research shall be done only in accordance with the terms of written permits granted by the Director of the Florida Board of Parks and Historic Memorials. Such permits shall be issued only to persons representing reputable scientific, research, or educational institutions. No permits will be granted for specimens the removal of which would disturb the remaining natural features or mar their appearance. All permits are subject to cancellation without notice at the discretion of the issuing official. Permits shall be for a limited term and may be renewed at the discretion of the issuing official.

§ 15.10 Operation of watercraft.

No watercraft shall be operated in such a manner as to strike or otherwise cause damage to the natural features of the Preserve. Except in case of emergency endangering life or property, no anchor shall be cast or dragged in such a way as to damage any reef structure.

§ 15.11 Explosives and dangerous weapons.

No person shall carry, use or possess within the Preserve firearms of any description, air rifles, spring guns, bows and arrows, slings, spear guns, harpoons, or any other kind of weapon potentially harmful to the reef structure. The use of such weapons from beyond the boundaries of the Preserve and aimed or directed into the Preserve is forbidden. The use or possession of explosives within the Preserve is prohibited.

§ 15.12 Closing of Preserve.

The Preserve may be closed to public use in the event of emergency conditions encouraged within the Preserve.

§ 15.13 Report of accidents.

Accidents involving injury to life or property shall be reported as soon as possible by the person or persons involved to the officer in charge of the Preserve.

§ 15.14 Applicability of laws.

In areas to which this part pertains all Federal Acts shall be enforced insofar as they are applicable, and the laws and regulations of the State of Florida shall be invoked and enforced in accordance with the Act of June 25, 1948 (62 Stat. 686; 18 U.S.C. 13)

PART 16—CONSERVATION OF HELIUM

Sec.

16.1 Agreements to dispose of helium in natural gas.
16.2 Applications for helium disposition agreements.
16.3 Terms and conditions.
16.4 Consideration to the United States; renegotiation.
16.5 Bonds.

AUTHORITY: R.S. 2478, as amended, 60 Stat. 950, 74 Stat. 918, 922; 43 U.S.C. 1201, 30 U.S.C. 181, 50 U.S.C. 167a, 167g.

§ 16.1 Agreements to dispose of helium in natural gas.

(a) Pursuant to his authority and jurisdiction over Federal lands, the Secretary may enter into agreements with qualified applicants to dispose of the helium of the United States upon such

terms and conditions as he deems fair, reasonable, and necessary to conserve such helium, whenever helium can be conserved that would otherwise be wasted or lost to Federal ownership or use in the production of oil or gas from Government lands embraced in an oil and gas lease or whenever federally owned deposits of helium-bearing gas are being drained. The precise nature of any agreement will depend on the conditions and circumstances involved in that particular case.

(b) An agreement shall be subject to the existing rights of the Federal oil and gas lessee.

(c) An agreement shall provide that in the extraction of helium from gas produced from Federal lands, it shall be extracted so as to cause no delay, except that required by the extraction process, in the delivery of the residue of the gas produced from such lands to the owner thereof. Title will be granted to the helium which is physically reduced to possession.

[30 FR 9218, July 23, 1965]

§ 16.2 Applications for helium disposition agreements.

The application for a helium disposition agreement need not be in any particular form, but must contain information sufficient to enable the Secretary to determine that the proposal will conserve helium that will otherwise be wasted, drained, or lost to Federal ownership or use, and to evaluate the suitability of the proposal.

[30 FR 9219, July 23, 1965]

§ 16.3 Terms and conditions.

The applicant must agree not to develop wells on Federal land with the principal purpose of recovering the helium component of natural gas unless permission to do so has been expressly granted by the Secretary.

[30 FR 9219, July 23, 1965]

§ 16.4 Consideration to the United States; renegotiation.

(a) The Secretary shall determine the royalty or other compensation to be paid by the applicant, which royalty or other compensation together with the royalties and other compensation paid by the oil and gas lessee, shall be in an amount sufficient to secure to the United States a return on all the values, including recovered helium.

(b) The Secretary may require that each agreement shall contain a renegotiation clause providing for renegotiation of the royalty percentage ten years from the effective date of the agreement and at five-year intervals thereafter.

[29 FR 9383, July 9, 1964. Redesignated at 30 FR 9218, July 23, 1965]

§ 16.5 Bonds.

The applicant shall be required to submit a bond in such amount and in such form as the Secretary may prescribe to secure the faithful performance of the terms of any agreement made.

[29 FR 9383, July 9, 1964. Redesignated at 30 FR 9218, July 23, 1965]

PART 17—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF THE INTERIOR

Subpart A—Nondiscrimination on the Basis of Race, Color, or National Origin

Sec.
17.1 Purpose.
17.2 Application of this part.
17.3 Discrimination prohibited.
17.4 Assurances required.
17.5 Compliance information.
17.6 Conduct of investigations.
17.7 Procedure for effecting compliance.
17.8 Hearings.
17.9 Decisions and notices.
17.10 Judicial review.
17.11 Effect on other regulations; forms and instructions.
17.12 Definitions.
APPENDIX A TO SUBPART A OF PART 17
APPENDIX B TO SUBPART A OF PART 17

Subpart B—Nondiscrimination on the Basis of Handicap

17.200 Purpose.
17.201 Application.
17.202 Definitions.
17.203 Discrimination prohibited.
17.204 Assurances required.
17.205 Remedial action, voluntary action, and self-evaluation.
17.206 Designation of responsible employee and adoption of grievance procedures.
17.207 Notification.

17.208 Administrative requirements for small recipients.
17.209 Effect of State or local law or other requirements and effect of employment opportunities.
17.210 Employment practices.
17.211 Reasonable accommodation.
17.212 Employment criteria.
17.213 Pre-employment inquiries.
17.214–17.215 [Reserved]
17.216 Accessibility.
17.217 Existing facilities.
17.218 New construction.
17.219 [Reserved]
17.220 Preschool, elementary, and secondary education.
17.221–17.231 [Reserved]
17.232 Postsecondary education.
17.233–17.249 [Reserved]
17.250 Health, welfare, and social services.
17.251 Drug and alcohol addicts.
17.252 Education of institutionalized persons.
17.253–17.259 [Reserved]
17.260 Historic Preservation Programs.
17.270 Recreation.
17.271–17.279 [Reserved]
17.280 Enforcement procedures.

Subpart C—Nondiscrimination on the Basis of Age

GENERAL

17.300 What is the purpose of the Age Discrimination Act of 1975?
17.301 What is the purpose of DOI's age discrimination regulations?
17.302 To what programs or activities do these regulations apply?
17.303 Definitions.

STANDARDS FOR DETERMINING AGE DISCRIMINATION

17.310 Rules against age discrimination.
17.311 Exceptions to the rules against age discrimination.
17.312 Burden of proof.
17.313 Special benefits for children and the elderly.
17.314 Age distinctions contained in DOI regulations.
17.315 Affirmative action by recipients.

DUTIES OF DOI RECIPIENTS

17.320 General responsibilities.
17.321 Notice to subrecipients and beneficiaries.
17.322 Assurance of compliance and recipient assessment of age distinctions.
17.323 Information collection requirements.

INVESTIGATION, CONCILIATION, AND ENFORCEMENT PROCEDURES

17.330 Compliance reviews.
17.331 Complaints.
17.332 Mediation.
17.333 Investigation.
17.334 Prohibition against intimidation or retaliation.
17.335 Compliance procedure.
17.336 Hearings, decisions, post-termination proceedings.
17.337 Remedial action by recipients.
17.338 Alternate funds disbursal procedure.
17.339 Exhaustion of administrative remedies.

Subpart D [Reserved]

Subpart E—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of the Interior

17.501 Purpose.
17.502 Application.
17.503 Definitions.
17.504–17.509 [Reserved]
17.510 Self-evaluation.
17.511 Notice.
17.512–17.529 [Reserved]
17.530 General prohibitions against discrimination.
17.531–17.539 [Reserved]
17.540 Employment.
17.541–17.548 [Reserved]
17.549 Program accessibility: Discrimination prohibited.
17.550 Program accessibility: Existing facilities.
17.551 Program accessibility: New construction and alterations.
17.552–17.559 [Reserved]
17.560 Communications.
17.561–17.569 [Reserved]
17.570 Compliance procedures.

EDITORIAL NOTE: Nomenclature changes to part 17 appear at 68 FR 51376–51379, Aug. 26, 2003.

Subpart A—Nondiscrimination on the Basis of Race, Color, or National Origin

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d–1; and the laws referred to in Appendix A.

§ 17.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 to the end that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or

be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of the Interior.

[29 FR 16293, Dec. 4, 1964, as amended at 43 FR 4259, Feb. 1, 1978]

§ 17.2 Application of this part.

(a) This part applies to any program for which Federal financial assistance is authorized under a law administered by the Department, including programs and activities that are federally-assisted under the laws listed in appendix A to this subpart. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This part does not apply to (1) any Federal financial assistance by way of insurance or guaranty contracts, (2) money paid, property transferred, or other assistance extended before the effective date of this part, (3) any assistance to any individual who is the ultimate beneficiary, or (4) except to the extent described in § 17.3, any employment practice, under any such program, of any employer, employment agency, or labor organization. The fact that a statute under which Federal financial assistance is extended to a program or activity is not listed in appendix A to subpart A shall not mean, if title VI is otherwise applicable, that such program or activity is not covered. Other statutes now in force or hereafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(b) In any program receiving Federal financial assistance in the form, or for the acquisition, of real property or an interest in real property, to the extent that rights to space on, over, or under any such property are included as part of the program receiving that assistance, the nondiscrimination requirement of that part shall extend to any facility located wholly or in part of the space.

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17975, July 5, 1973; 43 FR 4259, Feb. 1, 1978]

§ 17.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient to which this part applies may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program or the

class of individuals to whom, or the situations in which, such services, financial aid, other benefits or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect if defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

(4)(i) In administering a program regarding which the recipient has previously discriminated against persons on the grounds of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

(5) References in this section to services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(6) The enumeration of specific forms of prohibited discrimination in this paragraph (b) and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246, as amended, or any Executive Order which supersedes it.

(2) The requirements of paragraph (c)(1) of this section apply to programs under laws funded or administered by the Department where a primary objective of the Federal financial assistance is (i) to reduce the unemployment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals in meeting expenses incident to the commencement or continuation of their education or training, or (iii) to provide work experience which contributes to the education or training of such individuals. Assistance given under the following laws has one of the above purposes as a primary objective: Water Resources Research Act of 1964, title I, 78 Stat. 329, and those statutes listed in appendix A to this subpart where the facilities or employment opportunities provided are limited, or a preference is given, to students, fellows, or other persons in training or related employment.

(3) Where a primary objective of the Federal financial assistance is not to

provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefit of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to this part, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Benefits for Indians, natives of certain territories, and Alaska natives.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits which, in accordance with Federal law, are limited to Indians, natives of certain territories, or Alaska natives, if the individual is not a member of the class to which the benefits are addressed. Such benefits include those authorized by statutes listed in appendix B to this subpart.

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17976, July 5, 1973; 43 FR 4259, Feb. 1, 1978; 68 FR 51376, Aug. 26, 2003]

§ 17.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, except an application to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by, an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. Every award of Federal financial assistance shall require the submission of such an assurance. In the case where the Federal financial assistance is to provide or is in the form of personal property, or real property or interest therein or structures thereon, or improvement of real property or structures, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended to the program. In the case where the assistance is sought for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith. The Secretary shall specify the form of the foregoing assurances, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) In the case where Federal financial assistance is provided in the form of a transfer of real property, structures, or improvements thereon, or interest therein, from the Federal Government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property or interest therein from the Federal Government is involved, but property is acquired or improved with Federal financial assistance, the recipient shall agree to include such covenant in any subsequent transfer of such property. When the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the Secretary, such a condition and right

of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In such event if a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing facilities on such property for the purposes for which the property was transferred, the Secretary may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to subordinate such right of reversion to the lien of such mortgage or other encumbrance.

(b) *Continuing Federal financial assistance.* (1) Every application by a State or any agency or political subdivision of a State for continuing Federal financial assistance to which this regulation applies shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (i) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part, or a statement of the extent to which it is not, at the time the statement is made, so conducted, and (ii) provide or be accompanied by provision for such methods of administration for the program as are found by the Secretary or his designee to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation, including methods of administration which give reasonable assurance that any noncompliance indicated in the statement under paragraph (b)(1)(i) of this section will be corrected.

(2) With respect to some programs which are carried out by States or agencies or political subdivisions of States and which involve continuing Federal financial assistance administered by the Department, there has been no requirement that applications be filed by such recipients. From the effective date of this part no Federal financial assistance administered by this Department will be extended to a State or to an agency or a political subdivision of a State unless an application for such Federal financial assistance has been received from the State or State agency or political subdivision.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible official of the Department of Health, Education, and Welfare determines is adequate to accomplish the purposes of the Act and this part within the earliest practicable time and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible official of the Department of Health, Education, and Welfare may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurances from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research for a special training project, for student assistance, or for another purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution.

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17976, July 5, 1973; 68 FR 51376, Aug. 26, 2003]

§ 17.5 Compliance information.

(a) *Cooperation and assistance.* The Secretary or his designee shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Secretary or his designee timely, complete and accurate compliance reports, at such times, and in such form and containing such information, as the Secretary or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally—assisted programs. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the Secretary or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner as the Secretary or his designee finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

[38 FR 17976, July 5, 1973]

§ 17.6 Conduct of investigations.

(a) *Periodic compliance reviews.* The Secretary or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the Secretary, or his designee.

(c) *Investigations.* Whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part, a prompt investigation shall be made. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the recipient shall be informed in writing and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be

resolved by informal means, action will be taken as provided for in § 17.7.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, the recipient and complainant, if any, shall be informed in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17977, July 5, 1973]

§ 17.7 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 17.4.* If an applicant fails or refuses to furnish an assurance required under § 17.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph, except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until (1) the Secretary or his designee has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary pursuant to § 17.9(e), and (4) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the Secretary or his designee has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional effort shall be made to persuade the recipient or other person to

comply with this part and to take such corrective action as may be appropriate.

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17977, July 5, 1973]

§ 17.8 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by §17.7(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the administrative law judge to whom the matter has been assigned that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the act and §17.7(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the Office of Hearings and Appeals of the Department in the Washington, DC, area, at a time fixed by the administrative law judge to whom the matter has been assigned unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before an administrative law judge designated by the Office of Hearings and Appeals in accordance with 5 U.S.C. 3105 and 3344.

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent that the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more Federal statutes, authorities, or other means by which Federal financial assistance is extended and to which this part applies or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title VI of the act, the Secretary

may, by agreement with such other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 17.9.

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17977, July 5, 1973]

§ 17.9 Decisions and notices.

(a) *Initial decision by an administrative law judge.* The administrative law judge shall make an initial decision and a copy of such initial decision shall be sent by registered mail, return receipt requested, to the recipient or applicant.

(b) *Review of the initial decision.* The applicant or recipient may file his exceptions to the initial decision, with his reasons therefor, with the Director, Office of Hearings and Appeals, within thirty days of receipt of the initial decision. In the absence of exceptions, the Director, Office of Hearings and Appeals, on his own motion within forty-five days after the initial decision, may notify the applicant or recipient that he will review the decision. In the absence of exceptions or a notice of review, the initial decision shall constitute the final decision subject to the approval of the Secretary pursuant to paragraph (f) of this section.

(c) *Decisions by the Director, Office of Hearings and Appeals.* Whenever the Director, Office of Hearings and Appeals, reviews the decision of a hearing examiner pursuant to paragraph (b) of this section, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contention, and a copy of the final decision of the Director, Office of Hearings and Appeals, shall be given to the applicant or recipient and to the complainant, if any.

(d) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 17.8(a), a decision shall be made by the Director, Office of Hearings and Appeals on the record and a copy of such decision shall be given in writing to the applicant or recipient and to the complainant, if any.

(e) *Rulings required.* Each decision of an administrative law judge or the Director, Office of Hearings and Appeals, shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(f) *Approval by Secretary.* Any final decision of a hearing examiner or of the Director, Office of Hearings and Appeals, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part of the act, shall promptly be transmitted to the Secretary, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(g) *Content of decisions.* The final decision may provide for the suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and effectuate the purposes of the act and this part, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the Secretary that it will fully comply with this part.

(h) *Post termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (g) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered

pursuant to paragraph (g) of this section may at any time request the Secretary to restore fully its eligibility to receive Federal financial assistance.

(3) If the Secretary denies any such request, the applicant or recipient may submit to the Secretary a request for a hearing in writing, specifying why it believes the Secretary to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record in accordance with the procedures set forth in subpart I of part 4 of this title. The applicant or recipient shall be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (h)(1) of this section.

(4) While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (g) of this section shall remain in effect.

[38 FR 17977, July 5, 1973; 44 FR 54299, Sept. 19, 1979]

§ 17.10 Judicial review.

Action taken pursuant to section 602 of the act is subject to judicial review as provided in section 603 of the act.

[29 FR 16293, Dec. 4, 1964]

§ 17.11 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color, or national origin under any program to which this regulation applies and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) Executive Orders 10925, 11114 and 11246, as amended and regulations issued thereunder, (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions insofar as such order, regulations, or instructions prohibit discrimination on the grounds of race, color, or national origin in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* The Secretary or his designee shall issue and promptly make available to interested persons instructions and procedures for effectuating this part as applied to programs to which this part applies and for which he is responsible.

(c) *Supervision and coordination.* The Secretary may from time to time assign to such officials of the Department as he deems appropriate, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the act and this part (other than responsibility for final decision as provided in § 17.9), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of title VI of the act and this part to similar programs and in similar situations. Any action taken, determination made or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the Secretary of the Interior.

[29 FR 16293, Dec. 4, 1964, as amended at 43 FR 4259, Feb. 1, 1978]

§ 17.12 Definitions.

As used in this part:

(a) The term *act* means the Civil Rights Act of 1964 (Pub. L. 88–352 78 Stat. 241).

(b) The term *Department* means the Department of the Interior, and includes each of its bureaus and offices.

(c) The term *Secretary* means the Secretary of the Interior or, except in § 17.9(f), any person to whom he has delegated his authority in the matter concerned.

(d) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term ''State'' means any one of the foregoing.

(e) The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) grants or donations of Federal property and interests in property, (3) the detail of Federal personnel (4) the sale or lease of, or the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration or at a consideration which is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(f) The terms *program or activity* and *program* mean all of the operations of any entity described in paragraphs (f)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (f)(1), (2), or (3) of this section.

(g) The term *facility* includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(h) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or any other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include the ultimate beneficiary.

(i) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient.

(j) The term *applicant* means one who submits an application, request, or plan required to be approved by the head of a bureau or office, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term ''application'' means such an application, request, or plan.

(k) The term *Office of Hearings and Appeals* refers to a constituent office of the Department established July 1, 1970. 35 FR 12081 (1970).

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17978, July 5, 1973; 68 FR 51376, Aug. 26, 2003]

APPENDIX A TO SUBPART A OF PART 17

Federal financial assistance subject to part 17 includes, but is not limited to, that authorized by the following statutes:

I. *Public Lands and Acquired Lands.* (a) Grants and loans of Federal funds.

1. Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181–287).
2. Mineral Leasing Act for Acquired Lands (30 U.S.C. 351–359).
3. Alaska Grazing Act (44 Stat. 1452, 48 U.S.C. 471, *et seq.*).
4. Proceeds of Certain Land Sales (R.S. sec. 3689, as amended, 31 U.S.C. 711 (17)).
5. Taylor Grazing Act (48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.*).
6. Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (50 Stat. 874, 43 U.S.C. 1181f).
7. Payment to States for Swamp Lands Erroneously Sold by U.S. (R.S. sec. 3689, as amended, 31 U.S.C. 711 (18)).
8. Alaska Statehood Act, sec. 6(f), (72 Stat. 341, 48 U.S.C. note preceding sec. 21).

(b) Sale, lease, grant, or other disposition of, or the permission to use, Federal property or any interest in such property at less than fair market value.

1. Materials Act (61 Stat. 681, as amended 30 U.S.C. 601–604).
2. Rights-of-way for Tramroads, Canals, Reservoirs (28 Stat. 635, as amended, 43 U.S.C. 956, 957).
3. Highway Rights-of-way (R.S. sec. 2477 43 U.S.C. 932).
4. Small Tract Act (52 Stat. 609, as amended, 43 U.S.C. 682a—682e).
5. Rights-of-way for Dams, Reservoirs, Water Plants, Canals, etc. (33 Stat. 628, 16 U.S.C. 524).
6. Rights-of-way for Power and Communication Facilities (36 Stat. 1253, as amended, 43 U.S.C. 961).
7. Recreation and Public Purposes Act (44 Stat. 741, as amended, 43 U.S.C. 869—869–4).
8. Stock-Watering Reservoirs (29 Stat. 434, as amended, 43 U.S.C. 952–955).
9. Alaska Housing Authority Act (63 Stat. 60, 48 U.S.C. 484c).
10. Railroad Rights-of-way in Alaska (30 Stat. 409, 48 U.S.C. 411–419).
11. Grants to States in Aid Schools (44 Stat. 1026 as amended, 43 U.S.C. 870).
12. Carey Act (28 Stat. 422, as amended, 43 U.S.C. 641).
13. Airports and Aviation Fields (45 Stat. 728, as amended, 49 U.S.C. 211–214).
14. Special Land Use Permits (R.S. sec. 453, as amended, 43 U.S.C. 2).
15. Rights-of-way for Irrigation and Drainage (26 Stat. 1101, as amended, 43 U.S.C. 946).
16. Rights-of-way for Pipelines to Transport Oil or Natural Gas (41 Stat. 449, as amended, 30 U.S.C. 185).
17. Townsite Laws (R.S. 2380 *et seq.*, as amended, 43 U.S.C. 711 *et seq.*).
18. Leases of Lands near Springs (43 Stat. 1133, 43 U.S.C. 971).
19. Rights-of-way for Railroads (18 Stat. 482, 43 U.S.C. 934).
20. Grants of Easements (76 Stat. 1129, 40 U.S.C. 319–319c).

II. *Water and Power.* (a) Grants and loans of Federal funds.

1. Federal Reclamation Program (32 Stat. 388, 43 U.S.C. 391, and Acts amendatory or supplementary thereto).
2. Reservation of Land for Park, Playground, or Community Center (38 Stat. 727, 43 U.S.C. 569).
3. Distribution System Loan Program (69 Stat. 244, as amended, 43 U.S.C. 421a—421d).
4. Rehabilitation and Betterment Loan Program (63 Stat. 724, as amended, 43 U.S.C. 504).
5. Small Reclamation Project Loan Program (70 Stat. 1044, 43 U.S.C. 422a—422k).
6. Assistance to School Districts on Reclamation Projects (62 Stat. 1108, 43 U.S.C. 385a).
7. Payment from Colorado River Dam Fund, Boulder Canyon Project (54 Stat. 776 as amended, 43 U.S.C. 618(c)).
8. Payment on In Lieu of Taxes Lands Acquired Pursuant to Columbia Basin Project Act (57 Stat. 19, 16 U.S.C. 835c–1).
9. Payment in Lieu of Taxes on Land to Trinity County, California (69 Stat. 729).
10. Saline Water Research Program (66 Stat. 328, as amended, 42 U.S.C. 1951).
11. Water User Repayment Obligations on Reclamation Projects (43 Stat. 703, 43 U.S.C. 501, 62 Stat. 273, 66 Stat. 754).
12. Water Resources Research Act (78 Stat. 329).

(b) Sale, lease, grant or other disposition of, or the permission to use, Federal property or any interest in such property at less than fair market value.

1. Townsite Disposal on Reclamation Projects (34 Stat. 116, 43 U.S.C. 566).
2. Transfer of Federal Property in Coulee Dam, Washington (71 Stat. 529, 16 U.S.C. 835c note).
3. Transfer of Federal Property to Boulder City, Nevada (72 Stat. 1726, 43 U.S.C. 617u note).
4. Reservation of Land for Park, Playground, or Community Center (38 Stat. 727, 43 U.S.C. 569).
5. Saline Water Research Program-Donation of Laboratory Equipment (72 Stat. 1793, 42 U.S.C. 1892).
6. Reclamation Program-Conveyance of Land to School Districts (41 Stat. 326, 43 U.S.C. 570).
7. Recreation and Public Purposes Program (44 Stat. 741, as amended, 43 U.S.C. 869–869a).
8. Dedication of Land for Public Purposes, Page. Arizona (72 Stat. 1686, 1688).

9. Removal of Sand, Gravel, and Other Minerals, and Building Materials from Reclamation Project Lands (53 Stat. 1196, as amended, 43 U.S.C. 387).

III. *Mineral Resources*. Grants and loans of Federal funds.

1. Control of Coal Mine Fires (68 Stat. 1009, 30 U.S.C. 551–558 *et seq.*)

2. Anthracite Mine Drainage and Flood Control and Sealing of Abandoned Mines and Filling Voids (69 Stat. 352, as amended, 30 U.S.C. 571–576).

3. Sealing and filling of voids in abandoned coal mines, reclamation of surface mine areas, and extinguishing mine fires (79 Stat. 13, as amended, 40 U.S.C., App., 205).

IV. *Fish and Wildlife*. (a) Grants of Federal funds.

1. Pittman-Robertson Act (50 Stat. 917, as amended, 16 U.S.C. 669).

2. Dingell-Johnson Act (64 Stat. 430, 16 U.S.C. 777).

3. Sharing of Refuge Revenues (49 Stat. 383, as amended, 16 U.S.C. 715s).

4. Aid to Alaska (Section 6(e) of the Alaska Statehood Act, 72 Stat. 340, and Act of February 28, 1944, 58 Stat. 101, 16 U.S.C. 631e).

5. Anadromous Fish Act of 1965 (79 Stat. 1125, 16 U.S.C. 757a—757f).

6. Aid to Education (70 Stat. 1126, 16 U.S.C. 760d).

7. Jellyfish Act of 1966 (80 Stat. 1149, 16 U.S.C. 1201–1205).

(b) Sale, lease, grant, or other disposition of, or the permission to use, Federal property or any interest in such property at less than fair market value.

1. Cooperative Research and Training Program for Fish and Wildlife Resources (74 Stat. 733, 16 U.S.C. 753a)

2. Protection and Conservation of Bald and Golden Eagles (54 Stat. 251, as amended 16 U.S.C. 668a).

3. Wildlife Land Transfers (sec. 8 of Colorado River Storage Project Act of 1956, 70 Stat. 110, 43 U.S.C. 620g)

4. Fish and Wildlife Coordination Act (48 Stat. 401, as amended, 16 U.S.C. 661–664).

(c) Furnishing of services of a type for which the recipient would otherwise pay.

1. Lampry Eradication Program (60 Stat. 930, as amended, 16 U.S.C. 921)

2. Cooperative Research and Training Program for Fish and Wildlife Resources (74 Stat. 733, 16 U.S.C. 753a)

3. Fish and Wildlife Coordination Act (48 Stat. 401, as amended, 16 U.S.C. 661 *et seq.*).

V. *Parks and Territories*. (a) Grants and loans of Federal funds.

1. Payments to School Districts—Yellowstone National Park (62 Stat. 338, 16 U.S.C. 40a).

2. Payments in Lieu of Taxes—Grand Teton National Park (64 Stat. 851, 16 U.S.C. 406d–3).

3. Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 47a).

4. Bureau of Outdoor Recreation (77 Stat. 49, 16 U.S.C. 460*l*).

5. Revised Organic Act of the Virgin Islands (68 Stat. 497, as amended, 48 U.S.C. 1541–1644).

6. Guam Rehabilitation Act (77 Stat. 302).

7. Organic Act of Guam (64 Stat. 384 as amended, 48 U.S.C. 1421–1425 except sec. 9(a), 48 U.S.C. 1422c(a)).

8. Guam Agricultural Act (P.L. 88–584, 78 Stat. 926).

9. Outdoor Recreation Programs (78 Stat. 897, as amended, 16 U.S.C. 460*l*—460*l*–11).

(b) Sale, lease, grant or other disposition of, or the permission to, use Federal property or any interest in such property at less than fair market value.

1. Puerto Rico Federal Relations Act (39 Stat. 954, 48 U.S.C. 748).

2. Virgin Islands Corporation Act (63 Stat. 350, as amended, 48 U.S.C. 1407 *et seq.*).

3. Territorial Submerged Lands Act (77 Stat. 338, 48 U.S.C. 1701–1704).

4. Organic Act of Guam (64 Stat. 392, 48 U.S.C. 1421f(c)).

(c) Furnishing of services by the Federal Government of a type for which the recipient would otherwise pay.

1. Bureau of Outdoor Recreation (77 Stat. 49, 16 U.S.C. 460*l*).

VI. *Indian Affairs*. (a) Grants and loans of Federal funds.

1. Menominee County, Wis. Educational Grants (76 Stat. 53).

(b) Sale, lease, grant, or other disposition of or the permission to use, Federal property or any interest in such property at less than fair market value.

1. Conveyance of School Property (67 Stat. 41, as amended, 25 U.S.C. 293a).

2. Adult Vocational Training Act (70 Stat. 986, 25 U.S.C. 309).

VII. *General*. 1. Department Projects under the Public Works Acceleration Act (76 Stat. 541, 42 U.S.C. 2641–2643).

2. Grants for Support of Scientific Research (72 Stat. 1793, 42 U.S.C. 1891–1893).

3. Special Use Permits (R.S. sec. 441, as amended, 43 U.S.C. 1457).

4. Land and Water Conservation Fund Act of 1964 (Pub. L. 88–578, 78 Stat. 897).

[29 FR 16293, Dec. 4, 1964, as amended at 38 FR 17978, July 5, 1973]

APPENDIX B TO SUBPART A OF PART 17

The following statutes authorize Federal financial assistance limited to individuals of a particular race, color, or national origin

I. *Indians and Alaska Natives*. 1. Snyder Act (42 Stat. 208, 25 U.S.C. 13).

2. Adult Vocational Training Act (70 Stat. 986, 25 U.S.C. 309).

3. Vocational and Trade School Act (48 Stat. 986, 25 U.S.C. 471)

4. Johnson-O'Malley Act (48 Stat. 596, as amended, 25 U.S.C. 452–53)

5. Revolving Fund for Loan to Indians (48 Stat. 986, 25 U.S.C. 470).
6. Revolving Fund for Loans to Tribes (77 Stat. 301).
7. Conveyance of Buildings, Improvements, or Facilities to Tribes (70 Stat. 1057, 25 U.S.C. 443a).
8. Alaska Reindeer Act (50 Stat. 900, 48 U.S.C. 250–250p)
9. Disposals to Alaskan Natives (44 Stat. 629, 48 U.S.C. 355a and 355c).

II. *Natives of Certain Territories*. 1. Acceptance of Samoan Cession Agreement (45 Stat. 1253, as amended, 48 U.S.C. 1661).
2. Samoan Omnibus Act (76 Stat. 586, 48 U.S.C. 1666)
3. Guam Organic Act (64 Stat. 387, 48 U.S.C. 1422c).

[29 FR 16293, Dec. 4, 1964, as amended at 68 FR 51376, Aug. 26, 2003]

Subpart B—Nondiscrimination on the Basis of Handicap

AUTHORITY: 29 U.S.C. 794.

SOURCE: 47 FR 29546, July 7, 1982, unless otherwise noted.

§ 17.200 Purpose.

The purpose of this subpart is to implement section 504 of the Rehabilitation Act of 1973 and its subsequent amendments, which are designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 17.201 Application.

This subpart applies to each recipient of Federal financial assistance from the Department of the Interior and to each program or activity that receives such assistance.

§ 17.202 Definitions.

As used in this subpart, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Public Law 93–112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93–516, and the Rehabilitation, Comprehensive Service, and Developmental Disabilities Act of 1978, Public Law 95–602, 29 U.S.C. 700 *et seq*.

(b) *Section 504* means section 504 of the Act.

(c) *Education of the Handicapped Act* means that statute as amended by the Education for All Handicapped Children Act of 1975, Public Law 94–142, 20 U.S.C. 1401 *et seq*.

(d) *Department* means the Department of the Interior.

(e) *Director* means the Director of the Office for Equal Opportunity of the Department.

(f) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) *Federal financial assistance* means any grant, cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Easements, transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, outdoor spaces, including those used for recreation, park sites, developed sites, or other real or personal property or interest in such property.

(j) *Handicapped person*. (1) Handicapped person means any person who (i) has a physical, mental or sensory impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1)(i) of this section, the phrase:

(i) *Physical, mental or sensory impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical, mental or sensory impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having a mental, physical or sensory impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means:

(A) Has a physical, mental or sensory impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

(B) Has a physical, mental or sensory impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(C) Has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question. Insofar as this part relates to employment of handicapped persons, the term ''handicapped person'' does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

(2) With respect to public preschool, elementary, secondary, or adult education services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under State law to provide such services to handicapped persons, or (iii) to whom a State is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act.

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

(4) With respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j)(2)(i) of this section.

(m) *Integrated setting* means that whenever possible, the recipient should make its aid, benefits, or services available to the handicapped in the same setting and under similar circumstances as are available to the nonhandicapped.

(n) *Ultimate beneficiary* means one among a class of persons who are entitled to benefit from, or otherwise participate in, programs or activities receiving Federal financial assistance and to whom the protections of this subpart extend. The ultimate beneficiary class may be the general public or some narrower group of persons.

(o) *Advisory Council* means the Advisory Council on Historic Preservation.

(p) *ATBCB* means the Architectural and Transportation Barriers Compliance Board, an agency empowered by the Architectural Barriers Act of 1968 (Pub. L. 90–480) to establish accessibility standards under section 502.

(q) *Program or activity* means all of the operations of any entity described in paragraphs (q)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (q)(1), (2), or (3) of this section.

[47 FR 29546, July 7, 1982, as amended at 68 FR 51377, Aug. 26, 2003]

§ 17.203 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aids, benefits or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or services to beneficiaries of the recipient's program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) Aids, benefits, and services, to be equally effective, are not required to produce the identical result of level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services, a recipient may not deny a qualified handicapped person the opportunity to participate in all aid, benefits, or services covered by this subpart that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose of effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or services provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance for the period during which the facility is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(7) Nothing in this section is to be construed as affecting the acquisition of historic sites or wilderness areas.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of nonhandicapped persons from aid, benefits, or services limited by Federal statute or Executive Order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statute or Executive Order to a different class of handicapped persons is not prohibited by this subpart.

(d) Recipients shall take appropriate steps to insure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

[47 FR 29546, July 7, 1982, as amended at 68 FR 51377, Aug. 26, 2003]

§ 17.204 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this subpart applies shall provide assurances, in accordance with OMB Circular A–102, that the program or activity will be operated in compliance with this subpart. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial

assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall unless prohibited by the conveyance authority, also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(4) Every application by a State or any agency or political subdivision of a State for continuing Federal financial assistance shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (i) contain or be accompanied by a statement that the program or activity is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this subpart, or a statement of the extent to which it is not, at the time the statement is made, so conducted, and (ii) provide or be accompanied by provision for such methods of administration for the program or activity as are found by the Secretary or his designee to give reasonable assurance that the applicant and all recipients of Federal financial assistance will comply with all requirements imposed by or pursuant to this regulation, including methods of administration which give reasonable assurance that any noncompliance indicated in the statement under paragraph (c)(4)(i) of this section will be corrected.

§ 17.205 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this subpart, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this subpart and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this subpart, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this subpart, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this subpart:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this subpart;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this subpart; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) A list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

(3) A recipient, whose application is approved after the effective date of this regulation, shall within one year of receipt of the Federal financial assistance, be required to comply with the provisions of this section.

§ 17.206 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more people shall designate at least one person to coordinate efforts to comply with this subpart.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more people shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 17.207 Notification.

(a) A recipient that employs fifteen or more people shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, the mentally retarded, the learning disabled, and any other disability that impairs the communication process, and unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of handicap in violation of section 504 and this subpart. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated pursuant to § 17.206(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this subpart. Methods of initial and continuing notification may include the posting of notices in recipients' publications, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 17.208 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 17.206 and 17.207, in whole or in part, when the Director finds a violation of this subpart or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 17.209 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this subpart is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

§ 17.210 Employment practices.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this subpart applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs or activities assisted under the Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this subpart applies in a manner which insures that discrimination on the basis of handicap does not occur, and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progressions, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer-sponsored activities, including those that are social or recreation; and

(9) Any other term, condition, or privilege of employment, such as granting awards, recognition and/or monetary recompense for money-saving suggestions or superior performance.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 17.211 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include but is not limited to: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions. This list is neither all

inclusive nor meant to suggest that employers must follow all the actions listed.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operations, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a handicapped employee or applicant if the basis for denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 17.212 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless it can be demonstrated to the Director that (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) All job qualifications must be shown to be directly related to the job in question.

§ 17.213 Pre-employment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a pre-employment medical examination or make a pre-employment inquiry as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make a pre-employment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 17.205(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 17.205(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, provided that:

(1) The recipient states clearly on any written questionnaire used for this purpose, or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts.

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this subpart.

(3) The recipient must communicate with the applicant in a manner that will ensure that the applicant understands clearly the reasons for the recipient's questions.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty,

provided that: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this subpart.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 17.214–17.215 [Reserved]

§ 17.216 Accessibility.

No handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this subpart applies.

§ 17.217 Existing facilities.

(a) *Accessibility*. A recipient shall operate each program or activity so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesigning of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, delivery of services at alternate accessible sites, alterations of existing facilities and construction of new facilities in conformance with the requirements of § 17.218, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Small recipients*. If a recipient with fewer than fifteen employees that provides services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services whose facilities are accessible.

(d) *Time period*. A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this subpart except that where structural changes in facilities are necessary, such changes shall be made as expeditiously as possible, but in no event later than three years after the effective date of this subpart. New recipients receiving Federal financial assistance shall comply with the requirement of paragraph (a) of this section, except that where structural changes in facilities are necessary, such changes shall be made as expeditiously as possible, but in no event later than three years after the date of approval of the application.

(e) *Transition plan*. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section a recipient shall develop, within one year of the effective date of this subpart, a transition plan setting forth the steps necessary to complete such changes. New recipients, receiving financial assistance after the effective date of this regulation, shall develop a transition plan within one year of receipt of the financial assistance. The plan shall be developed with the assistance of interested persons, including handicapped

persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible and usable;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility under paragraph (a) of this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice*. The recipient shall adopt and implement procedures to insure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

[47 FR 29546, July 7, 1982, as amended at 68 FR 51377, Aug. 26, 2003]

§ 17.218 New construction.

(a) *Design and construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this subpart.

(b) *Alteration*. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this subpart, in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards*. (1) Effective as of August 15, 1990, design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[47 FR 29546, July 7, 1982, as amended at 55 FR 28912, July 16, 1990]

§ 17.219 [Reserved]

§ 17.220 Preschool, elementary, and secondary education.

This section applies to preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance, and to recipients that operate, or that receive Federal financial assistance for the operation of such programs or activities. For the purposes of this section, recipients shall comply with the Section 504 requirements promulgated by the Department of Education at 34 CFR part 104, subpart D.

§§ 17.221–17.231 [Reserved]

§ 17.232 Postsecondary education.

This section applies to postsecondary education and activities, including postsecondary vocational education programs or activities, that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of such programs or activities. For the purposes of this section, all recipients shall comply with the section

504 requirements promulgated by the Department of Education at 34 CFR part 104, subpart E.

§§ 17.233–17.249 [Reserved]

§ 17.250 Health, welfare, and social services.

This subpart applies to health, welfare, and other social service programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of such programs or activities.

(a) *General*. In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective, as defined in § 17.203(b), as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice*. A recipient that provides notice concerning beneficiaries or services, or written material concerning waivers of rights or consent to treatment, shall take such steps as are necessary to insure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired*. A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids*. (1) A recipient that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, visual aids, and other aids for persons with impaired hearing or vision.

§ 17.251 Drug and alcohol addicts.

A recipient that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or addict who is suffering from a medical condition, because of the person's drug or alcohol abuse or addiction.

§ 17.252 Education of institutionalized persons.

A recipient that operates or supervises a program or activity that provides aid, benefits, or services for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 17.202(d)(2), in its program or activity is provided an appropriate education, as defined in the regulation set forth by the Department of Education at 34 CFR 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under § 17.216.

§§ 17.253–17.259 [Reserved]

§ 17.260 Historic Preservation Programs.

(a) *Definitions*. For the purposes of this section, Historic Preservation Programs are those that receive Federal financial assistance that has preservation of historic properties as a primary purpose.

Historic properties means those buildings or facilities that are listed or eligible for listing in the National Register of Historic Places, or such properties designated as historic under a

statute of the appropriate State or local governmental body.

Substantial impairment means a permanent alteration that results in a significant loss of the integrity of finished materials, design quality or special character.

(b) *Obligations.* (1) A recipient shall operate any program or activity involving Historic Preservation Programs so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons. This paragraph does not necessarily require a recipient to make each of its existing historic properties or every part of an historic property accessible to and usable by qualified handicapped persons. Methods of achieving accessibility include:

(i) Making physical alterations which enable qualified handicapped persons to have access to otherwise inaccessible areas or features of historic properties;

(ii) Using audio-visual materials and devices to depict otherwise inaccessible areas or features of historic properties;

(iii) Assigning persons to guide qualified handicapped persons into or through otherwise inaccessible portions of historic properties;

(iv) Adopting other innovative methods to achieve accessibility.

Because the primary benefit of an Historic Preservation Program is the experience of the historic property itself, in taking steps to achieve accessibility, recipients shall give priority to those means which make the historic property, or portions thereof, physically accessible to handicapped individuals.

(2) Where accessibility cannot be achieved without causing a substantial impairment of significant historic features, the Secretary may grant a waiver of the accessibility requirement. In determining whether accessibility can be achieved without causing a substantial impairment, the Secretary shall consider the following factors:

(i) Scale of property, reflecting its ability to absorb alterations;

(ii) Use of the property, whether primarily for public or private purpose;

(iii) Importance of the historic features of the property to the conduct of the program or activity; and,

(iv) Cost of alterations in comparison to the increase in accessibility.

The Secretary shall periodically review any waiver granted under this section and may withdraw it if technological advances or other changes so warrant.

(c) *Advisory Council comments.* Where the property is federally owned or where Federal funds may be used for alterations, the comments of the Advisory Council on Historic Preservation shall be obtained when required by section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), and 36 CFR part 800, prior to effectuation of structural alterations.

[47 FR 29546, July 7, 1982, as amended at 55 FR 28912, July 16, 1990; 68 FR 51377, Aug. 26, 2003]

§ 17.270 Recreation.

This section applies to recipients that operate, or that receive Federal financial assistance for the operation of programs or activities involving recreation.

(a) *Accessibility in existing recreation facilities.* In the case of existing recreation facilities, accessibility of programs or activities shall mean accessibility of programs or activities when viewed in their entirety as provided at § 17.217. When it is not reasonable to alter natural and physical features, the following other methods of achieving accessibility may include, but are not limited to:

(1) Reassigning aid, benefits, or services to accessible locations.

(2) Delivering aid, benefits, or services at alternate accessible sites operated by or available for such use by the recipient.

(3) Assignments of aides to beneficiaries.

(4) Construction of new facilities in conformance with the requirements of § 17.218.

(5) Other methods that result in making the aid, benefits, or services accessible to handicapped persons.

(b) [Reserved]

[47 FR 29546, July 7, 1982, as amended at 68 FR 51377, Aug. 26, 2003]

§§ 17.271–17.279 [Reserved]

§ 17.280 Enforcement procedures.

The compliance and enforcement provisions applicable to title VI of the Civil Rights Act of 1964 apply to this subpart. These procedures are found in 43 CFR part 17, subpart A, §§ 17.5–17.11 and 43 CFR part 4, subpart I.

Subpart C—Nondiscrimination on the Basis of Age

AUTHORITY: Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.;* 45 CFR part 90.

SOURCE: 54 FR 3598, Jan. 25, 1989, unless otherwise noted.

GENERAL

§ 17.300 What is the purpose of the Age Discrimination Act of 1975?

The Age Discrimination Act of 1975, as amended, is designed to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also permits federally assisted programs or activities, and recipients of Federal funds, to continue to use certain age distinctions and factors other than age which meet the requirements of the Act and these regulations.

§ 17.301 What is the purpose of DOI's age discrimination regulations?

The purpose of these regulations is to set out DOI's policies and procedures under the Age Discrimination Act of 1975 and the general age discrimination regulations at 45 CFR part 90. The Act and the general regulations prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act and the general regulations permit federally assisted programs or activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age which meet the requirements of the Act and its implementing regulations.

§ 17.302 To what programs or activities do these regulations apply?

(a) The Act and these regulations apply to each DOI recipient and to each program or activity operated by the recipient which receives Federal financial assistance provided by DOI.

(b) The Act and these regulations do not apply to:

(1) An age distinction contained in that part of a Federal, State or local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or,

(ii) Establishes criteria for participation in age-related terms; or,

(iii) Describes intended beneficiaries or target groups in age-related terms; or

(2) Any employment practice of any employer, employment agency, or labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assistance for public service employment under the Job Partnership Training Act (29 U.S.C. 1501 *et seq.*).

§ 17.303 Definitions.

As used in these regulations, the term:

(a) *Act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94–135).

(b) *Action* means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) *Age* means how old a person is, or the number of years from the date of a person's birth.

(d) *Age distinction* means any action using age or an age-related term.

(e) *Age-related term* means a word or words which necessarily imply a particular age or range of ages (for example, ''children,'' ''adult,'' ''older persons,'' but not ''student'').

(f) *Discrimination* means unlawful treatment based on age.

(g) *DOI* means the United States Department of the Interior.

(h) *Federal financial assistance* means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel;

(3) Real and personal property or any interest in or use of property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *FMCS* means the Federal Mediation and Conciliation Service.

(j) *Program or activity* means all of the operations of any entity described in paragraphs (j)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (j)(1), (2), or (3) of this section.

(k) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, transferee, or subrecipient, but excludes the ultimate beneficiary of the assistance.

(l) *Secretary* means the Secretary of the Department of the Interior or his or her designee.

(m) *Subrecipient* means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(n) *United States* means the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Commonwealth of the Northern Marianas, and the territories and possessions of the United States.

[54 FR 3598, Jan. 25, 1989, as amended at 68 FR 51378, Aug. 26, 2003]

STANDARDS FOR DETERMINING AGE DISCRIMINATION

§ 17.310 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in § 17.311.

(a) *General rule.* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(b) *Specific rules.* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements, use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to, discrimination under a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 17.311 Exceptions to the rules against age discrimination.

(a) Definitions. For purposes of this section, the terms ''normal operation'' and ''statutory objective'' shall have the following meaning:

(1) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(2) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body.

(b) Exceptions to the rules against age discrimination: Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action otherwise prohibited by § 17.310 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

(1) Age is used as a measure or approximation of one or more other characteristics; and

(2) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and

(3) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(4) The other characteristic(s) are impractical to measure directly on an individual basis.

(c) Exceptions to the rules against age discrimination: Reasonable factors other than age. A recipient is permitted to take an action otherwise prohibited by § 17.310 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 17.312 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 17.311(b) and 17.311(c), is on the recipient of Federal financial assistance.

§ 17.313 Special benefits for children and the elderly.

If a recipient operating a program or activity provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 17.311.

§ 17.314 Age distinctions contained in DOI regulations.

Any age distinctions contained in a rule or regulation issued by DOI shall be presumed to be necessary to the achievement of a statutory objective of the program or activity to which the rule or regulation applies, notwithstanding the provisions of § 17.311.

§ 17.315 Affirmative action by recipients.

Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

DUTIES OF DOI RECIPIENTS

§ 17.320 General responsibilities.

Each DOI recipient has primary responsibility to ensure that its programs or activities are in compliance with the Act and these regulations, and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford DOI access to its records to the extent DOI finds

necessary to determine whether the recipient is in compliance with the Act and these regulations.

§ 17.321 Notice to subrecipients and beneficiaries.

(a) Where a recipient extends Federal financial assistance from DOI to subrecipients, the recipient shall provide the subrecipients written notice of their obligations under the Act and these regulations.

(b) Each recipient shall make necessary information about the Act and these regulations available to its beneficiaries in order to inform them of the protections against discrimination provided by the Act and these regulations.

§ 17.322 Assurance of compliance and recipient assessment of age distinctions.

(a) Each recipient of Federal financial assistance from DOI shall sign a written assurance as specified by DOI that it will comply with the Act and these regulations.

(b) *Recipient assessment of age distinctions.* (1) As part of a compliance review under § 17.330 or complaint investigation under § 17.331, DOI may require a recipient employing the equivalent of 15 or more employees to complete a written self-evaluation, in a manner specified by the responsible Department official, of any age distinction imposed in its program or activity receiving Federal financial assistance from DOI to assess the recipient's compliance with the Act.

(2) Whenever an assessment indicates a violation of the Act and the DOI regulations, the recipient shall take corrective action.

§ 17.323 Information collection requirements.

Each recipient shall:

(a) Keep records in a form and containing information which DOI determines may be necessary to ascertain whether the recipient is complying with the Act and these regulations.

(b) Provide to DOI, upon request, information and reports which DOI determines are necessary to ascertain whether the recipient is complying with the Act and these regulations.

(c) Permit reasonable access by DOI to the books, records, accounts, and other recipient facilities and sources of information to the extent DOI determines necessary to ascertain whether the recipient is complying with the Act and these regulations.

(d) The information collection requirements contained in this section have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1084–0027. The information will be collected and used to assess recipients' compliance with the Act. Response is required to obtain a benefit.

(e) Public reporting burden for this information is estimated to average 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed; and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to: Departmental Clearance Officer, U.S. Department of the Interior, 18th and C Streets, NW., Washington, DC 20240, Mail Stop 2242; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

INVESTIGATION, CONCILIATION, AND ENFORCEMENT PROCEDURES

§ 17.330 Compliance reviews.

(a) DOI may conduct compliance reviews and pre-award reviews of recipients or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. DOI may conduct these reviews even in the absence of a complaint against a recipient. The reviews may be as comprehensive as necessary to determine whether a violation of the Act and these regulations has occurred.

(b) If a compliance review or pre-award review indicates a violation of the Act or these regulations, DOI will attempt to secure voluntary compliance with the Act. If voluntary compliance cannot be achieved, DOI will arrange for enforcement as described in § 17.335.

§ 17.331 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with DOI, alleging discrimination prohibited by the Act or these regulations based on an action occurring on or after July 1, 1979. A complaint must be filed within 180 days from the date the complainant had knowledge of the alleged act of discrimination. For good cause shown, however, DOI may extend this time limit.

(b) DOI will consider the date a complaint is filed to be the date upon which the complaint sufficiently meets the criteria for acceptance as described in paragraphs (a) and (c)(1) of this section.

(c) DOI will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint, any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint, as described in paragraphs (a) and (c)(1) of this section.

(3) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(4) Notifying the complainant and the recipient (or their representatives) of their right to contact DOI for information and assistance regarding the complaint resolution process.

(d) DOI will return to the complainant any complaint outside the jurisdiction of these regulations, and will state the reason(s) why it is outside the jurisdiction of these regulations.

§ 17.332 Mediation.

(a) *Referral of complaints for mediation.* DOI will promptly refer to the FMCS all sufficient complaints that:

(1) Fall within the jurisdiction of the Act and these regulations unless the age distinction complained of is clearly within an exception; and,

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible.

(c) If the complainant and the recipient reach an agreement, FMCS shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The FMCS shall send the agreement to DOI. DOI, however, retains the right to monitor the recipient's compliance with the agreement.

(d) The FMCS shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) DOI will use the mediation process for a maximum of 60 days after receiving a complaint. Mediation ends if:

(1) 60 days elapse from the time the complaint is filed; or

(2) Prior to the end of that 60 day period, an agreement is reached; or

(3) Prior to the end of that 60 day period, the FMCS determines that an agreement cannot be reached.

(f) The FMCS shall return unresolved complaints to DOI.

§ 17.333 Investigation.

(a) *Informal investigation.* (1) DOI will investigate complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of the initial investigation, DOI will use informal fact finding methods, including joint or separate discussions with the complainant and recipient to establish the facts, and, if possible, settle the complaint on terms that are mutually agreeable to the parties. DOI may seek the assistance of any involved State agency.

(3) DOI will put any agreement in writing and have it signed by the parties and an authorized official at DOI.

(4) The settlement shall not affect the operation of any other enforcement effort of DOI, including compliance reviews and investigation of other complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal investigation*. If DOI cannot resolve the complaint through informal means, it will develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, DOI will attempt to obtain voluntary compliance. If DOI cannot obtain voluntary compliance, it will begin enforcement as described in § 17.335.

§ 17.334 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, inquiry, hearing, or other part of DOI's investigation, conciliation, and enforcement process.

§ 17.335 Compliance procedure.

(a) DOI may enforce the Act and these regulations through:

(1) Termination of a recipient's Federal financial assistance from DOI under the program or activity involved where the recipient has violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations.

(ii) Use of any requirement of, or referral to, any Federal, State or local government agency that will have the effect of correcting a violation of the Act or these regulations.

(b) DOI will limit any termination under § 17.335(a)(1) to the particular recipient and particular program or activity or part of such program or activity DOI finds in violation of these regulations. DOI will not base any part of a termination on a finding with respect to any program or activity of the recipient that does not receive Federal financial assistance from DOI.

(c) DOI will take no action under paragraph (a) of this section until:

(1) The Secretary or his/her designee has advised the recipient of its failure to comply with the Act and these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have elapsed after the Secretary or his/her designee has sent a written report of the circumstances and grounds of the action to the committees of Congress having legislative jurisdiction over the program or activity involved. The Secretary or his/her designee will file a report whenever any action is taken under paragraph (a) of this section.

(d) DOI also may defer granting new Federal financial assistance from DOI to a recipient when a hearing under § 17.335(a)(1) is initiated.

(1) New Federal financial assistance from DOI includes all assistance for which DOI requires an application or approval, including renewal or continuation of existing activities or authorization of new activities, during the deferral period. New Federal financial assistance from DOI does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the beginning of a hearing under § 17.335(a)(1).

(2) DOI will not begin a deferral until the recipient has received a notice of an opportunity for a hearing under § 17.335(a)(1). DOI will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the Secretary. DOI will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

§ 17.336 Hearings, decisions, post-termination proceedings.

Certain DOI procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to DOI's enforcement of these regulations. The procedural provisions of DOI's Title VI regulations can be found at 43 CFR 17.8 through 17.10 and 43 CFR part 4, subpart I.

§ 17.337 Remedial action by recipients.

Where DOI finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action that DOI may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, DOI may require both recipients to take remedial action.

§ 17.338 Alternate funds disbursal procedure.

(a) When DOI withholds funds from a recipient under these regulations, where permissible the Secretary may disburse the withheld funds directly to an alternate recipient under the applicable regulations of the bureau or office providing the assistance.

(b) The Secretary will require any alternative recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

§ 17.339 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) 180 days have elapsed since the complainant filed the complaint and DOI has made no finding with regard to the complaint; or

(2) DOI issues any finding in favor of the recipient.

(b) If DOI fails to make a finding within 180 days or issues a finding in favor of the recipient, DOI will:

(1) Promptly advise the complainant of this fact;

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant:

(i) That he or she may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;

(iii) That before commencing the action the complainant shall give 30 days notice by registered mail to the Secretary of HHS, the Attorney General of the United States, the Secretary of the Interior, and the recipient;

(iv) That the notice must state: the alleged violation of the Act; the relief requested; the court in which the complainant is bringing the action; and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

Subpart D [Reserved]

Subpart E—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of the Interior

AUTHORITY: 29 U.S.C. 794.

SOURCE: 52 FR 6553, Mar. 5, 1987, unless otherwise noted.

§ 17.501 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the U.S. Postal Service.

§ 17.502 Application.

This part applies to all programs and activities conducted and/or administered and/or maintained by the agency

except for programs or activities conducted outside the United States that do not involve handicapped persons in the United States.

§ 17.503 Definitions.

For purposes of this part, the term—

Agency means Department of the Interior.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describe the agency's actions in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complainant or behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, outdoor recreation and program spaces, park sites, developed sites, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical, mental, or sensory impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical, mental, or sensory impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical, mental or sensory impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental, physical, or sensory impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical, mental, or sensory impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical, mental, or sensory impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate state or local government body.

Qualified handicapped person means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from that program or activity.

(4) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 17.540.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 17.504–17.509 [Reserved]

§ 17.510 Self-evaluation.

(a) The agency shall, within one year of the effective date of this part, evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection—

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

§ 17.511 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 17.512–17.529 [Reserved]

§ 17.530 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service

that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs or activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 17.531–17.539 [Reserved]

§ 17.540 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 17.541–17.548 [Reserved]

§ 17.549 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 17.550, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 17.550 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 17.550(a) would result in such an alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible locations, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of paragraph (a) of this section in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative, methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible.

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(3) *Recreation programs.* In meeting the requirements of paragraph (a) in recreation programs, the agency shall provide that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. When it is not reasonable to alter natural and physical features, accessibility may be achieved by alternative methods as noted in paragraph (b)(1) of this section.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section within sixty (60) days of the effective date of this part except that where

structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities are necessary to achieve program accessibility, the agency shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

§ 17.551 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157) as established in 41 CFR 101–19.600 to 101–19.607 apply to buildings covered by this section.

§§ 17.552–17.559 [Reserved]

§ 17.560 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, attendant services, or other devices of a personal nature.

(2) Where the agency communicate with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 17.560 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency

resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 17.561–17.569 [Reserved]

§ 17.570 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Director of the Office for Equal Opportunity. Complaints filed pursuant to this section shall be delivered or mailed to the Director, Office for Equal Opportunity, U.S. Department of the Interior, Washington, DC 20240. If any agency official other than the Director of the Office for Equal Opportunity receives a complaint, he or she shall immediately forward the complaint to the agency's Director of the Office for Equal Opportunity.

(d)(1) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(2) If the agency Director for the Office of Equal Opportunity receives a complaint that is not complete, he or she shall notify the complainant, within thirty (30) days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete and submit the requested information within thirty (30) days of receipt of this notice the agency Director of the Office for Equal Opportunity shall dismiss the complaint without prejudice.

(3) The agency Director of the Office for Equal Opportunity may require agency employees to cooperate and participate in the investigation and resolution of complaints. Employees who are required to cooperate and participate in any investigation under this section shall do so as part of their official duties.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law:

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within ninety (90) days of receipt from the agency of the letter required by § 17.570(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Under Secretary.

(j) The agency shall notify the complainant of the results of the appeal within sixty (60) days of the receipt of the request. If the agency determines that it needs additional information from the complainant, it shall have sixty (60) days from the date it receives

the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this may be extended for an individual case when the Under Secretary determines that there is good cause, based on the particular circumstances of that case, for the extension.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

PART 18—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
18.100 Conditions on use of funds.
18.105 Definitions.
18.110 Certification and disclosure.

Subpart B—Activities by Own Employees

18.200 Agency and legislative liaison.
18.205 Professional and technical services.
18.210 Reporting.

Subpart C—Activities by Other Than Own Employees

18.300 Professional and technical services.

Subpart D—Penalties and Enforcement

18.400 Penalties.
18.405 Penalty procedures.
18.410 Enforcement.

Subpart E—Exemptions

18.500 Secretary of Defense.

Subpart F—Agency Reports

18.600 Semi-annual compilation.
18.605 Inspector General report.
APPENDIX A TO PART 18—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 18—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Pub. L. 101–121 (31 U.S.C. 1352); 5 U.S.C. 301.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6753, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 18.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A to this part, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B to this part, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A to this part, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment

providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B to this part, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 18.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated

for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 18.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000, unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraph (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraph (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraph (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 18.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 18.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 18.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 18.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 18.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 18.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 18.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 18.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 18.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B to this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraph (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 18.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

(a) The Department of the Interior implementation of the Program Fraud and Civil Remedies Act of 1985 is found at 43 CFR part 35.

(b) [Reserved]

[55 FR 6737, 6753, Feb. 26, 1990, as amended at 55 FR 6754, Feb. 26, 1990]

§ 18.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 18.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 18.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B to this part) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 18.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of

this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 18—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 18—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action: ☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	**2. Status of Federal Action:** ☐ a. bid/offer/application b. initial award c. post-award	**3. Report Type:** ☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter _____ date of last report _____
4. Name and Address of Reporting Entity: ☐ Prime ☐ Subawardee Tier _____, *if known:* **Congressional District,** *if known:*	**5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:** **Congressional District,** *if known:*	
6. Federal Department/Agency:	**7. Federal Program Name/Description:** CFDA Number, *if applicable:* _____	
8. Federal Action Number, *if known:*	**9. Award Amount,** *if known:* $	
10. a. Name and Address of Lobbying Entity *(if individual, last name, first name, MI):*	**b. Individuals Performing Services** *(including address if different from No. 10a)* *(last name, first name, MI):*	
(attach Continuation Sheet(s) SF-LLL-A, if necessary)		
11. Amount of Payment *(check all that apply):* $ _____ ☐ actual ☐ planned	**13. Type of Payment** *(check all that apply):* ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____	
12. Form of Payment *(check all that apply):* ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____		
14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11: *(attach Continuation Sheet(s) SF-LLL-A, if necessary)*		
15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No		
16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____	
Federal Use Only:		**Authorized for Local Reproduction Standard Form - LLL**

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
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Reporting Entity: _____ **Page** _____ **of** _____

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PART 19—WILDERNESS PRESERVATION

Subpart A—National Wilderness Preservation System

Sec.
19.1 Scope and purpose.
19.2 Definitions.
19.3 Reviews of roadless areas and roadless islands.
19.4 Liaison with other governmental agencies and submission of views by interested persons.
19.5 Hearing procedures.
19.6 Regulations respecting administration and uses of wilderness areas under jurisdiction of the Secretary.
19.7 Private contributions and gifts.
19.8 Prospecting, mineral locations, mineral patents, and mineral leasing within National Forest Wilderness.

Subpart B [Reserved]

AUTHORITY: 78 Stat. 890, R.S. 2478; 16 U.S.C. 1131–1136, 43 U.S.C. 1201.

SOURCE: Circ. 2203, 31 FR 3011, Feb. 22, 1966, unless otherwise noted.

Subpart A—National Wilderness Preservation System

§ 19.1 Scope and purpose.

This subpart sets forth sections dealings with the administration by the Department of the Interior of certain provisions of the Wilderness Act (78 Stat. 890; 16 U.S.C. 1131–1136).

§ 19.2 Definitions.

As used in this subpart the term:

(a) *National Forest Wilderness* means an area or part of an area of national forest lands designated by the Wilderness Act or by a subsequent act of Congress as a wilderness area.

(b) *National Park System* means all federally owned or controlled areas administered by the Secretary through the National Park Service.

(c) *National Wilderness Preservation System* means the Federally owned areas designated by the Wilderness Act or subsequent acts of Congress as wilderness areas.

(d) *National Wildlife Refuge System* means those lands and waters administered by the Secretary as wildlife refuges, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any statute, proclamation, executive order, or public land order.

(e) *Roadless area* means a reasonably compact area of undeveloped Federal land which possesses the general characteristics of a wilderness and within which there is no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use.

(f) *Roadless island* means a roadless area that is surrounded by permanent waters or that is markedly distinguished from surrounding lands by topographical or ecological features such as precipices, canyons, thickets, or swamps.

(g) *Secretary* means the Secretary of the Interior or an official of the Department of the Interior who exercises authority delegated by the Secretary of the Interior.

(h) *Wilderness* means a wilderness as defined in section 2(c) of the Wilderness Act.

§ 19.3 Reviews of roadless areas and roadless islands.

(a) The Secretary is required by section 3(c) of the Wilderness Act to review every roadless area of 5,000 contiguous acres or more in each unit of the National Park System and every roadless area of 5,000 contiguous acres or more and every roadless island in the national wildlife refuges and game ranges of the National Wildlife Refuge System, which was under the supervision of the Secretary on September 3, 1964. The Secretary is further required to recommend to the President whether each such area and island is suitable or not suitable for preservation as wilderness. Reports and recommendations must be submitted by the Secretary in time to permit the President to advise the Congress of his recommendations thereon:

(1) Covering not less than one-third of such areas and islands by September 3, 1967;

(2) Covering not less than an additional one-third by not later than September 3, 1971; and

(3) Covering the remainder by not later than September 3, 1974.

(b) The primary objective of the Department of the Interior's review of

roadless areas and roadless islands pursuant to section 3(c) of the Wilderness Act and the regulations of this part shall be to identify and recommend for preservation as wilderness, by inclusion in the National Wilderness Preservation System, those areas which, after consideration of all relevant factors, it is concluded will achieve the policy of the Congress, as expressed in section 2(a) of the Wilderness Act.

(c) Nothing in the sections of this part shall, by implication or otherwise, be construed to lessen the authority of the Secretary with respect to the maintenance of roadless areas within units of the National Park System or the maintenance of roadless areas and islands within units of the National Wildlife Refuge System.

§ 19.4 Liaison with other governmental agencies and submission of views by interested persons.

(a) When a review is initiated under the provisions of section 3(c) of the Wilderness Act and the sections of this part, arrangements shall be made for appropriate consideration of problems of mutual concern with other Federal agencies and with regional, State, and local governmental agencies.

(b) Any person desiring to submit recommendations as to the suitability or nonsuitability for preservation as wilderness of any roadless area in any unit of the National Park System, or of any such area or any roadless island in any unit of the National Wildlife Refuge System, may submit such recommendations at any time to the superintendent or manager in charge of the unit. Such recommendations will be accorded careful consideration and shall be forwarded with the report of review to the Office of the Secretary.

§ 19.5 Hearing procedures.

(a) Before any recommendation of the Secretary concerning the suitability or nonsuitability of any roadless area or island for preservation as wilderness is submitted to the President, a public hearing or hearings shall be held thereon at a location or locations convenient to the area or areas affected. If the lands involved are located in more than one State, at least one such hearing shall be held in each State. At least 30 days before the date of any such hearing, public notice thereof shall be published in the FEDERAL REGISTER and in newspapers of general circulation in the area. The public notice shall contain or make reference to a map of the lands involved and a definition of boundaries and a statement of the action proposed to be taken by the Secretary thereon.

(1) Any hearing held under this section shall be presided over by a hearing officer designated by the Secretary.

(2) Any person may present testimony at the hearing orally or in writing, or both, by notification to the hearing officer in accordance with the published notice of the hearing. Witnesses shall not be subjected to cross-examination but the hearing officer may invite responses by witnesses to questions he may ask for the purpose of clarifying the testimony presented.

(3) The witnesses shall not be sworn, but statements made by them orally or in writing are subject to the provisions of 18 U.S.C. 1001, which makes it a crime for any person knowingly and willfully to make to any agency of the United States any false, fictitious, or fraudulent statement as to any matter within its jurisdiction.

(4) A verbatim record of the hearing shall be kept.

(5) The hearing officer may be instructed by the Secretary to prepare and submit a recommendation concerning the suitability or nonsuitability of the area or areas for preservation as wilderness.

(6) A copy of the transcript of the hearing record, and of any recommendation made by the hearing officer as a result thereof, shall, during the pendency of the subject matter, be maintained for public examination (i) in an office of the Department of the Interior convenient to the area or areas affected and (ii) in the headquarters office of the Department in Washington, DC.

(7) The Secretary reserves the right at all times to consider information available to his office from any source not limited to the record of the public hearing or hearings, in the further consideration of proposed recommendations concerning the suitability or the

nonsuitability of the area or areas for preservation as wilderness.

(b) At least 30 days before the date of any such public hearing, the hearing officer shall advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and the other Federal departments and agencies concerned, and invite such officials and agencies to submit their views at the hearing. The Governor, the governing board, and the other Federal agencies may also submit views following the hearing but such views must be received in the Office of the Secretary by no later than 30 days following the date of the hearing to assure that they will receive consideration.

(c) Any public views received pursuant to the provisions of this section will be accorded careful consideration and a summary thereof shall be forwarded with the recommendations of the Secretary to the President with respect to the area under consideration.

[31 FR 3011, Feb. 22, 1966, as amended at 37 FR 16079, Aug. 10, 1972]

§ 19.6 Regulations respecting administration and uses of wilderness areas under jurisdiction of the Secretary.

Regulations respecting administration and use of areas under the jurisdiction of the Secretary which may be designated as wilderness areas by statute shall be developed with a view to protecting such areas and preserving their wilderness character for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, with inconsistent uses held to a minimum.

§ 19.7 Private contributions and gifts.

(a) The Secretary is authorized by section 6(b) of the Wilderness Act to accept on behalf of the United States private contributions and gifts to be used to further the purposes of the act. The Secretary, under the authorization of section 6(b), may accept on behalf of the United States any sums of money, marketable securities or other personal property (but not real property) to be used for such things as expediting reviews of roadless areas and islands under his jurisdiction, expediting mineral resource surveys of National Forest Wilderness, or fostering public information and research related to wilderness preservation.

(b) Anyone desiring to make a contribution or gift under the provisions of this section may submit an offer to the Secretary of the Interior, Washington, DC 20240, stating the amount of money or describing the securities or other personal property involved. If the offer involves property other than cash, the statement should set forth that the offeror is the owner of the property free and clear of all encumbrances and adverse claims. The offeror may specify a particular purpose for which the offer is made, but the Secretary may in his discretion reject any offer entailing purposes, terms, or conditions unacceptable to him.

(c) Sums of money and marketable securities received under this section that are not otherwise restricted and are allocated to furthering the purposes of the Wilderness Act as it relates to lands within the National Park System shall be transferred to a special account in the National Park Trust Fund and shall be administered in accordance with the provisions of 36 CFR part 9.

(d) Offers of gifts of land to promote the purposes of a grazing district or facilitate administration of public lands, including preservation and management of wilderness, values, may be tendered to the Secretary under the provisions of section 8(a) of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272) as amended (43 U.S.C. 315g). Offers of gifts of land or interests in land to facilitate administration or contribute to improvement, management, use, or protection of public lands and their resources, including the preservation and management of wilderness values, may be tendered to the Secretary under the provisions of section 103(a) of the Public Land Administration Act of July 14 1960 (74 Stat. 506: 43 U.S.C. 1364). Persons desiring to make such offers should follow the procedures established by 43 CFR subpart 2111.

(e) Under the provisions of the Act of June 5, 1920 (41 Stat. 917; 16 U.S.C. 6),

the Secretary is authorized, in his discretion, to accept donations of patented lands, rights-of-way over patented lands or other lands, buildings, or other property within the various national parks and national monuments for the purposes of the National Park System. Persons desiring to offer lands, rights-of-way, or buildings under the provisions of the Act of June 5, 1920, should make inquiry of the superintendent of the national park or monument within which the property is located.

§ 19.8 Prospecting, mineral locations, mineral patents, and mineral leasing within National Forest Wilderness.

Regulations issued under the provisions of the Wilderness Act pertaining to prospecting, mineral locations, mineral patents, and mineral leasing within National Forest Wilderness are contained in parts 3327 and 3638 of subchapter C of chapter II of this title.

EDITORIAL NOTE: See Redesignation Table No. 2 of 43 CFR, which appears in Volume II of the List of CFR Sections Affected, 1964–1972, for the appropriate sections to former parts 3327 and 3638.

Subpart B [Reserved]

PART 20—EMPLOYEE RESPONSIBILITIES AND CONDUCT

Sec.

20.101 Cross-references to ethical conduct, financial disclosure and other applicable regulations.
20.102 Definitions.
20.103 Employee responsibilities.

Subpart B—Department Ethics Program

20.201 Ethics officials.
20.202 Ethics program responsibilities.
20.203 Exclusion from confidential financial disclosure requirement for certain special Government employees.

Subpart C—Acceptance and Payment of Travel and Related Expenses

20.301 General policy.
20.302 Exclusions.

Subpart D—Special Provisions Governing Financial and Other Outside Interests of Certain Employees of the Department

20.401 Interests in Federal lands.
20.402 Interests in underground or surface coal mining operations.
20.403 Certificates of disclaimer.

Subpart E—Other Employee Conduct Provisions

20.501 General policy.
20.502 Conformance with policy and subordination to authority.
20.503 Scope of authority.
20.504 Selling or soliciting.
20.505 Habitual use of intoxicants.
20.506 Appropriations, legislation and lobbying.
20.507 Unlawful organizations.
20.508 Notary.
20.509 Penalty mail and official stationery.
20.510 Fraud or false statements in a Government matter.
20.511 Carrying of firearms.
20.512 Labor practices.

Subpart F—Disciplinary and Remedial Actions

20.601 General.
20.602 Remedial action.
20.603 Appealing an order for remedial action.

AUTHORITY: 5 U.S.C. 301, 7301; 5 U.S.C. App. (Reorganization Plan No. 3 of 1950); 30 U.S.C. 1211; 43 U.S.C. 11, 31(a); 5 CFR 2634.903, 2634.905.

SOURCE: 62 FR 53720, Oct. 16, 1997, unless otherwise noted.

Subpart A—General Provisions

§ 20.101 Cross-references to ethical conduct, financial disclosure and other applicable regulations.

In addition to the rules in this part, employees of the Department of the Interior also should refer to the Standards of Ethical Conduct for Employees of the Executive Branch, at 5 CFR part 2635; the Department's regulations that supplement those executive branch-wide standards at 5 CFR part 3501; the employee responsibilities and conduct regulations at 5 CFR part 735; and the executive branch financial disclosure regulations at 5 CFR part 2634.

§ 20.102 Definitions.

(a) The following terms are used throughout this part and have the following meanings:

(1) *Department* means the U.S. Department of the Interior and any of its components.

(2) *Secretary* means the Secretary of the Interior.

(3) *Bureau* means each major program operating component of the Department, the Office of the Secretary, the Office of the Solicitor, and the Office of the Inspector General.

(4) *Employee* means a regular employee, a special Government employee, and a contract education employee in the Office of the Assistant Secretary—Indian Affairs or the Bureau of Indian Affairs, unless the text of a particular subpart, section, or paragraph indicates that either regular employees or special Government employees are not intended to be covered by that subpart, section or paragraph. Volunteers in National Parks whose services are accepted pursuant to 16 U.S.C. 18g are not employees.

(b) *Specific definitions*. Additional definitions of terms specifically associated with a particular subpart, section, or paragraph are found in that subpart, section, or paragraph.

§ 20.103 Employee responsibilities.

It is the responsibility of each employee:

(a) To be familiar with and to comply with all Federal statutes, Executive Orders, and regulations that govern his or her conduct. Employees are expected to consult with their supervisors and servicing ethics counselors on questions they may have regarding the applicability of any ethics or other conduct provision. Ethics advice may also be obtained from the Solicitor's Office and the Department Ethics Office.

(b) To report directly or through appropriate channels to the Office of Inspector General or other appropriate authority matters coming to their attention which do or may involve violations of law or regulation by employees, contractors, sub-contractors, grantees, subgrantees, lessees, licensees or other persons having official business with the Department.

Subpart B—Department Ethics Program

§ 20.201 Ethics officials.

(a) *Designated Agency Ethics Official* refers to the official designated under 5 CFR 2638.201 to coordinate and manage the Department's ethics program.

(b) The head of each bureau is the ''Ethics Counselor'' for that bureau, except that the Deputy Assistant Secretary for Policy is the Ethics Counselor for employees in the Office of the Secretary and related offices. The Solicitor is the Ethics Counselor for the Office of the Solicitor and the Inspector General is the Ethics Counselor for the Office of Inspector General.

(c) The personnel officer for each bureau or other qualified employee who has been delegated responsibility for the operational duties of the Ethics Counselor for the bureau, it the ''Deputy Ethics Counselor'' for that bureau.

(d) A bureau, regional, or area personnel officer or other qualified employee may be assigned to serve as an ''Associate Ethics Counselor'' or ''Assistant Ethics Counselor,'' with delegated responsibility to perform the operational duties of the Ethics Counselor at the field level. Associate Ethics Counselors or Assistant Ethics Counselors may also be designated within the bureau headquarters.

[62 FR 53720, Oct. 16, 1997, as amended at 63 FR 34259, June 24, 1998]

§ 20.202 Ethics program responsibilities.

(a) The Designated Agency Ethics Official (or the alternate agency ethics official in his or her absence) shall coordinate and manage the department's ethics program in accordance with 5 CFR 2638.203.

(b) Each Ethics Counselor shall, for his or her bureau:

(1) Order disciplinary or remedial action in accordance with the provisions of subpart F of this part. This authority may not be redelegated.

(2) Designate: (i) The Bureau Personnel Officer (or other qualified headquarters employee) as Deputy Ethics Counselor to carry out operational duties of the Ethics Counselor within

their bureaus under the general direction of the Ethics Counselor; and

(ii) Headquarters bureau, regional, or area personnel officers (or other qualified employees) as Associate Ethics Counselors or Assistant Ethics Counselors to perform ethics counseling and the collection and review of financial disclosure reports.

(3) Ensure that vacancy announcements for positions which require a public or confidential financial disclosure report alert applicants to the filing requirement.

(4) Establish and maintain internal procedures and guidelines to adequately and systematically inform employees of the content, meaning, and importance of ethical conduct and other conduct regulations.

(c) All supervisors may make decisions as to whether conduct by employees under their supervision would result in the appearance that the employee would violate or is violating the ethical standards set forth in 5 CFR 2635; all supervisors are expected, therefore, to be familiar with those standards. In addition, any supervisor who grants prior approval of an employee's outside employment under 5 CFR 3501.105(b) is expected, at a minimum, to provide information to the employee about the prohibitions in 18 U.S.C. 203, 205 and 208 at the time such approval is granted.

§ 20.203 Exclusion from confidential financial disclosure requirement for certain special Government employees.

In an instance involving the proposed employment of a special Government employee for highly specialized and limited duties, the head of the bureau or office may propose to the Designated Agency Ethics Official (DAEO) a reporting of financial interests restricted to such interests as may be determined to be relevant to the duties the special Government employee is to perform. The DAEO may, under the provisions of 5 CFR 2634.905, exclude the special Government employee from all or a portion of the confidential reporting requirements of the OGE Form 450. Any confidential financial disclosure requirement must be satisfied by the special Government employee before he begins his employment.

Subpart C—Acceptance and Payment of Travel and Related Expenses

§ 20.301 General policy.

(a) Except as specifically authorized by law, when an employee is on official duty (no leave status), all travel and accommodations shall be at Government expense and his or her acceptance of outside reimbursement for travel expenses or services in kind from private sources, either in his or her behalf or in behalf of the Government, is not allowed.

(b) Under certain circumstances, the Department may charge a fee or accept reimbursement for providing a service or thing of value to a private source when the service or thing of value provided benefits to both the Government and the particular private source (31 U.S.C. 9701). In such instances only a portion of the costs can be accepted from the private source. The Department must pay expenses associated with its usual official business and for the benefits it receives from participating in the event. The private source can be charged or may reimburse the Department for that portion of the service provided that exceeds the Department's usual expenses and the benefits to the Government. Under this provision, payments from private sources must be deposited in the U.S. Treasury unless the bureau receiving the payment is authorized by statute to accept such payments.

(c) When a bureau is authorized by statute other than 31 U.S.C. 1353 to accept gifts, and 31 U.S.C. 1353 does not apply, the travel expenses incurred by an employee directed to participate in a convention, seminar, or similar meeting sponsored by a private source for the mutual interest of the Government and the private source may be reimbursed to the bureau and credited to its appropriation. The employee shall be paid by the bureau in accordance with the law relating to reimbursement for official travel and any accommodations and goods or services in kind furnished an employee shall be treated as a donation to the bureau and

an appropriate reduction shall be made to the employee's reimbursement (46 CG 689 (1967)).

(d) When participation at a function is not in an official capacity, an employee may accept reimbursement of travel and accommodation expenses from a private source, provided that such acceptance is permitted by law and Federal regulations. Participation as a private citizen must occur on one's own time, such as while on leave. If participation should occur during the course of official travel (i.e., evening or weekend hours during official travel status), the travel voucher submitted for Government reimbursement of official duty expenses must be adjusted to claim only that per diem and travel attributable to official duty. Employees who are in positions for which the rate of pay is specified in 5 U.S.C. 5311–5318 (the Executive Schedule) are on 24-hour duty, and determinations of what constitutes official duty and what is private participation should be carefully made.

§ 20.302 Exclusions.

(a) Where employee travel is for attendance at a meeting or similar function (31 U.S.C. 1353(a)), the Department may accept payment for the employee and/or the employee's spouse's travel from a non-Federal source when proper consideration is given to the conditions in paragraph (a)(1) of this section and a written authorization to accept payment is issued in advance of the travel.

(1) *Conditions.* Such travel expenses paid for by a non-Federal source may be accepted by the Department only if all of the following conditions are met:

(i) The travel relates to the employee's official duties;

(ii) The travel, subsistence and related expenses are with respect to the attendance of an employee (and/or the accompanying spouse of such employee when applicable) at a meeting or similar function. This includes a conference, seminar, speaking engagement, symposium, training course, or similar event that takes place away from the employee's official station, and is sponsored or cosponsored by a non-Federal source;

(iii) The non-Federal source is not disqualified because of a real or apparent conflict of interest as determined under paragraph (a)(2) of this section; and

(iv) The travel event is not required to carry out the Department's statutory or regulatory functions. Examples of statutory or regulatory functions that are essential to the Department's mission include investigations, inspections, audits, site visits, compliance reviews or program evaluations.

(2) *Conflict of interest analysis.* (i) The Department's acceptance of any payment from a non-Federal source under the authority of 31 U.S.C. 1353 shall not be approved when an Authorized Approving Official, identified in paragraph (a)(2)(iii) of this section, determines that under the circumstances, acceptance of the travel expenses would cause a reasonable person with knowledge of all relevant facts to:

(A) Question the integrity of the work to be performed by the employee receiving the benefit; or

(B) Question the integrity of the Department's other program operations.

(ii) When making these determinations, an Authorized Approving Official shall be guided by all relevant considerations including, but not limited to:

(A) The identity of the non-Federal source and the source's relationship to the Department;

(B) The purpose of the meeting or similar function and its relationship to the Department's programs or operations;

(C) The identity of other expected participants and their relationship to the Department;

(D) The nature and sensitivity of any pending Department matter which, when decided, may affect the interests of the non-Federal source;

(E) The significance of the employee's role in any such pending matter;

(F) The monetary value and character of the travel benefits offered by the non-Federal source; and

(G) The potential reaction from Department customers, including the public, if the acceptance of travel expenses was made known to them.

(iii) An ''Authorized Approving Official'' means that Department official who has been delegated authority to approve the usual travel authorizations

of the employee who will benefit from the non-Federal travel payment.

(iv) The procedures stated below must be satisfied before the employee (and/or the accompanying spouse) begin his or her travel:

(A) Each employee (and/or the accompanying spouse) must have an approved Travel Authorization (Form DI–1020). Section 10 (''Purpose and Remarks'') of this Form must contain a statement that the authority to accept payment from a non-Federal source for the specified travel event is 31 U.S.C. 1353, and the travel situation complies with the conditions for acceptance under 41 CFR 304–1.4.

(B) The supplementary form entitled, ''Report of Payments Accepted From Non-Federal Sources Under 31 U.S.C. 1353'' (Form DI–2000) must also be completed and signed by the employee and the Authorized Approving Official. A copy of Form DI–1020 and Form DI–2000 must be filed with the employee's Deputy Ethics Counselor.

(C) Payment from a non-Federal source to cover the travel related expenses of an employee may be made in the form of a check or similar instrument made payable to the Department. Employees should not accept cash or negotiate checks or similar instruments payable to them. Any negotiable instruments received by an employee shall be transmitted immediately to the appropriate accounting office.

(b) When on official duty, contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings may be accepted by an employee when the payment is made by a non-profit, tax exempt organization as described in 26 U.S.C. 501(c)(3) and when no real or apparent conflict of interest will result. Prior advice should be obtained from the employee's ethics counselor in this circumstance (5 U.S.C. 4111).

(c) Employees may accept reimbursement by the Department for travel and related expenses when on detail under the Intergovernmental Personnel Act, in accordance with 5 U.S.C. 3375.

(d) Should the Director of the United States Information Agency, with the approval of the employing agency, assign an employee to a foreign government, reimbursement for the employee's pay and allowances shall be made to the United States in an amount equal to the compensation, travel expenses, and allowances payable to such person during the period of such assignment, in accordance with 22 U.S.C. 1451.

(e) Should an employee be detailed by the Secretary to an international organization which requests services, the employee is deemed to be (for the purpose of preserving his or her allowances, privileges, rights, seniority, and other benefits) an employee of the Department and the employee is entitled to pay, allowances, and benefits from funds available to the Department. The international organization may reimburse the Department for all or part of the pay, travel expenses, and allowances payable during the detail; or, the detailed employee may be paid or reimbursed directly by the international organization for allowances or expenses incurred in the performance of duties required by the detail without regard to 18 U.S.C. 209 (5 U.S.C. 3343).

Subpart D—Special Provisions Governing Financial and Other Outside Interests of Certain Employees of the Department

§ 20.401 Interests in Federal lands.

(a) *Statutory prohibition applicable to employees of the Bureau of Land Management.* (1) In accordance with 43 U.S.C. 11, employees of the Bureau of Land Management are prohibited from voluntarily acquiring a direct or indirect interest in Federal lands.

(2) *Definitions.* For purposes of applying the prohibition in 43 U.S.C. 11:

(i) *Federal lands.* means public lands or resources or an interest in lands or resources administered or controlled by the Department, including, but not limited to, all submerged lands lying seaward outside of the area of ''lands beneath navigable water'' as defined in 43 U.S.C. 1301(a), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

(ii) *Direct interest in Federal lands* means any employee ownership or part ownership in Federal lands or any participation in the earnings therefrom, or the right to occupy or use the property or to take any benefits there from, based upon a contract, grant, lease, permit, easement, rental agreement, or application. Direct interest in Federal lands also includes:

(A) Membership or outside employment in a business which has interests in Federal lands; and.

(B) Ownership of stock or other securities in corporations determined by the Department to have an interest in Federal lands directly or through a subsidiary.

(iii) *Indirect interest in Federal lands* means any ownership or part ownership of an interest in Federal lands by an employee in the name of another where the employee still reaps the benefits. Indirect interest in Federal lands also includes:

(A) Holdings in land, mineral rights, grazing rights or livestock which in any manner are connected with or involve the substantial use of the resources or facilities of the Federal lands; or

(B) Substantial holdings of a spouse or minor child.

(b) *Statutory prohibition applicable to employees of the U.S. Geological Survey.* (1) In accordance with 43 U.S.C. 31(a), the Director and members of the U.S. Geological Survey are prohibited from having any personal or private interests in the lands or mineral wealth of the region under survey.

(2) *Definitions.* For purposes of applying the prohibition in 43 U.S.C. 31(a):

(i) *Personal or private interest* means ownership of an interest in, or employment with a person or enterprise which leases or uses, Federal lands for commercial purposes.

(ii) *Region under survey* means Federal lands which are administered or controlled by the Department.

(c) *Exclusions.* (1)(i) Except for U.S. mineral surveyors, an individual employed on an intermittent or seasonal basis for a period not exceeding 180 working days in each calendar year, and a special Government employee (SGE) engaged in field work relating to land, range, forest, and mineral conservation and management activities, and the spouse of such an individual or SGE, shall not be precluded from retaining any interest, including renewal or continuation of existing rights, in Federal lands, provided that such individual or SGE or spouse shall not acquire any additional interest in Federal lands during employment.

(ii) A U.S. mineral surveyor is a person appointed under the authority of 30 U.S.C. 39, and as such is included within the term ''officers, clerks, and employees'' of the Bureau of Land Management as that term is used in 43 U.S.C. 11 and construed in *Waskey* v. *Hammer*, 223 U.S. 85 (1912). U.S. mineral surveyors are also considered to be special government employees.

(2) A Bureau of Land Management employee or any member of the employee's family may acquire wild free-roaming horses or burros from Federal lands for maintenance and protection through a cooperative agreement entered into in accordance with 43 CFR part 4700.

(3) A Bureau of Land Management employee may retain a direct or indirect interest in Federal lands when:

(i) There is little or no relationship between the employee's functions or duties and the particular interest in Federal lands, and

(ii) The employee, or the spouse or dependent child of the employee, acquired such an interest:

(A) By gift, devise, bequest, or court award or settlement, or

(B) Prior to the time the employee entered on duty in the Department.

(4) Pursuant to 43 U.S.C. 1621(d), 43 U.S.C. 11 does not apply to any land grants or other rights granted under 43 U.S.C. chapter 33.

(5) The recreational or other personal and noncommercial use of the Federal lands by an employee, the employee's spouse or dependent child, on the same terms as use of the Federal lands is available to the general public, is not prohibited.

(6) *Advisory councils.* Nothing in 43 U.S.C. 11 shall disqualify individuals appointed pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1739, as members of advisory boards or councils, from acquiring or retaining grazing licenses or permits

issued pursuant to section 3 of the Taylor Grazing Act (43 U.S.C. 315b), or any other interest in land or resources administered by the Bureau of Land Management: Provided, that in no case shall the member of any such board or council participate in any advice or recommendation concerning such license or permit in which such member is directly or indirectly interested.

(d) *Request for advice.* When an employee is in doubt as to whether the acquisition or retention of any interest in lands or resources administered by the Department would violate the provisions of this section, a statement of the facts should be submitted promptly by the individual involved to his or her servicing ethics counselor for guidance.

§ 20.402 Interests in underground or surface coal mining operations.

(a) *Definitions.* As used in this section:

(1) *Direct financial interest in underground or surface coal mining operations* means ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operation. Direct financial interests also include employment, pensions, creditor, real property and other financial relationships.

(2) *Indirect financial interest in underground or surface coal mining operations* means the same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests including interests held by his or her spouse, dependent child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, dependent child or other resident relative holds a financial interest.

(3) *Coal mining operation* means the business of developing, producing, preparing or loading bituminous coal, subbituminous coal, anthracite or lignite or of reclaiming the areas upon which such activities occur.

(4) *Performing any function or duty under the Surface Mining Control and Reclamation Act of 1977* means those decisions or actions, which if performed or not performed by an employee, affect the programs under the Act.

(b) *Prohibitions.* (1) Neither the Director nor any other employee of the Office of Surface Mining Reclamation and Enforcement or any other employee who performs functions or duties under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, shall have a direct or indirect financial interest in underground or surface coal mining operations.

(2) The Surface Mining Control and Reclamation Act of 1977, at 30 U.S.C. 1211(f), provides that anyone who knowingly violates the prohibitions in that Act shall, upon conviction, be punished by a fine of not more than $2,500, or by imprisonment for not more than one year, or both.

(c) Employees are encouraged to review regulations contained in 30 CFR part 706 which pertain to the prohibitions restated in this section.

§ 20.403 Certificates of disclaimer.

(a) Each employee of the U.S. Geological Survey, Bureau of Land Management, Minerals Management Service, and Office of Surface Mining Reclamation and Enforcement shall sign a certificate of disclaimer upon entrance to or upon transfer to a position within any of these bureaus. The employee's signature will indicate that he or she:

(1) Is aware of the specific restrictions pertinent to his or her employment; and

(2) Is in compliance with such restrictions.

(b) If an employee is unable to sign the certificate, he or she must submit a statement of facts to the appropriate ethics counselor for review and appropriate action.

(c) Signed certificates of disclaimer shall be filed and maintained by the employee's deputy ethics counselor.

Subpart E—Other Employee Conduct Provisions

§ 20.501 General policy.

Employees of the Department are expected to maintain especially high

standards of honesty, integrity, impartiality, and conduct to ensure the proper performance of Government business and the continual trust and confidence of citizens in their Government. Employees are expected to comply with all Federal statutes, Executive Orders, Office of Government Ethics and Office of Personnel Management regulations, and Departmental regulations. The conduct of employees should reflect the qualities of courtesy, consideration, loyalty to the United States, a deep sense of responsibility for the public trust, promptness in dealing with and serving the public, and a standard of personal behavior which will be a credit to the individual and the Department. These principles apply to official conduct and to private conduct which affects in any way the ability of the employee or the Department to effectively accomplish the work of the Department.

§ 20.502 Conformance with policy and subordination to authority.

Employees are required to carry out the announced policies and programs of the Department and to obey proper requests and directions or supervisors. While policies related to one's work are under consideration employees may, and are expected to, express their professional opinions and points of view. Once a decision has been rendered by those in authority, each employee is expected to comply with the decision and work to ensure the success of programs or issues affected by the decision. An employee is subject to appropriate disciplinary action, including removal, if he or she fails to:

(a) Comply with any lawful regulations, orders, or policies; or

(b) Obey the proper requests of supervisors having responsibility for his or her performance.

§ 20.503 Scope of authority.

Employes shall not engage in any conduct or activity which is in excess of his or her authority, or is otherwise contrary to any law or announced Departmental policy.

§ 20.504 Selling or soliciting.

Employees and other persons are prohibited from selling or soliciting for personal gain within any building or on any lands occupied or used by the Department. Exception is granted for Department-authorized operations, including, but not limited to, the Interior Department Recreation Association, the Indian Arts and Crafts store, and for cafeteria, newsstand, snack bar and vending machine operations which are authorized by the Department of the benefit of employees or the public.

§ 20.505 Habitual use of intoxicants.

An employee who habitually uses intoxicants to excess may be subject to removal (5 U.S.C. 7352).

§ 20.506 Appropriations, legislation and lobbying.

(a) Unless expressly authorized by Congress, employees are prohibited from using any part of the money appropriated by any enactment of Congress to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; this prohibition does not prevent any employee from communicating to Members of Congress on the request of any Member or through proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business (18 U.S.C. 1913).

(b) When acting in their official capacity, employees are required to refrain from promoting or opposing legislation relating to programs of the Department without the official sanction of the property Departmental authority.

(c) The rights of employees, individually or collectively, to otherwise petition Congress, or to a Committee or Member thereof, shall not be interfered with or denied (5 U.S.C. 7211).

§ 20.507 Unlawful organizations.

An employee may not advocate the violent overthrow of our constitutional

form of government nor may an employee be a member of an organization that he or she knows advocates the violent overthrow of our constitutional form of government (5 U.S.C. 7311).

§ 20.508 Notary.

An employee is prohibited from charging fees for performance of any notarial act for any employee of the Federal Government who is acting in his or her official capacity, or for any person during the hours of such notary's service to the Government (E.O. 977, Nov. 24, 1908).

§ 20.509 Penalty mail and official stationery.

(a) An employee is prohibited from using any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his or her private letter, packet, package, or other matter in the mail (18 U.S.C. 1719).

(b) Official Government envelopes and official letterhead stationery are Government property that may only be used for authorized purposes. Employees' use of Government envelopes to mail their own personal job applications is not authorized.

§ 20.510 Fraud or false statements in a Government matter.

An employees shall not, in any matter within the jurisdiction of any department or agency of the United States, knowingly or willfully falsify, conceal or cover up by any trick, scheme, or device a material fact, or make any false, fictitious, fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry (18 U.S.C. 1001). Special attention is required in the certification of time and attendance reports, applications for employment, request for travel reimbursement, and purchase orders and receiving forms.

§ 20.511 Carrying of firearms.

Employees, except those specifically designated to perform enforcement, police or other official duties requiring the use of firearms, are prohibited from carrying or having in their possession firearms on property under the control of the Secretary. Employees who are officially stationed in parks, refuges, Indian reservations, other Tribal lands or other wilderness areas which are known to be inhabited by wild animals, are permitted, when on those lands, to carry and use firearms for personal protection as permitted by existing policy or as authorized by the park, refuge or area supervisor. Notwithstanding this paragraph, employees who are not on official duty may carry firearms on Departmental lands under the same conditions and in accordance with procedures and authorizations established for members of the general public.

§ 20.512 Labor practices.

Employees are prohibited from striking against the Government of the United States (5 U.S.C. 7311). Additional information regarding affiliation with employee organizations is found in the Department Manual, Part 370, Chapter 711, Labor Management Relations.

Subpart F—Disciplinary and Remedial Actions

§ 20.601 General.

This subpart deals with disciplinary actions and remedial actions for violations, or potential violations, of conflict of interest laws or of the regulations in this part or in 5 CFR part 2635 or 5 CFR part 3501. Disciplinary action may include oral or written warning or admonishment, reprimand, suspension, reduction in grade or pay, removal from position or removal from office. Such action shall be taken in accordance with Departmental policies and procedures, applicable statutes, Executive Orders, regulations, and any applicable collective bargaining agreement provisions. Disciplinary action may be imposed independently from and without prior application of remedial actions, including those remedial actions listed in § 20.602.

§ 20.602 Remedial action.

(a)(1) Remedial action should normally be considered only after attempts to obtain voluntary resolution

have failed. Voluntary resolution may include:

(i) Voluntary divestiture;

(ii) Voluntary conversion to securities which are not prohibited, or the holding of which would not violate law or regulation; or

(iii) Voluntary reassignment to another position.

(2) If the bureau Ethics Counselor decides that remedial action is required, such action shall be initiated within a reasonable time, usually 90 days.

(b) Remedial action may include:

(1) *Reassignment or disqualification of the employee*. It may be possible for the employee to be reassigned to another job, or to be disqualified from performing particular duties. Although the number of cases where this remedy can be used should be rare, the possibility should be explored before divestiture of an interest is ordered.

(2) *Waiver*. (i) The Designated Agency Ethics Official (DAEO) is authorized to make a written advance determination pursuant to 18 U.S.C. 208(b)(1) waiving the prohibitions of 18 U.S.C. 208(a) for any Department employee except the Secretary and those employees in the same organization as the DEAO, i.e., the Department's Office of Policy, Management and Budget. The Secretary or the Deputy Secretary shall issue individual waivers pursuant to 18 U.S.C. 208(b)(1) for employees in the Office of Policy, Management and Budget.

(ii) In the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act, 5 U.S.C. App. (including an individual being considered for an appointment to such a position), the DAEO, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, 5 U.S.C. App., is authorized to certify in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved.

(iii) The DAEO may grant a waiver under 5 CFR 3501.103(e) from the regulatory restrictions at 5 CFR 3501.103 (b) and (c).

(3) *Divestiture of the interest*. An employee may be required to divest an interest, including outside employment, that is prohibited by law or regulation. Divestiture of the interest shall be ordered in all situations where it is determined by the appropriate official that there is no other satisfactory remedy. Evidence of divestiture must be provided in the form of broker's sale receipt or other appropriate document.

NOTE TO PARAGRAPH (b)(3): It may be possible in certain cases for the tax consequences of divestiture to be delayed, if the interest is sold pursuant to a certificate of divestiture issued before the sale by the Director, U.S. Office of Government Ethics. See 5 CFR part 2634, subpart J.

(c) *Authority to order remedial action*. (1) Each bureau Ethics Counselor is authorized to order remedial actions within his or her bureau. The advice of the appropriate Regional Solicitor, the Associate Solicitor—Division of General Law, or the Designated Agency Ethics Official or his or her designee may be sought before such an order is issued. This authority to order remedial action may not be redelegated.

(2) The Deputy Assistant Secretary for Policy is authorized to order remedial actions for employees within the Office of the Secretary, except that the Secretary shall order remedial actions in situations involving the Deputy Secretary.

(d) An employee who fails to comply with an order for remedial action is considered to be in violation of this part and shall be subject to disciplinary action.

§ 20.603 Appealing an order for remedial action.

(a) *When and how to appeal*. An employee has the right to appeal an order for remedial action under § 20.602, and shall have 30 days from the date of the remedial action order to exercise this right before any disciplinary action may be initiated. For appeals of remedial orders issued under § 20.602, the procedures described in 370 DM 771 may not be used in lieu of or in addition to those of this section. Each appeal shall be in writing and shall contain:

(1) The basis for appeal;

(2) Fact(s) supporting the basis; and

(3) The telephone number where appellant can be reached to discuss facts pertinent to the appeal.

(b) *Where to appeal.* (1) Orders for remedial action issued by an Ethics Counselor may be appealed to the Deputy Secretary, whose decision shall be final.

(2) Orders for remedial action issued by the Deputy Secretary may be appealed to the Secretary, whose decision shall be final.

(c) *Review Board analysis and recommendations.* (1)(i) Each appeal shall be considered by a Review Board consisting of:

(A) A program Assistant Secretary selected by the Designated Agency Ethics Official;

(B) The Associate Solicitor or the Deputy Associate Solicitor, Division of General law; and

(C) The Director or Deputy Director of the Departmental Office of Personnel within the Department.

(ii) Assistant Secretaries may delegate authority to serve on the Review Board to a Deputy Assistant Secretary who has not been involved, and who has not advised or made a decision on the issue or on the order for remedial action.

(2) The Deputy Agency Ethics Official or his or her assistant shall serve as secretary to the Review Board, except for cases in which he or she has previously participated. In such cases, the Review Board shall designate an employee who has not previously been involved with the case to serve as secretary.

(3) The Review Board members shall: (i) Obtain from the appropriate ethics counselor a full statement of actions and considerations which led to the order for remedial action including any supporting documentation or files used by the Ethics Counselor.

(ii) Obtain from the employee all facts, information, exhibits for documents which he or she feels should be considered before a final decision is made.

(iii) The secretary to the Review Board shall prepare a summary of the facts pertinent to the appeal. When appropriate, the Review Board may provide for personal appearance by the appellant before the Review Board if necessary to ascertain the circumstances concerning the appeal or may designate the Review Board secretary or another employee to conduct further fact finding, or may do both. Fact finding procedures shall be carried out by a person(s) who:

(A) Has not been involved in the matter being appealed; and

(B) Does not occupy a position subordinate to any official who recommended, advised, made a decision on, or who otherwise is or was involved in, the matter being appealed.

(iv) Establish a file containing all documents related to the appeal, which shall be available to the appellant and his or her representative.

(v) Provide to the official who will decide the appeal an advisory recommendation on the appeal. The views of dissenting members of the Review Board shall also be provided.

(d) *Assurances to the appellant.* Each appellant is assured of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal in presenting an appeal;

(2) A reasonable amount of official time to present the appeal if the employee is otherwise in a duty status;

(3) The right to obtain counseling from an ethics counselor of the Department; and

(4) The right to be accompanied, represented, and advised by a representative of his or her own choosing, except that the Review Board may disallow the choice of an individual as a representative if such representation would result in a conflict of interest or position, would conflict with the priority needs of the Department, or which would give rise to unreasonable costs to the Government.

(e) *Assurances to the appellant's representative.* Each person chosen to represent an appellant is assured of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal; and

(2) A reasonable amount of official time to present the appeal if the representative is an employee of the Department and is otherwise in a duty status.

PART 21—OCCUPANCY OF CABIN SITES ON PUBLIC CONSERVATION AND RECREATION AREAS

Sec.
21.1 Purpose.
21.2 Scope of regulations.
21.3 Definitions.
21.4 Occupancy under permit of privately owned cabins on recreation areas and conservation areas.
21.5 Occupancy under permit of Government-owned cabins on public recreation and conservation areas.
21.6 Cabin site occupancy where a recreation or conservation area has been leased to, or turned over to, another Federal or non-Federal public agency for administration.
21.7 Occupancy by trespassers.
21.8 Appeals.

AUTHORITY: Sec. 10, 32 Stat. 390; 43 U.S.C. 373; 52 Stat. 609, as amended, 43 U.S.C. 682; R.S. 2478, 43 U.S.C. 1201; 44 Stat. 471, as amended, 43 U.S.C. 869; 76 Stat. 653, 16 U.S.C. 460; 48 Stat. 402, as amended, 16 U.S.C. 664; 33 Stat. 614, 16 U.S.C. 686; 45 Stat. 448, 16 U.S.C. 690; 43 Stat. 651, 16 U.S.C. 725; 48 Stat. 1270, 43 U.S.C. 315; 39 Stat. 535, 16 U.S.C. 3.

SOURCE: 32 FR 8361, June 10, 1967, unless otherwise noted.

§21.1 Purpose.

This part establishes (a) when, and by what standards, use of conservation and recreation areas under private cabin permits must be modified or discontinued so as to allow the public use of such areas and (b) the procedures for renewing, extending, phasing out, or terminating private cabin permits. No current permits or any valid existing rights, are, per se, canceled by the provisions of this part. However, permits may be canceled for cause, or pursuant to termination provisions within the permit itself.

§21.2 Scope of regulations.

The provisions of this part apply to all recreation or conservation areas administered by the Department of the Interior, including recreation or conservation areas leased or transferred for administration to other Federal and non-Federal public agencies, wherever the Department of the Interior retains jurisdiction over the issuance of cabin site permits by such other agencies. The provisions of this part do not modify or cancel any existing arrangement whereby the Department of the Interior or bureau or office thereof has leased, or turned over for administration, a public recreation or conservation area to another Federal or non-Federal public agency. The provisions of this part will also provide policy guidelines for the Departmental handling of assignments, amendments, or modifications of existing permits or agreements, but do not apply to areas transferred by deed where the United States retains a reversionary interest, nor to areas of the National Park System other than those where private cabin sites are located.

(a) The policies set out in this part shall not affect occupancy by private persons who have private rights, or rights of occupancy adjudicated or confirmed by court action, statute, or pursuant to a contract by which they conveyed to the Government the land on which a cabin or other substantial improvement is located.

(b) The policies set out in this part shall not apply to any concession contract or to any other permit or occupancy primarily granted to serve public rather than private or individual purposes—such as, permits granted to groups who assist in maintaining historic trails, or permits for youth and church group camp facilities, etc.

(c) The regulations in this part shall not supersede or substantially contravene the implementation of the Lower Colorado River Land Use Plan.

§21.3 Definitions.

(a) *Public recreation area* or *recreation area* means any land, title to which is in the United States and under the administration or jurisdiction of the Department of the Interior that is suitable for recreational purposes, including all such areas of the National Park System not excepted by §21.2, Bureau of Reclamation Reservoir areas, and any other areas dedicated to or administered by the Department for public recreational use.

(b) *Conservation area* means any land, title to which is in the United States and under the administration or jurisdiction of the Department of the Interior that is designated for fish, wildlife,

or other conservation purposes, including all such areas of the National Wildlife Refuge Systems, National Fish Hatchery Systems, and any other such areas administered by the U.S. Fish and Wildlife Service; also, land administered by the Bureau of Land Management and suitable for conservation or protection of fish or wildlife.

(c) *Permit* means any lease, license, or other contract whereby a public recreation or conservation area is made available, in whole or part, to an individual or group for recreational purposes for a stipulated period of time, but does not include leases or transfers to other Federal or non-Federal public agencies.

(d) *Cabin site* means any area within a public recreation or conservation area whose occupancy and use is granted to an individual or group for a period of time by permit.

(e) *Substantial improvement* means any building, structure, or other relatively permanent facility or improvement affixed to a cabin site, utilized for human occupancy or related purposes, and costing or worth $1,000 or more. It does not include trailers or similar removable facilities.

(f) *Investment* in a substantial improvement refers to the basic expenditure of moneys or property in kind in connection with a particular improvement. Thus, for example, where property is conveyed by testamentary or inter vivos gift, the donee will be seen only as occupying the position of the donor with respect to the time and amount of the investment since it was the donor who made the investment.

(g) *Amortization* is the process whereby the investor in a substantial improvement derives sufficient use and/or economic benefit from the improvement over a period of time as to reasonably compensate for his investment.

(h) *Trespasser* means any person who is occupying land in a public recreation or conservation area without a valid permit.

(i) *Authorized Officer* means any person or persons designated by the head of any bureau or office of the Department with administrative jurisdiction over a particular conservation or recreation area, to make determinations and take other actions, consistent with the regulations in this part with respect to such area.

§ 21.4 Occupancy under permit of privately owned cabins on recreation areas and conservation areas.

(a) In any areas where the Authorized Officer determines that the recreational requirements of the general public are limited, and is an area where private cabin site use has heretofore been permitted, he may extend or renew permits. Each such existing permit and any extension or renewal thereof will be:

(1) Reviewed at least once in every 5-year period to determine that the continued use of the individual cabin site is not inconsistent with the needs of the general public for use of the area. In periodically reviewing whether the existence of private cabin sites conflicts with the best public use of an area, consideration shall be given to (i) existing and projected public need for the area, (ii) compatibility between public uses and private cabin sites, (iii) development potential and plans for the area, and (iv) other relevant factors.

(2) Whenever the Authorized Officer determines that the public need for use of a recreation or conservation area has grown to a point where continued private cabin site use is no longer in the public interest, the procedures set forth in paragraph (b) of this section will be invoked to phase out existing permits by reducing and eliminating renewals, or extensions, consistent with protection of legitimate investment in improvements. These determinations and the reasons therefor shall be published in the FEDERAL REGISTER, together with such other forms of public notice as may be appropriate and necessary as determined by the Authorized Officer.

(3) Except as otherwise provided in an existing permit, no substantial improvement may hereafter be placed on any cabin site under permit without the prior approval of the Authorized Officer, and on such terms as the Authorized Officer may provide, consistent with public need. All renewed or extended permits shall contain this provision. Any such provision shall expressly state that the permission to

place a substantial improvement on the site is a limited license subject to public need for the area and does not give the owner of the improvement any interest in the land or any special rights or equities, other than the right to remove the improvement at any time, subject to the land being left in reasonably unimpaired condition. This provision shall expressly stipulate that the owner shall have as a time period within which to amortize his investment in a substantial improvement placed on the site after the date of the regulations in this part, only the period of his existing permit, together with such extensions of his permit as may be granted consistent with the regulations in this part.

(b) Whenever the Authorized Officer determines, pursuant to paragraph (a)(2) of this section that the needs of the general public for a particular public recreation or conservation area are sufficient to be inconsistent with further use of that area for private cabin sites, no further extension, or renewals of permits for any individual site shall, except as otherwise required by law, be granted for any period extending more than 5 years after the effective date of that determination: *Provided, however,* That, except as otherwise required by law, if an investment was made in a substantial improvement upon a site before the effective date of this part, the extension or renewal of the permit for such site shall be made for a period sufficient to permit 20 years amortization of the investment from the date of the investment in the improvement upon the site, unless the Authorized Officer finds that the needs of the general public for that site require that the extension or renewal be for a lesser period. Thus, for example, if a permit for the site is purchased before the effective date of the regulations in this part with the substantial improvement then in place, for a consideration of $1,000 or more, such amortization period runs from the purchase date, and is not affected, in any event, by the date of the determination under paragraph (a) of this section. The amortization period for any investment in a substantial improvement on or after the effective date of the regulations in this part is covered by paragraph (a)(3) of this section, this paragraph (b), and paragraph (b)(5) of this section.

(1) Any permit, in an area required for general public recreation or conservation use, that expires prior to 5 years after the determination described in this paragraph (b), may, if otherwise authorized by law, be extended to the end of such 5 years if the Authorized Officer determines that such extension is necessary to the fair and efficient administration of this part.

(2) Any renewal or extension of a permit pursuant to this part shall be subject to the condition that the occupant maintain the site and the improvements thereon in a good and serviceable condition, ordinary wear and tear excluded.

(3) Any renewal or extension of a permit shall expressly state its termination date and that there will be no extension or renewal thereafter, except as provided by this part. Permits shall expressly state that they grant no vested property right but afford only a limited license to occupy the land, pending a greater public use.

(4) Upon termination of occupancy under a permit, its renewal or extension, the permittee shall remove his improvements from the site within 90 days from the date of termination, and the land shall be left in reasonably unimpaired condition and as near to its original undisturbed condition as possible. Any property not so removed shall become the property of the United States or may be moved off the site, at the cost of the permittee. Any renewal, or extension, of a permit shall state these requirements.

(5) Voluntary and involuntary transfers of cabin site permits, including by sale, devise, inheritance, or otherwise, may be permitted, subject to approval by the Authorized Officer, subject to the terms, conditions, and restrictions in the permit. No such transfer shall operate to extend the terms of a permit. A transfer after the effective date of the regulations in this part shall give the transferee no rights in addition to those which the transferor had. Where any transfer of a cabin site permit is approved, the approval shall state in writing the requirements of

this paragraph, and include the statement that the amortization period for any substantial improvement located on the site shall be limited to the period to which the transferor would have been entitled under the regulations in this part.

(6) Nonuse of a site for a period of more than 2 consecutive calendar years shall terminate the permit without right of renewal (subject to the specific terms of the permit): *Provided, however,* That where the nonuse is the result of the death, illness, or military service of the permittee the Authorized Officer may waive such nonuse. In such case, sale or transfer of the improvement may be made for the unexpired portion of the permit and subject to the provisions for amortization set forth in this section. The Authorized Officer may make exceptions to this termination provision in any case where he determines that the needs of the general public so require (see introductory text of this paragraph (b)). All permits renewed, or extended after the effective date of this part shall state the requirements of this paragraph.

§ 21.5 Occupancy under permit of Government-owned cabins on public recreation and conservation areas.

(a) Those permittees who occupy Government-owned cabins, including those whose permits currently have expired, but previously have been renewed on a year-to-year basis, may have their permits renewed up to July 1, 1969. After that date, the permits shall not be renewed and shall be terminated finally except upon a determination by the Authorized Officer that a renewal or extension is fully consistent with the public use of the area.

(b) The provisions for amortization of substantial improvements do not apply to this type of occupancy.

§ 21.6 Cabin site occupancy where a recreation or conservation area has been leased to, or turned over to, another Federal or non-Federal public agency for administration.

(a) After the effective date of this part, any agreement whereby a recreation or conservation area is leased or turned over to another Federal or non-Federal public agency for administration, shall include the requirement that any permits to individuals, groups or others issued or extended by another Federal or non-Federal public agency to whom an area has been leased or transferred for administration, shall comply with, and set forth on the face of the permit, the requirements stated in this part. Similar requirements shall be applied in situations where an existing agreement reserves such authority to this Department.

(b) All such arrangements between another public agency and a permittee (see § 21.2) shall be reviewed by the Authorized Officer to assure full compliance with those provisions of the permit which are designed to assure performance in the best interests of the general public.

(c) Renewals, extensions, or new leases or transfers to other Federal, State, or local agencies for administration of public recreation areas, shall be granted only pursuant to the policies set forth in this part, and only upon an affirmative finding by the Authorized Officer that they are fully consistent with present and future public uses. All applicable safeguards set forth in this part, including the protection of future public uses, shall be expressly incorporated into such leases or transfers.

§ 21.7 Occupancy by trespassers.

Occupants of cabin sites who do not hold a valid permit for the occupancy or use of the site, shall be required to surrender occupancy, failing which legal action shall be taken. Nothing herein shall grant any rights to a trespasser.

§ 21.8 Appeals.

Any determination made pursuant to any of the provisions of this part may be appealed to the Director, Office of Hearings and Appeals, in accordance with the general rules set forth in subpart B of part 4 of this title and the special procedural rules in subpart G of part 4 of this title, applicable to proceedings in appeals cases which do not lie within the appellate jurisdiction of an established Appeals Board of the Office of Hearings and Appeals.

[36 FR 7206, Apr. 15, 1971]

PART 22—ADMINISTRATIVE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT AND INDEMNIFICATION OF DEPARTMENT OF THE INTERIOR EMPLOYEES

Subpart A—Administrative Tort Claims

Sec.
22.1 Purpose.
22.2 Provisions of law and regulations thereunder.
22.3 Procedure for filing claims.
22.4 Denial of claims.
22.5 Payment of claims.

Subpart B—Indemnification of Department of the Interior Employees

22.6 Policy.

AUTHORITY: 28 U.S.C. 2671–2680; 5 U.S.C. 301.

SOURCE: 32 FR 6683, May 2, 1967, unless otherwise noted.

Subpart A—Administrative Tort Claims

§ 22.1 Purpose.

(a) The purpose of this part is to establish procedures for the filing and settlement of claims accruing on and after January 18, 1967, under the Federal Tort Claims Act (in part, 28 U.S.C. 2401(b), 2671–2680, as amended by Pub. L. 89–506, 80 Stat. 306).

(b) [Reserved]

[32 FR 6683, May 2, 1967, as amended at 47 FR 38329, Aug. 31, 1982]

§ 22.2 Provisions of law and regulations thereunder.

(a) Section 2672 of title 28 U.S. Code, as above amended, provides that:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided,* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

(b) Subsection (a) of section 2675 of said title 28 provides that:

An action shall not be instituted upon a claim against the United States for money damages for injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of any agency to make final disposition of a claim within 6 months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counter-claim.

(c) Section 2678 of said title 28, as amended, provides that no attorney shall charge fees in excess of 25 percent of a judgment or settlement after litigation, or in excess of 20 percent of administrative settlements.

(d) Subsection (b) of section 2679 of said title 28 provides that tort remedies against the United States resulting from the operation of any employee of

the Government of any motor vehicle while acting within the scope of his employment shall be exclusive of any other civil action or proceeding against the employee or his estate.

(e) Subsection (b) of section 2401 of said title 28 provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(f) The Federal Tort Claims Act, as amended, shall apply to claims accruing 6 months or more after date of its enactment (date of enactment, July 18, 1966).

(g) Pursuant to section 2672 of title 28, United States Code, as amended, the Attorney General has issued regulations (herein referred to as ''the Regulations''; 28 CFR part 14), prescribing standards and procedures for settlement of tort claims (31 FR 16616). The officers to whom authority is delegated to settle tort claims shall follow and be guided by such Regulations (28 CFR part 14).

§ 22.3 Procedure for filing claims.

(a) The procedure for filing and the contents of claims shall be pursuant to §§ 14.2, 14.3 and 14.4 of the regulations (28 CFR part 14).

(b) Claims shall be filed directly with the local field office of the Bureau or Office of the Department out of whose activities the accident or incident occurred.

(c) Upon receipt of a claim, the time and date of receipt shall be recorded. The claim shall be forwarded with the investigative file immediately to the appropriate Associate, Regional, or Field Solicitor for determination.

(5 U.S.C. 301, 5 U.S.C. 552)

[40 FR 53591, Nov. 19, 1975]

§ 22.4 Denial of claims.

Denial of a claim shall be communicated as provided by § 14.9 of the regulations (28 CFR part 14).

§ 22.5 Payment of claims.

(a) When an award of $2,500 or less is made, the voucher signed by the claimant shall be transmitted for payment to the appropriate Bureau or Office of the Department. When an award over $2,500 is made, transmittal for payment will be made as prescribed by § 14.10 of the regulations (28 CFR part 14).

(b) Prior to payment appropriate releases shall be obtained as provided in said section.

Subpart B—Indemnification of Department of the Interior Employees

§ 22.6 Policy.

(a) The Department of the Interior may indemnify a Department employee, who is personally named as a defendant in any civil suit in state or federal court or an arbitration proceeding or other proceeding seeking damages against a Department employee personally, for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of his or her employment and that such indemnification is in the interest of the Department of the Interior as determined by the Secretary or his designee.

(b) The Department of the Interior may settle or compromise a personal damage claim against a Department employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damage claim was taken within the employee's scope of employment and that such settlement or compromise is in the interest of the Department of the Interior as determined by the Secretary or his designee.

(c) Absent exceptional circumstances as determined by the Secretary or his designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment, or award.

(d) A Department employee may request indemnification to satisfy a verdict, judgment, or award entered

against the employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal, in a timely manner to the Solicitor, who shall make a recommended disposition of the request. Where appropriate, the Department shall seek the views of the Department of Justice. The Solicitor shall forward the request, the accompanying documentation, and the Solicitor's recommendation to the Secretary or his designee for decision.

(e) Any payment under this section either to idemnify a Department of the Interior employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the Department of the Interior.

[55 FR 4610, Feb. 9, 1990]

PART 23—SURFACE EXPLORATION, MINING AND RECLAMATION OF LANDS

Sec.
23.1 Purpose.
23.2 Scope.
23.3 Definitions.
23.4 Application for permission to conduct exploration operations.
23.5 Technical examination of prospective surface exploration and mining operations.
23.6 Basis for denial of a permit, lease, or contract.
23.7 Approval of exploration plan.
23.8 Approval of mining plan.
23.9 Performance bond.
23.10 Reports: Inspection.
23.11 Notice of noncompliance: Revocation.
23.12 Appeals.
23.13 Consultation.

AUTHORITY: Sec. 32, 41 Stat. 450, as amended; 30 U.S.C. 189; sec. 5, 44 Stat. 1058; 30 U.S.C. 285; sec. 10, 61 Stat. 915; 30 U.S.C. 359; and sec. 2, 48 Stat. 1270; 43 U.S.C. 315.

SOURCE: 34 FR 852, Jan. 18, 1969, unless otherwise noted.

§ 23.1 Purpose.

It is the policy of this Department to encourage the development of the mineral resources under its jurisdiction where mining is authorized. However, the public interest requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment—land, water, and air—and to avoid, minimize, or correct hazards to the public health and safety. The regulations in this part prescribe procedures to that end.

§ 23.2 Scope.

(a) Except as provided in paragraph (b) of this section, the regulations in this part provide for the protection and conservation of nonmineral resources during operations for the discovery, development, surface mining, and onsite processing of minerals under permits, leases, or contracts issued pursuant to: The Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181–287); the Mineral Leasing Act for Acquired Lands (30 U.S.C. 251–359); and title 23, United States Code, section 317, relating to appropriation for highway purposes of lands owned by the United States.

(b) The regulations in this part do not cover the exploration for oil and gas or the issuance of leases, or operations thereunder, for oil and gas under the mineral leasing acts, which are covered by regulations in subpart 3107 and part 3120 of this title and 30 CFR part 221; neither do they cover minerals underlying Indian tribal or allotted lanes, which are subject to regulations in title 25 CFR, nor minerals subject to the general mining laws (30 U.S.C. 21 through 54); nor minerals under the Materials Act; nor minerals underlying lands, the surface of which is not owned by the U.S. Government; nor minerals or operations subject to the provisions of 43 CFR subpart 3041.

NOTE: See Redesignation Table 2 of 43 CFR part 4000 to End, for appropriate sections of former subpart 3107 and part 3120 referred to in the above paragraph (b).

(c) The regulations in this part shall apply only to permits, leases, or contracts issued subsequent to the date on which the regulations become effective.

[34 FR 852, Jan. 18, 1969, as amended at 37 FR 12801, June 29, 1972; 41 FR 20273, May 17, 1976; 48 FR 27016, June 10, 1983]

§ 23.3 Definitions.

As used in the regulations in this part:

(a) *Mineral leasing acts* means the Mineral Leasing Act of February 25, 1920, as amended and supplemented (30 U.S.C. 181–287) and the Mineral Leasing Act for Acquired Lands (30 U.S.C. 351–359);

(b) *Mining Supervisor* means the Area Mining Supervisor, or his authorized representative, of the Geological Survey authorized as provided in 30 CFR 211.3 and 231.2 to supervise operations on the land covered by a permit or lease;

(c) *District manager* means the manager of the district office or other authorized officer of the Bureau of Land Management having administrative jurisdiction of and responsibility for the land covered by a permit, lease, contract, application, or offer;

(d) *Overburden* means all the earth and other materials which lie above a natural deposit of minerals and such earth and other materials after removal from their natural state in the process of mining;

(e) *Area of land to be affected* or *area of land affected* means the area of land from which overburden is to be or has been removed and upon which the overburden or waste is to be or has been deposited, and includes all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to an operation and for haulage;

(f) *Operation* means all of the premises, facilities, roads, and equipment used in the process of determining the location, composition or quality of a mineral deposit, or in developing, extracting, or onsite processing of a mineral deposit in a designated area;

(g) *Method of operation* means the method or manner by which a cut or open pit is made, the overburden is placed or handled, water is controlled or affected and other pacts performed by the operator in the process of exploring or uncovering and removing or onsite processing of a mineral deposit;

(h) *Holder* or *Operator* means the permittee, leasee, or contractor designated in a permit, lease, or contract;

(i) *Reclamation* means measures undertaken to bring about the necessary reconditioning or restoration of land or water that has been affected by exploration or mineral development, mining or onsite processing operations, and waste disposal, in ways which will prevent or control onsite and offsite damage to the environment.

[34 FR 852, Jan. 18, 1969, as amended at 38 FR 10009, Apr. 23, 1973; 48 FR 27016, June 10, 1983]

§ 23.4 Application for permission to conduct exploration operations.

No person shall, in any manner or by any means which will cause the surface of lands to be disturbed, explore, test, or prospect for minerals (other than oil and gas) subject to disposition under the mineral leasing acts without first filing an application for, and obtaining, a permit, lease or contract which authorizes such exploring, testing, or prospecting.

[34 FR 852, Jan. 18, 1969, as amended at 48 FR 27016, June 10, 1983]

§ 23.5 Technical examination of prospective surface exploration and mining operations.

(a)(1) In connection with an application for a permit or lease under the mineral leasing acts, the district manager shall make, or cause to be made, a technical examination of the prospective effects of the proposed exploration or surface mining operations upon the environment. The technical examination shall take into consideration the need for the preservation and protection of other resources, including recreational, scenic, historic, and ecological values; the control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation, replacement of soil, or by other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety.

(2) A technical examination of an area should be made with the recognition that actual potential mining sites and mining operations vary widely with respect to topography, climate, surrounding land uses, proximity to densely used areas, and other environmental influences and that mining and

reclamation requirements should provide sufficient flexibility to permit adjustment to local conditions.

(b) Based upon the technical examination, the district manager shall formulate the general requirements which the applicant must meet for the protection of nonmineral resources during the conduct of exploration or mining operations and for the reclamation of lands or waters affected by exploration or mining operations. The general requirements shall be made known in writing to the applicant before the issuance of a permit or lease or the making of a contract, and upon acceptance thereof by the applicant, shall be incorporated in the permit, lease, or contract. If an application or offer is made under the Mineral Leasing Act for Acquired Lands and if the lands are under the jurisdiction of an agency other than the Department of the Interior, the requirements must incorporate provisions prescribed by that agency. If the application or offer is made under the Mineral Leasing Act of February 25, 1920, and if the lands are under the jurisdiction of an agency other than the Department of the Interior, the district manager shall consult representatives of the agency administering the land and obtain their recommendations for provisions to be incorporated in the general requirements. If the district manager does not concur in the recommendations, the issues shall be referred for resolution to the Under Secretary of the Department of the Interior and the comparable officer of the agency submitting the recommendations. In the case of disagreement on the issues which are so referred, the Secretary of the Interior shall make a determination on the recommendations which shall be final and binding.

(c) In each instance in which an application or offer is made under the mineral leasing acts, the mining supervisor shall participate in the technical examination and in the formulation of the general requirements. If the lands covered by an application or offer are under the jurisdiction of a bureau of the Department of the Interior other than the Bureau of Land Management, the district manager shall consult representatives of the bureau administering the land. If the lands covered by the application or offer are under the jurisdiction of an agency other than the Department of the Interior and that agency makes a technical examination of the type provided for in paragraph (a) of this section, district managers and mining supervisors are authorized to participate in that examination.

(d) Whenever it is determined that any part of the area described in an application or offer for a permit, lease, or contract is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid—

(1) Rock or landslides which would be a hazard to human lives or endanger or destroy private or public property; or

(2) Substantial deposition of sediment and silt into streams, lakes, reservoirs; or

(3) A lowering of water quality below standards established by the appropriate State water pollution control agency, or by the Secretary of the Interior; or

(4) A lowering of the quality of waters whose quality exceeds that required by the established standards—unless and until it has been affirmatively demonstrated to the State water pollution control agency and to the Department of the Interior that such lowering of quality is necessary to economic and social development and will not preclude any assigned uses made of such waters; or

(5) The destruction of key wildlife habitat or important scenic, historical, or other natural or cultural features; the district manager may prohibit or otherwise restrict operations on such part of an area.

(e) If, on the basis of a technical examination, the district manager determines that there is a likelihood that there will be a lowering of water quality as described in paragraphs (d) (3) and (4) of this section caused by the operation, no lease or permit shall be issued or contract made until after consultation with the Federal Water Pollution Control Administration and a finding by the Administration that the proposed operation would not be in

violation of the Federal Water Pollution Control Act, as amended (33 U.S.C. section 466 *et seq.*) or of Executive Order No. 11288 (31 FR 9261). Where a permit or lease is involved the district manager's determination shall be made in consultation with the mining supervisor.

(f) Each notice of a proposed appropriation of a materials site filed by the Department of Transportation under 23 U.S.C. 317 shall be transmitted to the proper district manager. The district manager shall cause a technical examination to be made as provided in paragraph (a) of this section and shall formulate the requirements which the State highway department or its nominee must meet. If the land covered by the proposed appropriation is under the jurisdiction of a bureau of the Department other than the Bureau of Land Management, the district manager shall consult representatives of the bureau administering the land. If the district manager determines, or, in an instance in which the land is administered by another bureau, a representative of that bureau determines that the proposed appropriation is contrary to the public interest or is inconsistent with the purposes for which such land or materials are reserved, the district manager shall promptly submit the matter to the Secretary of the Interior for his decision. In other instances, the district manager shall notify the Department of Transportation of the requirements and conditions which the State highway department or its nominee must meet.

[34 FR 852, Jan. 18, 1969, as amended at 48 FR 27016, June 10, 1983]

§ 23.6 Basis for denial of a permit, lease, or contract.

An application or offer for a permit, lease, or contract to conduct exploratory or extractive operations may be denied any applicant or offeror who has forfeited a required bond because of failure to comply with an exploration or mining plan. However, a permit, lease, or contract may not be denied an applicant or offeror because of the forfeiture of a bond if the lands disturbed under his previous permit, lease, or contract have subsequently been reclaimed without cost to the Federal Government.

§ 23.7 Approval of exploration plan.

(a) Before commencing any surface disturbing operations to explore, test, or prospect for minerals covered by the mineral leasing acts the operator shall file with the mining supervisor a plan for the proposed exploration operations. The mining supervisor shall consult with the district manager with respect to the surface protection and reclamation aspects before approving said plan.

(b) Depending upon the size and nature of the operation and the requirements established pursuant to § 23.5 the mining supervisor or the district manager may require that the exploration plan submitted by the operator include any or all of the following:

(1) A description of the area within which exploration is to be conducted;

(2) Two copies of a suitable map or aerial photograph showing topographic, cultural and drainage features;

(3) A statement of proposed exploration methods, i.e. drilling, trenching, etc., and the location of primary support roads and facilities;

(4) A description of measures to be taken to prevent or control fire, soil erosion, pollution of surface and ground water, damage to fish and wildlife or other natural resources, and hazards to public health and safety both during and upon abandonment of exploration activities.

(c) The mining supervisor or the district manager shall promptly review the exploration plan submitted to him by the operator and shall indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 23.5, the provisions of the regulations in this part, and the terms of the permit.

(d) The operator shall comply with the provisions of an approved exploration plan. The mining supervisor and the district manager may, with respect to such a plan, exercise the authority provided by paragraphs (f) and (g) of § 23.8 respecting a mining plan.

[34 FR 852, Jan. 18, 1969, as amended at 48 FR 27016, June 10, 1983]

§ 23.8 Approval of mining plan.

(a) Before surface mining operations may commence under any permit or lease issued under the mineral leasing acts the operator must file a mining plan with the mining supervisor and obtain his approval of the plan. Paragraphs (b) through (g) of this section confer authority upon mining supervisors with respect to mining plans pertaining to permits or leases issued under the mineral leasing acts. The mining supervisor shall consult with the district manager with respect to the surface protection and reclamation aspects before approving said plan.

(b) Depending on the size and nature of the operation and the requirements established pursuant to § 23.5, the mining supervisor or the district manager may require that the mining plan submitted by the operator include any or all of the following:

(1) A description of the location and area to be affected by the operations;

(2) Two copies of a suitable map, or aerial photograph showing the topography, the area covered by the permit, lease, or contract, the name and location of major topographic and cultural features, and the drainage plan away from the area to be affected;

(3) A statement of proposed methods of operating, including a description of proposed roads or vehicular trails; the size and location of structures and facilities to be built;

(4) An estimate of the quantity of water to be used and pollutants that are expected to enter any receiving waters;

(5) A design for the necessary impoundment, treatment or control of all runoff water and drainage from workings so as to reduce soil erosion and sedimentation and to prevent the pollution of receiving waters;

(6) A description of measures to be taken to prevent or control fire, soil erosion, pollution of surface and ground water, damage to fish and wildlife, and hazards to public health and safety; and

(7) A statement of the proposed manner and time of performance of work to reclaim areas disturbed by the holder's operation.

(c) In those instances in which the permit, lease, or contract requires the revegetation of an area of land to be affected the mining plan shall show:

(1) Proposed methods of preparation and fertilizing the soil prior to replanting;

(2) Types and mixtures of shrubs, trees, or tree seedlings, grasses or legumes to be planted; and

(3) Types and methods of planting, including the amount of grasses or legumes per acre, or the number and spacing of trees, or tree seedlings, or combinations of grasses and trees.

(d) In those instances in which the permit, lease, or contract requires regrading and backfilling, the mining plan shall show the proposed methods and the timing of grading and backfilling of areas to be affected by the operation.

(e) The mining supervisor or the district manager shall review the mining plan submitted to him by the operator and shall promptly indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 23.5, the provisions of the regulations in this part and the terms of the permit, lease, or contract. The operator shall comply with the provisions of an approved mining plan.

(f) A mining plan may be changed by mutual consent of the mining supervisor or the district manager and the operator at any time to adjust to changed conditions or to correct any oversight. To obtain approval of a change or supplemental plan the operator shall submit a written statement of the proposed changes or supplement and the justification for the changes proposed. The mining supervisor or the district manager shall promptly notify the operator that he consents to the proposed changes or supplement or, in the event he does not consent, he shall specify the modifications thereto under which the proposed changes or supplement would be acceptable. After mutual acceptance of a change of a plan the operator shall not depart therefrom without further approval.

(g) If circumstances warrant, or if development of a mining plan for the entire operation is dependent upon unknown factors which cannot or will not be determined except during the progress of the operations, a partial

plan may be approved and supplemented from time to time. The operator shall not, however, perform any operation except under an approved plan.

[34 FR 852, Jan. 18, 1969, as amended at 48 FR 27016, June 10, 1983]

§ 23.9 Performance bond.

(a)(1) Upon approval of an exploration plan or mining plan, the operator shall be required to file a suitable performance bond of not less than $2,000 with satisfactory surety, payable to the Secretary of the Interior, and the bond shall be conditioned upon the faithful compliance with applicable regulations, the terms and conditions of the permit, lease, or contract, and the exploration or mining plan as approved, amended or supplemented. The bond shall be in an amount sufficient to satisfy the reclamation requirements of an approved exploration or mining plan, or an approved partial or supplemental plan. In determining the amount of the bond consideration shall be given to the character and nature of the reclamation requirements and the estimated costs of reclamation in the event that the operator forfeits his performance bond.

(2) In lieu of a performance bond an operator may elect to deposit cash or negotiable bonds of the U.S. Government. The cash deposit or the market value of such securities shall be equal at least to the required sum of the bond.

(b) A bond may be a nationwide or statewide bond which the operator has filed with the Department under the provisions of the applicable leasing regulations in subchapter C of chapter II of this title, if the terms and conditions thereof are sufficient to comply with the regulations in this part.

(c) The district manager shall set the amount of a bond and take the necessary action for an increase or for a complete or partial release of a bond. He shall take action with respect to bonds for leases or permits only after consultation with the mining supervisor.

(d) Performance bonds will not be required of Federal, State, or other governmental agencies. Where the exploration or mining is actually performed for such Federal, State, or governmental agencies by a contractor who would have to post a bond under the terms of paragraph (a) of this section if he were the operator, such agencies shall require the contractor to furnish a bond payable to the United States which meets the requirements of paragraph (a) of this section. If, for some other purpose, the contractor furnishes a performance bond, an amendment to that bond which meets the requirements of paragraph (a) of this section will be acceptable in lieu of an additional or separate bond.

[34 FR 852, Jan. 18, 1969, as amended at 35 FR 11237, July 14, 1970]

§ 23.10 Reports: Inspection.

(a)(1) The holder of a permit or lease under the mineral leasing acts shall file the reports required by this section with the mining supervisor.

(2) The provisions of this section confer authority and impose duties upon mining supervisors with respect to permits or leases issued under the mineral leasing acts.

(b) Operations report: Within 30 days after the end of each calendar year, or if operations cease before the end of a calendar year, within 30 days after the cessation of operations, the operator shall submit an operations report containing the following information:

(1) An identification of the permit, lease, or contract and the location of the operation;

(2) A description of the operations performed during the period of time for which the report is filed;

(3) An identification of the area of land affected by the operations and a description of the manner in which the land has been affected;

(4) A statement as to the number of acres disturbed by the operations and the number of acres which were reclaimed during the period of time;

(5) A description of the method utilized for reclamation and the results thereof;

(6) A statement and description of reclamation work remaining to be done.

(c) Grading and backfilling report: Upon completion of such grading and backfilling as may be required by an approved exploration or mining plan,

the operator shall make a report thereon and request inspection for approval. Whenever it is determined by such inspection that backfilling and grading has been carried out in accordance with the established requirements and approved exploration or mining plan, the district manager shall issue a release of an appropriate amount of the performance bond for the area graded and backfilled. Appropriate amounts of the bond shall be retained to assure that satisfactory planting, if required, is carried out.

(d) Planting report: (1) Whenever planting is required by an approved exploration or mining plan, the operator shall file a report with the mining supervisor or district manager whenever such planting is completed. The report shall—

(i) Identify the permit, lease, or contract;

(ii) Show the type of planting or seeding, including mixtures and amounts;

(iii) Show the date of planting or seeding;

(iv) Identify or describe the areas of the lands which have been planted:

(v) Contain such other information as may be relevant.

(2) The mining supervisor or district manager, as soon as possible after the completion of the first full growing season, shall make an inspection and evaluation of the vegetative cover and planting to determine if a satisfactory growth has been established.

(3) If it is determined that a satisfactory vegetative cover has been established and is likely to continue to grow, any remaining portion of the performance bond may be released if all requirements have been met by the operator.

(e) Report of cessation or abandonment of operations: (1) Not less than 30 days prior to cessation or abandonment of operations, the operator shall report his intention to cease or abandon operations, together with a statement of the exact number of acres of land affected by his operations, the extent of reclamation accomplished and other relevant information.

(2)(i) Upon receipt of such report the mining supervisor or the district manager shall make an inspection to determine whether operations have been carried out and completed in accordance with the approved exploration or mining plan.

(ii) Whenever the lands in a permit, lease or contract issued under the mineral leasing acts are under the jurisdiction of a bureau of the Department of the Interior other than the Bureau of Land Management the mining supervisor or the district manager, as appropriate, shall obtain the concurrence of the authorized officer of such bureau that the operation has been carried out and completed in accordance with the approved exploration or mining plan with respect to the surface protection and reclamation aspects of such plan before releasing the performance bond.

(iii) Whenever the lands in a permit, lease or contract issued under the Mineral Leasing Act of 1920 are under the jurisdiction of an agency other than the Department of the Interior, the mining supervisor or the district manager, as appropriate, shall consult representatives of the agency administering the lands and obtain their recommendations as to whether the operation has been carried out and completed in accordance with the approved exploration or mining plan with respect to the surface protection and reclamation aspects of such plan before releasing the performance bond. If the mining supervisor or district manager, as appropriate, do not concur in the recommendations of the agency regarding compliance with the surface protection and reclamation aspects of the approved exploration or mining plan, the issues shall be referred for resolution to the Under Secretary of the Department of the Interior and the comparable officer of the agency submitting the recommendations. In the case of disagreement on issues which are so referred, the Secretary of the Interior shall make a determination which shall be final and binding. In cases in which the recommendations are not concurred in by the mining supervisor or district manager, the performance bond shall not be released until resolution of the issues or until a final determination by the Secretary of the Interior.

(iv) Whenever the lands in a permit or lease issued under the Mineral Leasing Act for Acquired Lands are under the jurisdiction of an agency other than the Department of the Interior, the mining supervisor or the district manager, as appropriate, shall obtain the concurrence of the authorized officer of such agency that the operation has been carried out and completed in accordance with the approved exploration or mining plan with respect to the surface protection and reclamation aspects of such plan before releasing the performance bond.

[34 FR 852, Jan. 18, 1969, as amended at 48 FR 27016, June 10, 1983]

§ 23.11 Notice of noncompliance: Revocation.

(a) The provisions of this section confer authority and impose duties upon mining supervisors with respect to permits or leases issued under the mineral leasing acts. The Mining supervisor shall consult with the district manager before taking any action under this section.

(b) The mining supervisor or district manager shall have the right to enter upon the lands under a permit, lease, or contract, at any reasonable time, for the purpose of inspection or investigation to determine whether the terms and conditions of the permit, lease, or contract, and the requirements of the exploration or mining plan have been complied with.

(c) If the mining supervisor or the district manager determines that an operator has failed to comply with the terms and conditions of a permit, lease, or contract, or with the requirements of an exploration or mining plan, or with the provisions of applicable regulations under this part the supervisor or manager shall serve a notice of noncompliance upon the operator by delivery in person to him or his agent or by certified or registered mail addressed to the operator at his last known address.

(d) A notice of noncompliance shall specify in what respects the operator has failed to comply with the terms and conditions of a permit, lease, or contract, or the requirements of an exploration or mining plan, or the provisions of applicable regulations, and shall specify the action which must be taken to correct the noncompliance and the time limits within which such action must be taken.

(e) Failure of the operator to take action in accordance with the notice of noncompliance shall be grounds for suspension by the mining supervisor or the district manager of operations or for the initiation of action for the cancellation of the permit, lease, or contract and for forfeiture of the performance bond required under § 23.9.

[34 FR 852, Jan. 18, 1969, as amended at 48 FR 27016, June 10, 1983]

§ 23.12 Appeals.

(a) A person adversely affected by a decision or order of a district manager or of a mining supervisor made pursuant to the provisions of this part shall have a right of appeal to the Board of Land Appeals, Office of Hearings and Appeals, whenever the decision appealed from was rendered by a district manager, or to the Director of the Geological Survey if the decision or order appealed from was rendered by a mining supervisor, and the further right to appeal to the Board of Land Appeals from an adverse decision of the Director of the Geological Survey unless such decision was approved by the Secretary prior to promulgation.

(b) Appeals to the Board of Land Appeals shall be made pursuant to part 4 of this title. Appeals to the Director of the Geological Survey shall be made in the manner provided in 30 CFR part 290.

(c) In any case involving a permit, lease, or contract for lands under the jurisdiction of an agency other than the Department of the Interior, or a bureau of the Department of the Interior other than the Bureau of Land Management, the officer rendering a decision or order shall designate the authorized officer of such agency as an adverse party on whom a copy of any notice of appeal and any statement of reasons, written arguments, or briefs must be served.

(d) Hearings to present evidence on an issue of fact before an administrative law judge may be ordered by the Board of Land Appeals or the Director of the Geological Survey, as the case

may be, in accordance with the procedure set forth in part 4 of this title.

[35 FR 10009, June 18, 1970, as amended at 36 FR 7206, Apr. 15, 1971; 38 FR 10009, Apr. 23, 1973]

§ 23.13 Consultation.

Whenever the lands included in a permit, lease, or contract are under the jurisdiction of an agency other than the Department of the Interior or under the jurisdiction of a bureau of the Department of the Interior other than the Bureau of Land Management, the mining supervisor or the district manager, as appropriate, shall consult the authorized officer of such agency before taking any final action under §§ 23.7, 23.8, 23.10 (c) and (d) (2) and (3), and 23.11(c).

PART 24—DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE POLICY: STATE-FEDERAL RELATIONSHIPS

Sec.
24.1 Introduction.
24.2 Purpose.
24.3 General jurisdictional principles.
24.4 Resource management and public activities on Federal lands.
24.5 International agreements.
24.6 Cooperative agreements.
24.7 Exemptions.

AUTHORITY: 43 U.S.C. 1201.

SOURCE: 48 FR 11642, Mar. 18, 1983, unless otherwise noted.

§ 24.1 Introduction.

(a) In 1970, the Secretary of the Interior developed a policy statement on intergovernmental cooperation in the preservation, use and management of fish and wildlife resources. The purpose of the policy (36 FR 21034, Nov. 3, 1971) was to strengthen and support the missions of the several States and the Department of the Interior respecting fish and wildlife. Since development of the policy, a number of Congressional enactments and court decisions have addressed State and Federal responsibilities for fish and wildlife with the general effect of expanding Federal jurisdiction over certain species and uses of fish and wildlife traditionally managed by the States. In some cases, this expansion of jurisdiction has established overlapping authorities, clouded agency jurisdictions and, due to differing agency interpretations and accountabilities, has contributed to confusion and delays in the implementation of management programs. Nevertheless, Federal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law.

(b) The Secretary of the Interior reaffirms that fish and wildlife must be maintained for their ecological, cultural, educational, historical, aesthetic, scientific, recreational, economic, and social values to the people of the United States, and that these resources are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans. Because fish and wildlife are fundamentally dependent upon habitats on private and public lands managed or subject to administration by many Federal and State agencies, and because provisions for the protection, maintenance and enhancement of fish and wildlife and the regulation for their use are established in many laws and regulations involving a multitude of Federal and State administrative structures, the effective stewardship of fish and wildlife requires the cooperation of the several States and the Federal Government.

(c) It is the intent of the Secretary to strengthen and support, to the maximum legal extent possible, the missions of the States[1] and the Department of the Interior to conserve and manage effectively the nation's fish and wildlife. It is, therefore, important that a Department of the Interior Fish and Wildlife Policy be implemented to coordinate and facilitate the efforts of

[1] "States" refers to all of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, the Commonwealth of Northern Mariana Islands and other territorial possessions, and the constituent units of government upon which these entities may have conferred authorities related to fish and wildlife matters.

Federal and State agencies in the attainment of this objective.

§ 24.2 Purpose.

(a) The purpose of the Department of the Interior Fish and Wildlife Policy is to clarify and support the broad authorities and responsibilities of Federal[2] and State agencies responsible for the management of the nation's fish and wildlife and to identify and promote cooperative agency management relationships which advance scientifically-based resource management programs. This policy is intended to reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility, and to foster improved conservation of fish and wildlife.

(b) In developing and implementing this policy, this Department will be furthering the manifest Congressional policy of Federal-State cooperation that pervades statutory enactments in the area of fish and wildlife conservation. Moreover, in recognition of the scope of its activities in managing hundreds of millions of acres of land within the several States, the Department of the Interior will continue to seek new opportunities to foster a ''good neighbor'' policy with the States.

§ 24.3 General jurisdictional principles.

(a) In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State. Under the Property Clause of the Constitution, Congress is given the power to ''make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.'' In the exercise of power under the Property Clause, Congress may choose to preempt State management of fish and wildlife on Federal lands and, in circumstances where the exercise of power under the Commerce Clause is available, Congress may choose to establish restrictions on the taking of fish and wildlife whether or not the activity occurs on Federal lands, as well as to establish restrictions on possessing, transporting, importing, or exporting fish and wildlife. Finally, a third source of Federal constitutional authority for the management of fish and wildlife is the treaty making power. This authority was first recognized in the negotiation of a migratory bird treaty with Great Britain on behalf of Canada in 1916.

(b) The exercise of Congressional power through the enactment of Federal fish and wildlife conservation statutes has generally been associated with the establishment of regulations more restrictive than those of State law. The power of Congress respecting the taking of fish and wildlife has been exercised as a restrictive regulatory power, except in those situations where the taking of these resources is necessary to protect Federal property. With these exceptions, and despite the existence of constitutional power respecting fish and wildlife on Federally owned lands, Congress has, in fact, reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands.

(c) Congress has charged the Secretary of the Interior with responsibilities for the management of certain fish and wildlife resources, e.g., endangered and threatened species, migratory birds, certain marine mammals, and certain aspects of the management of some anadromous fish. However, even in these specific instances, with the limited exception of marine mammals, State jurisdiction remains concurrent with Federal authority.

§ 24.4 Resource management and public activities on Federal lands.

(a) The four major systems of Federal lands administered by the Department of the Interior are lands administered by the Bureau of Reclamation, Bureau of Land Management, units of the National Wildlife Refuge System and national fish hatcheries, and units of the National Park System.

(b) The Bureau of Reclamation withdraws public lands and acquires non-

[2] Hereinafter, the Bureau of Reclamation, Bureau of Land Management, Fish and Wildlife Service, and National Park Service will be referred to collectively as ''Federal agencies.''

Federal lands for construction and operation of water resource development projects within the 17 Western States. Recreation and conservation or enhancement of fish and wildlife resources are often designated project purposes. General authority for Reclamation to modify project structures, develop facilities, and acquire lands to accommodate fish and wildlife resources is given to the Fish and Wildlife Coordination Act of 1946, as amended (16 U.S.C. 661–667e). That act further provides that the lands, waters and facilities designated for fish and wildlife management purposes, in most instances, should be made available by cooperative agreement to the agency exercising the administration of these resources of the particular State involved. The Federal Water Project Recreation Act of 1965, as amended, also directs Reclamation to encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement. Reclamation withdrawal, however, does not enlarge the power of the United States with respect to management of fish and resident wildlife and, except for activities specified in Section III.3 above, basic authority and responsibility for management of fish and resident wildlife on such lands remains with the State.

(c) BLM-administered lands comprise in excess of 300 million acres that support significant and diverse populations of fish and wildlife. Congress in the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) directed that non-wilderness BLM lands be managed by the Secretary under principles of multiple use and sustained yield, and for both wilderness and non-wilderness lands explicitly recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands. Concomitantly, the Secretary of the Interior is charged with the responsibility to manage non-wilderness BLM lands for multiple uses, including fish and wildlife conservation. However, this authority to manage lands for fish and wildlife values is not a preemption of State jurisdiction over fish and wildlife. In exercising this responsibility the Secretary is empowered to close areas to hunting, fishing or trapping for specified reasons viz., public safety, administration, or compliance with provisions of applicable law. The closure authority of the Secretary is thus a power to close areas to particular activities for particular reasons and does not in and of itself constitute a grant of authority to the Secretary to manage wildlife or require or authorize the issuance of hunting and/or fishing permits or licenses.

(d) While the several States therefore possess primary authority and responsibility for management of fish and resident wildlife on Bureau of Land Management lands, the Secretary, through the Bureau of Land Management, has custody of the land itself and the habitat upon which fish and resident wildlife are dependent. Management of the habitat is a responsibility of the Federal Government. Nevertheless, Congress in the Sikes Act has directed the Secretary of the Interior to cooperate with the States in developing programs on certain public lands, including those administered by BLM and the Department of Defense, for the conservation and rehabilitation of fish and wildlife including specific habitat improvement projects.

(e) Units of the National Wildlife Refuge System occur in nearly every State and constitute Federally owned or controlled areas set aside primarily as conservation areas for migratory waterfowl and other species of fish or wildlife. Units of the system also provide outdoor enjoyment for millions of visitors annually for the purpose of hunting, fishing and wildlife-associated recreation. In 1962 and 1966, Congress authorized the use of National Wildlife Refuges for outdoor recreation provided that it is compatible with the primary purposes for which the particular refuge was established. In contrast to multiple use public lands, the conservation, enhancement and perpetuation of fish and wildlife is almost invariably the principal reason for the establishment of a unit of the National Wildlife Refuge System. In consequence, Federal activity respecting management of migratory waterfowl and other wildlife residing on units of the National Wildlife Refuge System

involves a Federal function specifically authorized by Congress. It is therefore for the Secretary to determine whether units of the System shall be open to public uses, such as hunting and fishing, and on what terms such access shall be granted. However, in recognition of the existing jurisdictional relationship between the States and the Federal Government, Congress, in the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd), has explicitly stated that nothing therein shall be construed as affecting the authority of the several States to manage fish and resident wildlife found on units of the system. Thus, Congress has directed that, to the maximum extent practicable, such public uses shall be consistent with State laws and regulations. Units of the National Wildlife Refuge System, therefore, shall be managed, to the extent practicable and compatible with the purposes for which they were established, in accordance with State laws and regulations, comprehensive plans for fish and wildlife developed by the States, and Regional Resource Plans developed by the Fish and Wildlife Service in cooperation with the States.

(f) Units of the National Park System contain natural, recreation, historic, and cultural values of national significance as designated by Executive and Congressional action. Specific enabling legislation has authorized limited hunting, trapping or fishing activity within certain areas of the system. As a general rule, consumptive resource utilization is prohibited. Those areas which do legislatively allow hunting, trapping, or fishing, do so in conformance with applicable Federal and State laws. The Superintendent may, in consultation with the appropriate State agency, fix times and locations where such activities will be prohibited. Areas of the National Park System which permit fishing generally will do so in accordance with applicable State and Federal Laws.

(g) In areas of exclusive Federal jurisdiction, State laws are not applicable. However, every attempt shall be made to consult with the appropriate States to minimize conflicting and confusing regulations which may cause undue hardship.

(h) The management of habitat for species of wildlife, populations of wildlife, or individual members of a population shall be in accordance with a Park Service approved Resource Management Plan. The appropriate States shall be consulted prior to the approval of management actions, and memoranda of understanding shall be executed as appropriate to ensure the conduct of programs which meet mutual objectives.

(i) Federal agencies of the Department of the Interior shall:

(1) Prepare fish and wildlife management plans in cooperation with State fish and wildlife agencies and other Federal (non-Interior) agencies where appropriate. Where such plans are prepared for Federal lands adjoining State or private lands, the agencies shall consult with the State or private landowners to coordinate management objectives;

(2) Within their statutory authority and subject to the management priorities and strategies of such agencies, institute fish and wildlife habitat management practices in cooperation with the States to assist the States in accomplishing their fish and wildlife resource plans;

(3) Provide for public use of Federal lands in accordance with State and Federal laws, and permit public hunting, fishing and trapping within statutory and budgetary limitations and in a manner compatible with the primary objectives for which the lands are administered. The hunting, fishing, and trapping, and the possession and disposition of fish, game, and fur animals, shall be conducted in all other respects within the framework of applicable State and Federal laws, including requirements for the possession of appropriate State licenses or permits.

(4) For those Federal lands that are already open for hunting, fishing, or trapping, closure authority shall not be exercised without prior consultation with the affected States, except in emergency situations. The Bureau of Land Management may, after consultation with the States, close all or any portion of public land under its jurisdiction to public hunting, fishing, or trapping for reasons of public safety, administration, or compliance with

provisions of applicable law. The National Park Service and Fish and Wildlife Service may, after consultation with the States, close all or any portion of Federal land under their jurisdictions, or impose such other restrictions as are deemed necessary, for reasons required by the Federal laws governing the management of their areas; and

(5) Consult with the States and comply with State permit requirements in connection with the activities listed below, except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities:

(i) In carrying out research programs involving the taking or possession of fish and wildlife or programs involving reintroduction of fish and wildlife;

(ii) For the planned and orderly removal of surplus or harmful populations of fish and wildlife except where emergency situations requiring immediate action make such consultation and compliance with State regulatory requirements infeasible; and

(iii) In the disposition of fish and wildlife taken under paragraph (i) (5)(i) or (i) (5)(ii) of this section.

§ 24.5 International agreements.

(a) International conventions have increasingly been utilized to address fish and wildlife issues having dimensions beyond national boundaries. The authority to enter into such agreements is reserved to the President by and with the advice and consent of the Senate. However, while such agreements may be valuable in the case of other nations, in a Federal system such as ours sophisticated fish and wildlife programs already established at the State level may be weakened or not enhanced.

(b) To ensure that effective fish and wildlife programs already established at the State level are not weakened, the policy of the Department of the Interior shall be to recommend that the United States negotiate and accede to only those international agreements that give strong consideration to established State programs designed to ensure the conservation of fish and wildlife populations.

(c) It shall be the policy of the Department to actively solicit the advice of affected State agencies and to recommend to the U.S. Department of State that representatives of such agencies be involved before and during negotiation of any new international conventions concerning fish and wildlife.

§ 24.6 Cooperative agreements.

(a) By reason of the Congressional policy (e.g., Fish and Wildlife Coordination Act of 1956) of State-Federal cooperation and coordination in the area of fish and wildlife conservation, State and Federal agencies have implemented cooperative agreements for a variety of fish and wildlife programs on Federal lands. This practice shall be continued and encouraged. Appropriate topics for such cooperative agreements include but are not limited to:

(1) Protection, maintenance, and development of fish and wildlife habitat;

(2) Fish and wildlife reintroduction and propagation;

(3) Research and other field study programs including those involving the taking or possession of fish and wildlife;

(4) Fish and wildlife resource inventories and data collection;

(5) Law enforcement;

(6) Educational programs;

(7) Toxicity/mortality investigations and monitoring;

(8) Animal damage management;

(9) Endangered and threatened species;

(10) Habitat preservation;

(11) Joint processing of State and Federal permit applications for activities involving fish, wildlife and plants;

(12) Road management activities affecting fish and wildlife and their habitat;

(13) Management activities involving fish and wildlife; and,

(14) Disposition of fish and wildlife taken in conjunction with the activities listed in this paragraph.

(b) The cooperating parties shall periodically review such cooperative agreements and adjust them to reflect changed circumstances.

§ 24.7 Exemptions.

(a) Exempted from this policy are the following:

(1) The control and regulation by the United States, in the area in which an international convention or treaty applies, of the taking of those species and families of fish and wildlife expressly named or otherwise covered under any international treaty or convention to which the United States is a party;

(2) Any species of fish and wildlife, control over which has been ceded or granted to the United States by any State; and

(3) Areas over which the States have ceded exclusive jurisdiction to the United States.

(b) Nothing in this policy shall be construed as affecting in any way the existing authorities of the States to establish annual harvest regulations for fish and resident wildlife on Federal lands where public hunting, fishing or trapping is permitted.

PART 26—GRANTS TO STATES FOR ESTABLISHING YOUTH CONSERVATION CORPS PROGRAMS

Sec.

26.1 Introduction.
26.2 Definitions.
26.3 Program purpose and objectives.
26.4 Legislation.
26.5 Administrative requirements.
26.6 Request for grant.
26.7 Application format and instructions.
26.8 Program reporting requirements.
26.9 Consideration and criteria for awarding grants.

AUTHORITY: Sec. 4, 86 Stat. 1320, as amended, 88 Stat. 1067 (16 U.S.C. 1704)

SOURCE: 43 FR 41004, Sept. 13, 1978, unless otherwise noted.

§ 26.1 Introduction.

(a) The Youth Conservation Corps (YCC) is a program of summer employment for young men and women, aged 15 through 18, who work, earn, and learn together by doing projects which further the development and conservation of the natural resources of the United States. The corps is open to youth of both sexes, and youth of all social, economic, and racial classifications who are permanent residents of the United States, its territories, possessions, trust territories or commonwealths.

(b) The Youth Conservation Corps Act of 1970 (Pub. L. 91–378) provided for a 3-year pilot program to be carried out on lands and waters under the jurisdiction of the Secretary of Agriculture or the Secretary of the Interior. Public Law 92–597 amended the 1970 Act to include a pilot program (beginning in fiscal year 1974) of grants to States to assist them in meeting the cost of Youth Conservation Corps projects on non-Federal public lands and waters within the States. Public Law 93–408 made the Youth Conservation Corps program permanent.

§ 26.2 Definitions.

(a) Terms used in these Regulations are defined as follows:

(1) *Act*. The Youth Conservation Corps Act of 1970. Public Law 91–378, as amended.

(2) *Secretaries*. The Secretaries of Agriculture and the Interior, or their designated representatives, who jointly administer the grant program. Within the Department of Agriculture, the YCC program is administered by the Forest Service; within the Department of the Interior it is administered by the Office of Youth Programs.

(3) *States*. Any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(4) *Grant*. Money or property provided in lieu of money, paid or furnished by the Secretaries pursuant to the Act to a State to carry out a YCC program on non-Federal public lands and waters. The amount of any grant shall be determined jointly by the Secretaries, except that no grant for any project may exceed 80 per centum of the cost (as determined by the Secretaries) of said project.

(5) *Grantee*. Any State which is a recipient of a Federal grant for the operation of a YCC program.

(6) *Subgrantee*. Any public organization, municipality, county, or agency which administers non-Federal public

lands and waters which successfully applied through a State for the operation of a Youth Conservation Corps project within that State.

(7) *Contractor*. Any public agency or organization or any private nonprofit agency or organization which has been in existence for at least 5 years which operates a YCC project for a grantee or subgrantee.

(8) *Program agent*. Individual designated in writing by the Governor to have program responsibility for all aspects of YCC operations in that State except for those projects conducted under Federal auspices.

(9) *State grant program*. That part of the YCC program carried out on non-Federal public lands and waters by States receiving YCC grants-in-aid.

(10) *Project*. The operating unit of the State YCC grant program. A project will be designated as either residential or nonresidential.

(i) *Residential project*. One in which youth reside either 7 or 5 days per week at a site on or in proximity to the public lands where they conduct their work-learning program.

(ii) *Nonresidential project*. One in which youth reside at home and daily commute to the public lands to conduct their work-learning program.

(11) *Operating year*. January 1 through December 31.

(12) *Non-Federal public lands and waters*. Any lands or waters within the territorial limits of a State owned either in fee simple by a State or political subdivision thereof or over which a State or political subdivision thereof has, as determined by the Secretaries, sufficient long-term jurisdiction so that improvements made as the result of a grant will accrue primarily to the benefit of the public as a whole. Federally owned public lands and waters administered by a State or political subdivision thereof under agreement with a Department or Agency of the Federal Government are eligible under such definition if the Secretaries determine that the State or political subdivision thereof is entitled to or is likely to retain administrative responsibility for an extended period of time sufficient to justify classification as non-Federal public lands or waters.

§ 26.3 Program purpose and objectives.

(a) The purpose of the Act is to further the development and maintenance of the natural resources of the United States by American youth and in so doing prepare them for the ultimate responsibility of maintaining and managing these resources for the American people. The Departments of Agriculture and the Interior have stressed the following three equally important objectives of the Youth Conservation Corps as reflected in the law:

(1) Accomplish needed conservation work on public lands.

(2) Provide gainful employment for 15- through 18-year-old males and females from all social, economic, and racial backgrounds.

(3) Develop an understanding and appreciation of the Nation's environment and heritage in participating youth.

(b) These objectives will be accomplished in a manner that will provide the youth with an opportunity to acquire increased self-dignity and self-discipline, better work and relate with peers and supervisors, and build lasting cultural bridges between youth from various social, ethnic, racial and economic backgrounds.

(c) Each YCC project will have, to the maximum extent possible as determined by the Secretaries' representatives, the following characteristics:

(1) A properly balanced and integrated environmental work-learning program in which environmental knowledge and awareness derives principally from meaningful work activities on public lands.

(2) A mixture of youth of both sexes from various social, economic, ethnic, and racial backgrounds which is representative of the youth residing within the recruiting area.

(3) A group-living component, both in residential and nonresidential programs, wherein enrollees have an opportunity to relate to each other and to staff during nonworking hours in activities which promote social interaction and group learning (e.g., evening cookouts, overnight or weekend camping).

(4) An enrollment of sufficient size (not less than 10 enrollees) that will permit social interaction and group learning. The program encourages

projects of a size of 20 to 50 enrollees as the most desirable size.

§ 26.4 Legislation.

State programs must meet all of the requirements of section 4 of the act. Section 4 of the act which applies to the grant program reads as follows:

Sec. 4(a). The Secretary of the Interior and the Secretary of Agriculture shall jointly establish a program under which grants shall be made to States to assist them in meeting the cost of projects for the employment of young men and women to develop, preserve, and maintain non-Federal public lands and waters within the States. For purposes of this section, the term ''States'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

(b)(1) No grant may be made under this section unless an application therefor has been submitted to, and approved by, the Secretary of the Interior and the Secretary of Agriculture. Such application shall be in such form, and submitted in such manner, as the Secretaries shall jointly by regulation prescribe, and shall contain—

(A) Assurances satisfactory to the Secretaries that individuals employed under the project for which the application is submitted shall: (i) Have attained the age of 15 but not attained the age of 19, (ii) be permanent residents of the United States or its territories, possessions, or the Trust Territory of the Pacific Islands, (iii) be employed without regard to the personnel laws, rules, and regulations applicable to full-time employees of the applicant, (iv) be employed for a period of not more than 90 days in any calendar year, and (v) be employed without regard to their sex or social, economic, or racial classification; and

(B) Such other information as the Secretaries may jointly by regulation prescribe.

(2) The Secretaries may approve applications which they determine (A) meet the requirements of paragraph (1), and (B) are for projects which will further the development, preservation, or maintenance of non-Federal public lands or waters within the jurisdiction of the applicant.

(c)(1) The amount of any grant under this section shall be determined jointly by the Secretaries, except that no grant for any project may exceed 80 per centum of the cost (as determined by the Secretaries) of such project.

(2) Payments under grants under this section may be made in advance or by way of reimbursement and at such intervals and on such conditions as the Secretaries find necessary.

(d) Thirty per centum of the sum appropriated under section 6 for any fiscal year shall be made available for grants under this section for such fiscal year.

§ 26.5 Administrative requirements.

The following administrative requirements must be met:

(a) Recruitment and selection will be conducted in accordance with a Statewide plan designed to assure:

(1) An equal opportunity for both sexes, for all urban and rural youth regardless of social, economic, ethnic or racial background, with special outreach efforts toward minority, disadvantaged, non-public school youth, and youth having left school before graduation;

(2) That selections will be made on a random basis, without consideration of race, creed, religion, or national origin. Each project should be assigned as near as possible an equal number of slots for males and females;

(3) That enrollees have attained age 15 by June 1 but not age 19 by August 30;

(4) That not more than 10 percent of the enrollees in a project have been YCC enrollees in previous years and all returnees be designated as youth leaders and paid $1.50 per day in addition to their hourly rate of pay.

(b) To the maximum extent practicable, enrollees should be selected from an area within 1 day's surface travel from their home to a residential YCC project.

(c) Capital outlays for facilities should be kept at a minimum. No grant is to be made for construction of residential facilities other than to provide temporary facilities and their necessary basic infrastructure, and necessary renovation or modification of existing facilities.

(d) Operation of a project or session will be for a minimum of 26 consecutive calendar days. Projects during nonsummer periods may be authorized by the Secretaries when it can clearly be demonstrated that enrollment will not interfere with the established educational systems.

(e) The enrollee is an employee of the grantee or subgrantee. Depending on grantee's or subgrantee's work-week, grantees will insure that enrollees are engaged in up to 40 hours of work-

learning activities each week, 25 percent of which will be in environmental awareness.

(f) To arrive at the enrollee weekly pay rate, the Federal or State minimum hourly wage (whichever is higher) should be multiplied by 30 hours per week, or 75 percent of the number of hours in the grantee or subgrantee established work-week, if less than 40 hours. To the maximum extent possible, the grantee should apply the same meal and lodging deduction as used by the Federal program.

(g) The Federal Government will cost-share as part of the grant enrollee pay based on up to 30 hours per week; any cost based on enrollee compensation for more than 30 hours per week will be assumed by the grantee or subgrantee and will not be part of the grant.

(h) Grantees must provide for an effective accident control, health, and safety program. As a minimum, grantees shall follow U.S. Department of Labor Bulletin No. 101, ''A Guide to Child Labor Provisions of the Fair Labor Standards Act.''

(i) Grantees will have a financial management system which will provide the information called for in attachment G of the Office of Management and Budget (OMB) circular A–102 (formerly FMC 74–7).

(j) ''Request for Advance or Reimbursement,'' as outlined in OMB circular A–102, attachment H, item 4(a), will be used to obtain an advance to start and/or maintain the program. It can also be used to obtain a reimbursement during or at the end of a project. An advance, not to exceed 1 month's needs, may be made after approval of the grant application.

(k) Grantees will prepare a ''Financial Status Report'' required by OMB circular A–102, attachment H, item (3)a. This report will be prepared on a cash basis. Instructions and forms will be supplied each grantee at the time of grant award. Grantees shall require similar reports from all subgrantees and contractors to facilitate their own reporting to the grantor agencies. The Financial Status Report will be prepared as of December 31 of each operating year. This report will be forwarded in time to reach the Secretaries by March 31 of the following operating year.

(l) Allowable costs under the grant program are defined in FMC 74–4 and OMB circular A–102.

(m) Records retention and custodial requirements for records are prescribed by attachment C to OMB circular A–102.

(n) A budget revision is required in advance when the scope of the grant is to be changed through (1) addition or elimination of a project, (2) reduction in the State's grant program of 5 percent or more of enrollees, and/or (3) determination that the grantee will not utilize Federal funds in amount in excess of $5,000 or 5 percent of the Federal grant, whichever is greater. A budget revision must also be submitted when the State's matching ratio is reduced. No budget revision may be submitted later than March 31 following the end of the operating year. Procedures in attachment K of OMB circular A–102 will be followed.

(o) Grantees shall comply with the provisions of attachments N and O of OMB circular A–102 in regard to nonexpendable personal property and procurement standards.

(p) The Secretaries or their designees shall periodically review the conduct of the program of the State.

(q) Grantees will supervise those projects in the State being administered by subgrantees and contractors. Subgrantees and contractors will be required to operate in accordance with the procedures outlined in these regulations and the grant agreement with the State. Periodic inspection of subgrantee projects will be made by the grantee under the direction of the program agent or his designee. Grantees or subgrantees may contract with any public agency or organization or any private nonprofit agency or organization which has been in existence for at least 5 years.

(r) Grantees will meet the financial audit requirements of attachment G to OMB circular A–102 and will require the same of subgrantees. Copies of audits will be made available to the Secretaries upon request.

(s) Grantees shall provide accidental injury compensation and tort claims

coverage under State laws for its enrollees. Enrollees shall be employed without regard to State personnel laws, rules, and regulations applicable to full-time employees. It is not intended that State enrollees be covered for retirement, unemployment compensation, health and life insurance purposes, or that they earn or be granted leave-with-pay or sick leave; such charges shall not be considered a qualifiying expense for Federal cost-share purposes.

(t) If the grantee fails to comply with the grant award stipulations, standards, or conditions, the Secretaries may jointly suspend the grant, in whole or in part, pending corrective action. Subsequent to or during any period of suspension of the grant, the Federal Government shall not be obligated to reimburse the grantee for any incurrence of obligations for suspended projects other than direct pay of enrollees and then only for a period of time which both the Secretaries shall determine to be reasonable. In addition, the Secretaries may jointly terminate the grant, in whole or in part. Termination shall be effected by notice of termination. Upon receipt of a notice of termination, the grantee shall:

(1) Discontinue further commitments of grant funds for the terminated project(s).

(2) Cancel all sub-grants or contracts, where possible, scheduled for payment with funds budgeted for the terminated project(s).

(3) Within 90 days after receipt of the notice of termination for the entire grant, supply either of the Secretaries with a financial status report, along with a refund check for any unused portion of funds advanced, or a request for reimbursement for allowable expenditures incurred in the grant program.

§ 26.6 Request for grant.

(a) Of the amount available for Youth Conservation Corps projects, 30 percent will be allocated for State projects. All States will be given an opportunity to participate in the program. Allocated funds not needed by a State will be reallocated, based on the merit of proposals submitted in accordance with paragraph (c) of this section.

(b) Pursuant to section (4)(c)(1) of Public Law 93–408, States may receive grants up to but not to exceed 80 percent of the cost of funding any project from the Federal Government. The combined Federal/State costs of individual projects and other program expenses as established in the grant application determine the Federal/State cost-sharing ratio. Matching State costs can consist of either direct expenditures or services of an in-kind nature.

(c) Application for Federal Assistance (Standard Form 424) will be used by applicants in applying for grants under this program. Application forms will be supplied to Program Agents. Only a Program Agent may submit an application. A single grant application must be submitted for the entire summer program within each State. A separate application must be used for non-summer projects. A non-summer project is defined as one which extends beyond September 30, or begins prior to May 1.

(d) The Secretaries have designated individuals for each State who will jointly represent them. Grant applications (original and two copies) must be submitted to the designated reresentative of either Secretary. January 1 has been established as the deadline date for acceptance of applications for each operating year. Names and addresses of designated representatives will be furnished to each State. The Secretaries' representatives must jointly approve grant proposals. Approval or disapproval of proposals will be documented by a formal letter to the Program Agent. The Secretaries' representatives will also be available for technical assistance and will monitor the program.

§ 26.7 Application format and instructions.

Grant application must be made using the Office of Management and Budget approved form (SF–424) entitled ''Federal Assistance.'' Specific instructions and requirements which must be followed are included in the Secretaries' State Grant Procedures Handbook. General instructions for completing the form by part numbers are:

(a) Part I—(SF–424 Cover Sheet, Sections I and II) shall be completed.

(b) Part II—(Budget Data). See YCC State Grant Procedures Handbook for definitions of cost categories and for budget narrative instructions.

(c) Part III—(Program Narrative Statement). Complete a separate description of each project, which will include the following information (Items 13, 14, 15, and 16 may be consolidated, if common to all projects):

(1) Project number.

(2) Project name and address.

(3) Project location (nearest city or town and county).

(4) Name of grantee, sub-grantee and/or contractor.

(5) Land Ownership class(es) benefiting from the program—State, county, municipal or other non-Federal public lands (identify).

(6) Number of male and female youth planned for project, including youth leaders.

(7) Type of project (7-day residential; 5-day residential; non-residential; other).

(8) Length of session(s) (e.g., number of weeks) and proposed beginning and ending dates per session.

(9) Cost of project.

(10) Description of living conditions, if residential project (types of facilities, age, condition, tents, cabins, dormitories, food service).

(11) Project staff (number and position titles).

(12) Work-learning program. (Describe major projects, planned units of production if applicable, and any constraints that are anticipated. Explain how environmental learning will be integrated into projects.)

(13) Complete calculation for daily rate of enrollee pay, including deduction for food lodging.

(14) Description of health and safety program.

(15) Description of enrollee recruiting and selection system. (The Statewide recruiting and selection plan may be substituted.)

(16) Description of staff recruiting and selection system, including affirmative action measures to be taken.

(d) Part IV—(Assurances) is preprinted within Attachment M, Exhibit M–5, OMB Circular A–102, and is to be included as part of the application. The following assurance is not preprinted and must be included by the grantee in the grant application: The grantee agrees to administer tests and questionnaires; conduct interviews; submit enrollee statistical and work accomplishment data; and otherwise assist the Federal Government in collecting information.

§ 26.8 Program reporting requirements.

(a) Monitoring and reporting of program performance will be in accordance with Attachment I of OMB Circular A–102.

(b) The reporting and/or recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

§ 26.9 Consideration and criteria for awarding grants.

The decision by both of the Secretaries' representatives on grants to individual States will consider the following:

(a) The amount of grant funds allocated to the State.

(b) The quality of the proposed program in terms of meeting program characteristics and objectives.

(c) The overall cost per enrollee 8-week position.

(d) Actual prior performance of the State in administering YCC projects.

(e) The performance of the grantee in meeting the conditions of the grant and the requirements of OMB Circular A–102 and FMC 74–4.

PART 27—NONDISCRIMINATION IN ACTIVITIES CONDUCTED UNDER PERMITS, RIGHTS-OF-WAY, PUBLIC LAND ORDERS, AND OTHER FEDERAL AUTHORIZATIONS GRANTED OR ISSUED UNDER TITLE II OF PUBLIC LAW 93–153

Sec.
27.1 Purpose.
27.2 Application.
27.3 Discrimination prohibited.
27.4 Assurances.
27.5 Equal opportunity terms.
27.6 Equal opportunity implementation.
27.7 Compliance information.

27.8 Compliance procedures.
27.9 Procedures for effecting compliance.
27.10 Hearings.
27.11 Decisions and notices.
27.12 Judicial review.
27.13 Effect on other regulations; forms and instructions.
27.14 Definitions.

AUTHORITY: Sec. 403, 87 Stat. 576 (1973)

SOURCE: 39 FR 34285, Sept. 24, 1974, unless otherwise noted.

§ 27.1 Purpose.

The purpose of this part is to effectuate section 403 of Public Law 93–153 (87 Stat. 576) to the end that no person shall on the grounds of race, creed, color, national origin, or sex, be excluded from receiving, or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization granted or issued under title II of Public Law 93–153, 87 Stat. 584, the Trans-Alaska Pipeline Authorization Act.

§ 27.2 Application.

This part applies to all activities, including contracting, employment, services, financial aids, and other benefits, conducted under permits, rights-of-way, public land orders, and other Federal authorizations granted or issued under title II of the Act by recipients of those authorizations, their agents, contractors, and subcontractors at each of their facilities conducting such activities.

§ 27.3 Discrimination prohibited.

(a) *General*. No person shall on the grounds of race, creed, color, national origin, or sex, be excluded from receiving or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization to which this part applies.

(b) *Specific discriminatory actions prohibited*. No recipient of any permit, right-of-way, public land order, or other Federal authorization to which this part applies, or its contractors, or subcontractors to which this part applies may directly or through contractual or other arrangements, on the grounds of race, creed, color, national origin, or sex, discriminate in offering or providing employment, contracting, services, financial aids, or other benefits as follows:

(1) *Employment practices*. No recipient, contractor, or subcontractor to which this part applies may, directly or through contractual or other arrangements, subject an individual to discrimination on the grounds of race, creed, color, national origin, or sex in its employment practices, including recruitment advertising, hiring, firing, up-grading, promotion, demotion, or transfer, layoff, or terminations, rates of pay or other forms of compensation, or benefits, selection for training, or apprenticeship, use of facilities, treatment of employees or any other employment practice.

(2) *Contracting practices*. No recipient, contractor, or subcontractor to which this part applies may discriminate on the grounds of race, creed, color, national origin, or sex in its contracting practices, including but not limited to, determining qualification for placement on bidder lists, composition of bidder lists, pre-bid conferences, solicitation for bids, designation of quantities, or other specifications, delivery schedules, contract award and performance, or any other contracting practice.

(3) *Services, financial aids and other benefits*. No recipient, contractor, or subcontractor to which this part applies may, directly or through contractual or other arrangements, on the grounds of race, creed, color, national origin, or sex, discriminate in offering or providing services, financial aids, or other benefits as follows:

(i) Deny an individual any service, financial aid, or other benefit provided, in whole or in part, because of any Federal authorization to which this part applies;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit provided, in whole or in part, because of any Federal authorization to which this part applies;

(iv) Restrict an individual in any way in the enjoyment of any advantage or

privilege enjoyed by others receiving any service, financial aid, or other benefit provided, in whole or in part, because of any Federal authorization to which this part applies;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit offered, in whole or in part, because of any Federal authorization to which this part applies;

(vi) Deny an individual an opportunity to participate in any activity made possible, in whole or in part, because of any Federal authorization to which this part applies, through the provision of services or otherwise, or afford him an opportunity to do so which is different from that afforded others;

(vii) Deny an individual the opportunity to participate as a member of a planning or advisory body participating in the provision of any service, financial aid, or other benefit which is integrally associated with any Federal authorization to which this part applies;

(4) *Determining and administering services, financial aids and other benefits.* In determining the types of services, financial aids or other benefits, or facilities which will be provided because of any Federal authorization to which this part applies, or the class of individuals or establishments to whom, or the situations in which, such services, financial aids, other benefits or facilities will be provided, or the class of individuals or establishments to be afforded an opportunity to participate in any activity made possible, in whole or in part, because of any Federal authorization to which this part applies, a recipient, contractor, or subcontractor to which this part applies, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals or establishments to discrimination because of their race, creed, color, national origin, or sex.

(5) *Site or location of facilities.* In determining the site or location of facilities, for the provision of services, financial aids, or other benefits, a recipient, contractor or subcontractor to which this part applies, may not make selections with the purpose or effect of excluding individuals or establishments from, denying them the benefits of, or subjecting them to discrimination on the grounds of race, creed, color, national origin, or sex, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of section 403 of Public Law 93–153 and implementing rules, regulations, and orders.

(6) *References to services, financial aides or other benefits.* References to services, financial aids or other benefits shall be deemed to include all services, financial aids, or other benefits provided in or through facilities, programs, or operations made possible, in whole or in part, because of any Federal authorizations to which this part applies.

(7) *Scope of prohibited discrimination.* The enumeration of specific forms of prohibited discrimination in this paragraph (b) does not limit the generality of the prohibitions in paragraph (a) of this section.

§ 27.4 Assurances.

Every application for a permit, right-of-way, public land order, or other Federal authorization to which this part applies, filed after the effective date of these regulations, and every contract covered hereunder to provide goods, services or facilities in the amount of $10,000 or more to the recipient of any Federal authorization to which this part applies, must contain an assurance that the recipient, contractor, or subcontractor does not and will not maintain any facilities in a segregated manner, and that all requirements imposed by or pursuant to section 403 of PubLic Law 93–153 shall be met, and that it will require a similar assurance in every subcontract over $10,000. The assurances shall be in a form specified by the Department Compliance Officer.

§ 27.5 Equal opportunity terms.

Each permit, right-of-way, public land order, or other Federal authorization to which this part applies, shall include by reference or incorporation

by operation of law the terms, conditions, obligations, and responsibilities of this section, as follows:

(a) The recipient hereby agrees that it will not, directly or through contractual or other arrangements, on the grounds of race, creed, color, national origin, or sex, discriminate against any individual or establishment in offering or providing contracts, employment, services, financial aids, or other benefits. Recipient will take affirmative action to utilize minority business enterprises in the performance of contracts awarded by recipient, to assure that applicants for employment are employed and that employees are treated during employment, and that individuals are offered and provided services, financial aids, and other benefits without regard to their race, creed, color, national origin, or sex. Recipient agrees to post in conspicuous places available to contractors, employees, and other interested individuals, notices which set forth these equal opportunity terms and to notify interested individuals, such as bidders, purchasers, and labor unions or representatives of workers with whom it has collective bargaining agreements of recipient's obligations under section 403 of Public Law 93–153.

(b) The recipient will comply with all rules, regulations, and orders of the Department of the Interior which implement section 403 of Public Law 93–153.

(c) The recipient will furnish all information and reports required by or pursuant to rules, regulations, and orders implementing section 403 of Public Law 93–153 and permit access to its books, records, and accounts by the Secretary of the Interior, the Department Compliance Officer, or other designee of the Secretary, for purposes of investigation to ascertain compliance with rules, regulations, and orders of the Department of the Interior which implement section 403 of Public Law 93–153.

(d) The recipient recognizes and agrees that its obligation for compliance with section 403 of Public Law 93–153 and implementing rules, regulations, and orders extends not only to direct activities, but also to require that contractors, subcontractors, suppliers, and lessees, comply with section 403 and implementing rules, regulations and orders. To that end the recipient agrees that with regard to all contracts over $10,000 and all contracts of indefinite quantity (unless there is reason to believe that the amount to be ordered in any year under the contract will not exceed $10,000) to:

(1) Obtain as part of its contractual arrangements with such parties, as a minimum form of assurance an agreement in writing, that:

(i) The contractor hereby agrees that it will not, directly or through contractual or other arrangements, on the grounds of race, creed, color, national origin, or sex, discriminate against any individual or establishment in offering or providing contracts, employment, services, financial aids, or other benefits. Contractor will take affirmative action to utilize minority business enterprises in the performance of subcontracts which is awards, and to assure that applicants are employed and that employees are treated during employment, and that individuals are offered and provided services, financial aids, and other benefits without regard to their race, creed, color, national origin, or sex. Contractor agrees to post in conspicuous places available to contractors, employees, and other interested individuals notices which set forth these equal opportunity terms and to notify interested individuals, such as bidders, purchasers, and labor unions or representatives of workers with whom it has collective bargaining agreements of contractor's obligations under section 403 of Public Law 93–153.

(ii) The contractor will comply with all rules, regulations, and orders of the Department of the Interior which implement section 403 of Public Law 93–153.

(iii) The contractor will furnish all information and reports required by or pursuant to rules, regulations, and orders implementing section 403 of Public Law 93–153 and permit access to its books, records, and accounts by the Secretary of the Interior, the Department Compliance Officer, or other designee of the Secretary, for purposes of investigation to ascertain compliance with rules, regulations, and orders of the Department of the Interior which

implement section 403 of Public Law 93–153.

(iv) Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of said rules, regulations, and orders shall constitute a breach of its contractual arrangements whereby said arrangements may be cancelled, terminated, or suspended, or may be subject to enforcement otherwise by appropriate legal proceedings.

(v) Contractor will obtain the provisions of paragraph (d)(1) (i) through (v) of this section in all subcontracts over $10,000 and all subcontracts of indefinite quantity (unless there is reason to believe that the amount to be ordered in any year under the contract will not exceed $10,000).

(2) Recipient will make every good faith effort to secure the compliance and will assist and cooperate actively with the Department Compliance Officer and the Secretary or his designee in obtaining and enforcing the compliance of said contracting parties with the requirements of section 403 and implementing rules, regulations, and orders, and with their respective contractual arrangements; and will take such action with respect to any contract or purchase order that the Secretary of the Interior, the Department Compliance Officer, or other designee of the Secretary may direct as a means of enforcing such provisions: *Provided, however*, That in the event the recipient becomes involved in litigation with a noncomplying party, it may request the Department of the Interior to enter into such litigation to protect the interests of the United States in the enforcement of these obligations, and

(3) Recipient will obtain and furnish to the Department Compliance Officer such information as he may require for the supervision or securing of such compliance.

(e) In the event of the recipient's noncompliance with the equal opportunity terms, compliance may be effected by the suspension or termination or refusal to grant or to continue providing the Federal authorization in accordance with procedures authorized by section 403 of Public Law 93–153, and set forth in implementing rules, regulations, or orders, or by any other means authorized by law.

§ 27.6 Equal opportunity implementation.

Within sixty (60) days of the effective date of these regulations, or within sixty (60) days from the commencement of a Federal authorization to which this part applies, whichever occurs later, recipients of Federal authorizations to which this part applies, shall prepare and submit an affirmative action plan for each of their establishments to which this part applies, to assure that the requirements of this part will be met. In addition, recipients and each of their prime contractors and subcontractors shall require each contractor and subcontractor with a contract of $50,000 or more and 50 or more employees to develop within sixty (60) days from the commencement of the contract and to keep on file a written affirmative action plan for each of its establishments, to which this part applies, with the exception of those establishments which the Department Compliance Officer determines are in all respects separate and distinct from performance of the activities of the prime contractor or subcontractor conducted under the Federal authorizations. Such plans shall include a set of specific and result-oriented procedures which the recipient, contractor or subcontractor commits itself to apply every good faith effort to achieve equal opportunity in all aspects of its operations. An acceptable program must include an analysis of all areas of operation of the recipient, contractor, or subcontractor in which it could be deficient in offering services, opportunities, or benefits to minority groups and women, and all areas of employment in which it could be deficient in the utilization of minority groups and women and all areas of contracting in which it could be deficient in the utilization of minority business enterprises, and, further, specific goals and specific timetables to which its efforts will be directed, to correct all deficiencies and thus to increase materially the participation of minorities and women in all aspects of its operation. The implementing affirmative action plans shall include the following:

(a) *Services, financial aids, and other benefits.* The implementing program is required to specifically address all

areas of operation of the recipient, contractor or subcontractor which offer and provide services, financial aids, and other benefits; it shall identify those services, financial aids, and benefits; analyze the opportunities available to minorities and women in each area; and set forth affirmative action, including goals and time- tables, which will be taken to materially increase participation of minorities and women.

(b) *Employment practices.* The implementing plan shall address all aspects of employment operations and is required to contain all analyses and commitments, including goals and timetables, which are required in rules, regulations, and orders implementing Executive Order 11246, as amended, and to include additional commitments to employment goals for minorities and women in construction operations, to the extent that those goals are not established under Executive Order 11246.

(c) *Contracting practices.* Recipients to which this part applies and each of their contractors and subcontractors with a contract of $150,000 or more shall also include in their affirmative action plan a program in which the recipient, contractor or subcontractor agrees to take specific affirmative action as set forth below to utilize minority business enterprises as subcontractors and suppliers. For this purpose, the term *minority business enterprise* means a business enterprise that is owned or controlled by minority group members or women. The plan shall identify specific actions which the recipient, contractor or subcontractor will take to:

(1) Designate a liaison officer who will administer the minority business enterprises program;

(2) Provide adequate and timely consideration of the potentialities of minority business enterprises in all contracting decisions;

(3) Afford minority business enterprises an equitable opportunity to compete for contracts and subcontracts by arranging solicitations, time for preparation of bids, quantities, specifications, and delivery schedules so as to facilitiate the participation of minority business enterprises;

(4) Submit periodic reports of contracting opportunities, procedures, and awards to minority business enterprises, at such times, and in such form, and containing such information as the Department Compliance Officer may prescribe, including reports showing:

(i) Procedures which have been adopted to comply with the policies set forth in this clause, including the establishment of a source list of minority business enterprises;

(ii) Awards to minority business enterprises on the source lists, and

(iii) Specific efforts to identify and award contracts to minority business enterprises.

(5) Establish specific goals and timetables to utilize minority business enterprises in the performance of contracts awarded.

(6) Inform minority business enterprises and organizations of minority business enterprises of contracting opportunities and procedures.

(7) Cooperate with the Department Compliance Officer in any studies and surveys of the recipient's minority business enterprise procedures and practices that the Department Compliance Officer may from time to time conduct.

(8) Assist potential minority business enterprises in obtaining and maintaining suitable bonding capabilities, in those instances where bonds are required.

(d) *Exemption.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

§ 27.7 Compliance information.

(a) *Records, reports, and access to books.* Each recipient, contractor, or subcontractor to which this part applies, shall keep such records and submit to the Department Compliance Officer complete and accurate reports, at such times, and in such form, and containing such information, as he may determine to be necessary to enable him to ascertain whether the recipient, contractor or subcontractor has complied or is complying with rules, regulations and orders implementing section 403 of Public Law 93–153. In the case where the recipient, contractor or

subcontractor contracts with another, such other contractor shall also submit such compliance reports to the recipient, contractor or subcontractor as may be necessary to enable the recipient, contractor or subcontractor to determine and carry out his obligations under section 403 of Public Law 93–153 and implementing rules, regulations, and orders.

(b) *Access to sources of information.* Each recipient, contractor and subcontractor to which this part applies, shall permit access by the Department Compliance Officer or his designee or by the Secretary or his designee during normal business hours to such of his books, records, accounts, and other sources of information, and his facilities, as may be pertinent to ascertain compliance with rules, regulations, and orders implementing section 403 of Public Law 93–153.

(c) *Information in possession of other agency, institution, or person.* Where any information required of a recipient, contractor or subcontractor is in the exclusive possession of any other agency, institution, or person and such agency, institution or person shall fail or refuse to furnish this information, the recipient, contractor or subcontractor shall so certify in a report and shall set forth what efforts it has made to obtain the information.

(d) *Failure to submit reports.* Failure to file timely, complete and accurate reports as required constitutes noncompliance with the equal opportunity clause and is ground for the imposition by the agency, recipient, contractor, or subcontractor of any sanctions as authorized by section 403 of Public Law 93–153 and implementating rules, regulations, and orders.

(e) *Information to beneficiaries and participants.* Each recipient, contractor and subcontractor to which this part applies, shall make available to participants in and beneficiaries of its operations and services, information regarding the provisions of this part and the details of the recipient's, contractor's or subcontractor's compliance with this part, to the extent that it will enhance their participation in nondiscrimination programs of recipient, contractor, or subcontractor, and aid the recipient, contractor, or subcontractor in meeting its obligations under this part.

§ 27.8 Compliance procedures.

(a) *Approval of affirmative action plans.* The Department Compliance Officer shall from time to time review the recipient's, contractor's or subcontractor's affirmative action plans to determine whether they meet the requirements of rules, regulations and orders implementing section 403 of Public Law 93–153. Where deficiencies are found to exist, the Department Compliance Officer or his designee will so inform the recipient, contractor or subcontractor and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 27.9.

(b) *Periodic compliance reviews.* The Department Compliance Officer shall from time to time review the practices of recipients, contractors and subcontractors to determine whether they are complying with the rules, regulations and orders implementing section 403 of Public Law 93–153. The purpose of the compliance review is to determine if the recipient, contractor or subcontractor maintains nondiscriminatory operations and practices and whether it is taking the action required by the rules, regulations, and orders implementing section 403 of Public Law 93–153 to assure that no person on the grounds of race, creed, color, national origin or sex is excluded from receiving or participating in any activity conducted under any permit, right-of-way, public land order or other Federal authorization to which this part applies. It shall consist of a comprehensive analysis of all aspects of the recipient's, contractor's or subcontractor's operations and practices which may be involved, and the policies and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(c) *Complaints.* Any person who believes himself or any other individual to be subjected to discrimination prohibited by this part may file with the Department Compliance Officer or his designee, a written complaint. A complaint must be filed not later than 180

days from the date of the alleged discrimination, unless the time for filing is extended by the Department Compliance Officer or his designee.

(d) *Investigations.* The Department Compliance Officer or his designee will make a prompt investigation whenever a compliance review report, complaint, or any other information indicates a possible failure to comply with the rules, regulations, and orders implementing section 403 of Public Law 93–153. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, contractor, or subcontractor, the circumstances under which the possible noncompliance occurred and other factors relevant to a determination as to whether the recipient, contractor or subcontractor has failed to comply with section 403 of Public Law 93–153 and implementing rules, regulations, and orders.

(e) *Resolution of matters.* (1) If an investigation pursuant to paragraph (a), (b), (c), or (d) of this section indicates a failure to comply with the rules, regulations, and orders implementing section 403 of Public Law 93–153, the Department Compliance Officer or his designee will so inform the recipient, contractor or subcontractor and the matter will be resolved by informal means whenever possible. Before the recipient, contractor or subcontractor can be found to be in compliance, he must make specific commitments in writing, to correct all deficiencies. The commitments must include the precise actions to be taken and dates for completion. The time periods allotted shall be no longer than the minimum periods necessary to effect such changes. Upon approval of the Department Compliance Officer, the recipient, contractor or subcontractor, may be considered in compliance, on condition that the commitments are faithfully kept. The recipient, contractor or subcontractor shall be notified that making such commitments does not preclude future determinations of noncompliance when the commitments are not being met or when there is a determination by the Department Compliance Officer that the full facts were not known at the time commitments were accepted, and that commitments are not sufficient to correct deficiencies.

(2) If an investigation does not warrant action pursuant to paragraph (e)(1) of this section, the Department Compliance Officer shall so inform the recipient, contractor or subcontractor, and the complainant, if any, in writing.

(f) *Intimidatory or retaliatory acts prohibited.* No recipient, contractor or subcontractor shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 403 of Public Law 93–153 and implementing rules, regulations, and orders, or because he has made a complaint, testified, assisted, benefited from, or participated in any manner in an investigation, compliance review, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(g) *Approval of action by Authorized Officer.* During the period of construction of the Trans-Alaska Pipeline, and until such time as this paragraph (g) is rescinded by the Secretary, the Department Compliance Officer shall coordinate all actions taken pursuant to this part with the Authorized Officer and shall secure the approval of the Authorized Officer prior to the taking of any final act hereunder.

§ 27.9 Procedures for effecting compliance.

(a) *General.* If there appears to be a failure or refusal of any recipient, contractor, or subcontractor to observe or comply substantially with section 403 of Public Law 93–153, or implementing rules, regulations, and orders, compliance may be effected through the use of conciliation conferences, informal hearings, and procedures to cause termination or suspension of or refusal to grant or to continue the permit, or other Federal authorization to which this part applies, or of the contracts to which this part applies, or by any other means authorized by law. Such other means may include, but are not limited to:

(1) A reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States or any assurance or other contractural undertaking, and

(2) Any applicable proceeding under State or local law.

(b) *Noncompliance with § 27.4.* In the event that a recipient fails or refuses to furnish an assurance required under § 27.4, or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section the failure or refusal may, at the option of the Secretary, be grounds for authorizing proceedings to cause refusal of the Federal authorization in accordance with the procedures of paragraph (c) of this section. The Department of the Interior shall not be required to provide the authorization in such a case during the pendency of the administrative proceedings under such paragraph.

(c) *Termination of or refusal to grant or to continue the Federal authorization*—(1) *General.* In those instances where a recipient fails or refuses to observe or comply substantially with section 403 of Public Law 93–153 or implementing rules, regulations, and orders, noncompliance at the option of the Secretary, may be grounds for termination, suspension, refusal to grant or continue the Federal authorization.

(i) *Recommendation to proceed.* The Department Compliance Officer may request that the Secretary commence procedures to suspend, terminate, or refuse to grant or continue the Federal authorization or to cause such suspension, termination, or refusal to grant. He shall indicate the specific grounds for alleging noncompliance with section 403 and implementing rules, regulations, and orders, the actions which would create compliance, and the time necessary to achieve compliance.

(ii) *Commencement of proceedings.* Before the Secretary authorizes the commencement of an administrative proceeding for termination, suspension, or refusal to grant any Federal authorization to which this part applies, the Secretary or his designee shall give the recipient notice in writing of the alleged ground or grounds for termination or formal suspension, or refusal to grant, with sufficient particularity to enable the recipient to comply with section 403 of Public Law 93–153 and implementing rules, regulations and orders. The recipient shall have sixty (60) days from the date of delivery of the notice within which to comply. If compliance cannot be achieved in sixty (60) days, the recipient shall be entitled to additional time if he demonstrates that compliance is not possible within the sixty (60) day period and that the necessary curative actions were undertaken promptly and have been diligently prosecuted toward completion; *Provided further* that the aforesaid additional time shall not exceed ninety (90) days from the last day of the said sixty (60) day period, without the prior written consent of the Secretary or his designee which shall specify the last day upon which the curative action must be completed to the satisfaction of the Secretary or his designee.

(iii) *Opportunity for a hearing.* No order suspending, terminating or refusing to grant or continue any Federal authorization to which this part applies shall become effective until there has been an express finding on the record, after opportunity for a formal hearing, of a failure by the applicant or recipient to comply substantially with section 403 of Public Law 93–153 or implementing rules, regulations, and orders and the action has been approved by the Secretary pursuant to § 27.11(e).

(2) [Reserved]

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the action has been approved by the Secretary, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply and to take such corrective action as may be appropriate.

§ 27.10 Hearings.

(a) *Informal hearings*—(1) *Purpose.* The Department Compliance Officer may convene such informal hearings as may

be deemed appropriate for the purpose of inquiring into the status of compliance of any recipient, contractor, or subcontractor to which this part applies.

(2) *Notice*. Recipients, contractors, and subcontractors shall be advised in writing as to the time and place of the informal hearings and may be directed to bring specific documents and records, or furnish other relevant information concerning their compliance status. When so requested, the recipient, contractor, or subcontractor shall attend and bring requested documents and records, or other requested information.

(3) *Conduct of hearings*. The hearing shall be conducted by hearing officers appointed by the Department Compliance Officer. Parties to informal hearings may be represented by counsel or other authorized representative as provided in 43 CFR part 1 and shall have a fair opportunity to present any relevant material. Formal rules of evidence will not apply to such proceedings.

(b) *Formal hearings*—(1) *Opportunity for hearing*. Whenever an opportunity for a hearing is required by § 27.9(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (i) fix a date not less than twenty (20) days after the date of such notice within which the applicant or recipient may request of the Secretary or his designee or the administrative law judge to whom the matter has been assigned that the matter be scheduled for hearing or (ii) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 403 of Public Law 93–153 and implementing rules, regulations, and orders and consent to the making of a decision on the basis of information on the record.

(2) *Time and place of hearing*. Hearings shall be conducted by the Office of Hearings and Appeals of the Department, at a time and place fixed by the administrative law judge to whom the matter has been assigned. Hearings shall be held before an administrative law judge designated by the Office of Hearings and Appeals in accordance with its procedures.

(3) *Right to Counsel*. In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel or other authorized representative as provided in 43 CFR part 1.

(4) *Procedures, evidence, and record*. (i) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554 through 557 and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (b)(1) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the administrative law judge conducting the hearing at the outset of or during the hearing.

(ii) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where determined reasonably necessary by the administrative law judge conducting the hearing. The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to

examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent that the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(5) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more Federal authorizations to which this part applies, or asserted to constitute noncompliance with this part and the regulations of one or more other Federal departments or agencies, the Secretary may, by agreement with such other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 27.11.

§ 27.11 Decisions and notices.

(a) *Initial decision by an administrative law judge.* The administrative law judge shall make an initial decision and a copy of such initial decision shall be sent by registered mail, return receipt requested, to the recipient or applicant.

(b) *Review of the initial decision.* The applicant or recipient may file his exceptions to the initial decision, with his reasons therefor, with the Director, Office of Hearings and Appeals, within thirty (30) days of receipt of the initial decision. In the absence of exceptions, the Director, Office of Hearings and Appeals, on his own motion within forty-five (45) days after the initial decision, may notify the applicant or recipient that he will review the decision. In the absence of exceptions or a notice of review, the initial decision shall constitute the final decision subject to the approval of the Secretary pursuant to paragraph (f) of this section.

(c) *Decisions by the Director, Office of Hearings and Appeals.* Whenever the Director, Office of Hearings and Appeals, reviews the decision of an administrative law judge pursuant to paragraph (b) of this section, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contention, and a copy of the final decision of the Director, Office of Hearings and Appeals, shall be given to the applicant or recipient and to the complainant, if any.

(d) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 27.10 (b)(1), a decision shall be made by the Director, Office of Hearings and Appeals, on the record and a copy of such decision shall be given in writing to the applicant or recipient and to the complainant, if any.

(e) *Rulings required.* Each decision of an administrative law judge or the Director, Office of Hearings and Appeals, shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(f) *Approval by Secretary.* Any final decision of an administrative law judge or of the Director, Office of Hearings and Appeals, which provides for the suspension or termination of, or the refusal to grant or continue a Federal authorization, or the imposition of any other sanction available under this part, shall promptly be transmitted to the Secretary, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(g) *Content of decisions.* The final decision may provide for suspension or termination of, or refusal to grant or continue a Federal authorization, in whole or in part, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of section 403 of Public Law 93–153 and implementing rules, regulations, and orders, including provisions designated to assure that no Federal authorization will be extended under title II of Public Law 93–153 to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to section 403 and implementing rules, regulations, and orders or to have otherwise failed

to comply with this part, unless and until it corrects its noncompliance and satisfies the Secretary that it will fully comply with this part.

(h) *Post termination decisions.* An applicant or recipient adversely affected by an order issued under paragraph (g) of this section shall be restored to full eligibility to receive the Federal authorization if it satisfies the terms and conditions of that order for such eligibility and if it provides reasonable assurance that it will fully comply with this part.

§ 27.12 Judicial review.

Action taken pursuant to this part is subject to judicial review.

§ 27.13 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* Nothing in these regulations shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11246, as amended, and regulations therefor;

(2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, creed, color, national origin, or sex in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(3) Regulations to effectuate title VI of the Civil Rights Act of 1964.

(b) *Forms and instructions.* The Department Compliance Officer may issue and make available to interested persons instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The Secretary may from time to time assign to such officials of the Department as he deems appropriate, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of this part (other than responsibility for final decision as provided in § 27.11), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of this part. Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the Secretary of the Interior.

§ 27.14 Definitions.

As used in this part:

(a) The term *Secretary* means the Secretary of the Interior.

(b) The term *applicant* means one who submits an application for any Federal authorization to which this part applies.

(c) The term *recipient* means any entity or individual who receives a permit, right-of-way, public land order, or other Federal authorization granted or issued under title II of Public Law 93–153 and its agent or agents.

(d) The term *contract* means any agreement or arrangement between a recipient and any person (in which the parties do not stand in the relationship of an employer and an employee) in any way related to the activities of the recipient conducted under any permit, right-of-way, public land order, or other Federal authorization granted or issued under title II.

(e) The term *subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee) in any way related to the performance of any one or more contracts as defined above.

(f) The Authorized Officer means the employee of the Department, designated to act on behalf of the Secretary pursuant to the Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline or such other person to whom the Authorized Officer redelegates his authority pursuant to the delegation of authority to the Authorized Officer from the Secretary.

(g) The Department Compliance Officer means that officer of the Department of the Interior so designated by the Secretary.

PART 28—FIRE PROTECTION EMERGENCY ASSISTANCE

Sec.
28.1 Purpose.
28.2 Definitions.
28.3 Emergency assistance.

AUTHORITY: Act of May 27, 1955 (42 U.S.C. 1856, 1856b).

SOURCE: 41 FR 51794, Nov. 24, 1976, unless otherwise noted.

§ 28.1 Purpose.

The purpose of this part is to provide criteria for agencies in the Department to render fire protection emergency assistance to fire organizations not within the Department.

§ 28.2 Definitions.

As used in this part:

(a) The term *agency head* means the Secretary of the Interior or an official of the Department of the Interior who exercises authority delegated by the Secretary of the Interior.

(b) The term *fire protection* includes personnel services and equipment required for fire prevention, the protection of life and property, and firefighting; and

§ 28.3 Emergency assistance.

In the absence of a reciprocal fire protection agreement, each agency head may provide emergency fire protection will not jeopardize the property of the United States by making it impossible for the agency head to protect the property of the United States and such assistance is determined to be in the best interest of the United States. The providing of emergency assistance shall not be in the best interest of the United States and may not be granted by an agency head if:

(a) Persons other than those currently employed by the agency at the time of the emergency and trained in the type of emergency assistance being provided would be used in the providing of the emergency assistance.

(b) Assistance is provided to a place more than an hour's travel from where the agency maintains fire protection facilities. Assistance which requires more than an hour's travel may be given for those fire emergencies threatening to last more than 12 hours, or endangering human life.

PART 29—TRANS-ALASKA PIPELINE LIABILITY FUND

Sec.
29.1 Definitions.
29.2 Creation of the Fund.
29.3 Fund administration.
29.4 General powers.
29.5 Officers and employees.
29.6 Financing, accounting, and audit.
29.7 Imposition of strict liability.
29.8 Notification and advertisement.
29.9 Claims, settlement and adjudication.
29.10 Subrogation.
29.11 Investment.
29.12 Borrowing.
29.13 Termination.
29.14 Information collection.

AUTHORITY: Sec. 204(c), Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(c); secs. 311(p)(1) and 311(p)(2) of the Federal Water Pollution Control Act, 33 U.S.C. 1321 (p)(1), (2).

SOURCE: 53 FR 3396, Feb. 5, 1988, unless otherwise noted.

§ 29.1 Definitions.

As used in this part:

(a) *Act* means the Trans-Alaska Pipeline Authorization Act, title II of Public Law 93–153, 43 U.S.C. secs. 1651, *et seq*.

(b) *Affiliated* means:

(1) Any person owned or effectively controlled by the vessel Owner or Operators; or

(2) Any person that effectively controls or has the power to effectively control the vessel Owner or Operator by—

(i) Stock interest, or

(ii) Representation on a board of directors or similar body, or

(iii) Contract or other agreement with other stockholders, or

(iv) Otherwise, or;

(3) Any person which is under common ownership or control with the vessel Owner or Operator.

(c) *Claim* means a demand in writing for payment for damage allegedly caused by an incident.

(d) *Contact person* means a person designated by the Owner or Operator and identified to the Fund Administrator and the National Response Center operated by the Coast Guard as the official

responsible for coordinating with the Fund the resolution of claims filed as a result of a TAPS oil spill.

(e) *Damage* or *damages* means any economic loss, arising out of or directly resulting from an incident, including but not limited to:

(1) Removal costs;

(2) Injury to, or destruction of, real or personal property;

(3) Loss of use of real or personal property;

(4) Injury to, or destruction of, natural resources;

(5) Loss of use of natural resources; or

(6) Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence hunting, fishing and gathering opportunities.

(f) *Fund* means the Trans-Alaska Pipeline Liability Fund established as a non-profit corporate entity by section 204(c)(4) of the Trans-Alaska Pipeline Authorization Act.

(g) *Guarantor* means the person, other than the Owner or Operator who provides evidence of financial responsibility for an Owner or Operator, and includes an underwriter, insurer or surety company.

(h) *Incident* (or ''spill'') means a discharge of oil from a vessel which is carrying TAPS oil loaded on that vessel at the terminal facilities of the Pipeline and which:

(1) Violates applicable water quality standards, or

(2) Causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

(i) *Operator of the Pipeline* means the common agent designated by the Permittees to operate the Pipeline.

(j) *Owner of the oil* means the Owner of TAPS oil at the time that such oil is loaded on a vessel at the terminal facilities of the Pipeline.

(k)(1) *Owner* means, in the case of a vessel, the person owning the vessel carrying TAPS oil at the time of an incident, and

(2) *Operator* means, in the case of a vessel, the person operating, or chartering by demise, the vessel carrying TAPS oil at the time of an incident.

(l) *Person* means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or a Government entity.

(m) *Person in charge of the vessel* means the individual on board the vessel with the ultimate responsibility for vessel navigation and operations.

(n) *Permittees* means the holders of the Pipeline right-of-way for the Trans-Alaska Pipeline System.

(o) *Pipeline* means any Pipeline in the Trans-Alaska Pipeline System.

(p) *Secretary* means the Secretary of the Interior or an authorized representative of the Secretary.

(q) *TAPS oil* means oil which was transported through the Trans-Alaska Pipeline and loaded on a vessel at the terminal facilities of the Pipeline.

(r) *Terminal facilities* means those facilities of the Trans-Alaska Pipeline System at which oil is taken from the Pipeline and loaded on vessels or placed in storage for future loading onto vessels.

(s) *Trans-Alaska Pipeline System* or *System* means any Pipeline or terminal facilities constructed by the Permittees under the authority of the Act.

(t) *United States* includes the various States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(u) *Vessel* means any type of watercraft or other artificial contrivance, used or capable of being used as a means of transportation on water, which is engaged in any segment of transportation between the terminal facilities of the Pipeline and ports under the jurisdiction of the United States, and which is carrying TAPS oil.

§ 29.2 Creation of the Fund.

(a) The Trans-Alaska Pipeline Liability Fund (Fund) was created by the Act as a non-profit corporation to be administered by the holders of the Trans-Alaska Pipeline right-of-way under

regulations prescribed by the Secretary. The vessel Owner and Operator are strickly liable for the first $14 million of claims for any one incident. The vessel Owner and Operator remain liable for claims over that amount whenever the damages involved were caused by the unseaworthiness of the vessel or by negligence and should the Fund pay any claims under those circumstances, the Fund retains the right of subrogation. The Fund's maximum liability for any one incident is the amount of the claims over $14 million but not to exceed $100 million.

(b) The Fund shall be subject to, and shall take all steps necessary to carry out its responsibilities under, the Act and these implementing regulations.

(c) The right to repeal, alter, or amend these regulations is expressly reserved.

§ 29.3 Fund administration.

(a) The Fund shall be administered by a Board of Trustees designated by the Permittees and the Secretary as provided in paragraph (b) of this section.

(b)(1) The Board of Trustees shall be comprised of one member designated by each Permittee and three members designated by the Secretary. At least one member designated by the Secretary shall be chosen from persons nominated by the Governor of the State of Alaska. Each member shall serve for a period of three years and may succeed himself or herself. Each member shall have the right to vote. If additional persons become holders of rights-of-way, each such additional Permittee shall have the right to designate a trustee, and if any holder of right-of-way sells the interest in such right-of-way, such holder's designated trustee shall resign from the Board. The Board shall elect by a majority vote a Chairman and a Secretary annually.

(2) Where any activity of the Fund creates a conflict of interest, or the appearance of a conflict of interest, on the part of any member of the Board of Trustees, the member involved shall excuse himself or herself from any consideration of such activity by the Board of Trustees.

(c) The Board of Trustees by a majority vote shall select an Administrator to direct the day-to-day operations of the Fund.

(d) The Board of Trustees shall hold meetings every six months, or more frequently when necessary to consider pressing matters, including pending claims under § 29.9.

(e)(1) Each Board Member and officer of the Fund now or hereafter serving as such, shall be indemnified by the Fund against any and all claims and liabilities to which he or she has or shall become subject by reason of serving or having served as such Board Member or officer, or by reason of any action alleged to have been taken, omitted, or neglected by him or her as such Board Member or officer; and the Fund shall reimburse each such person for all legal expenses reasonably incurred by him or her in connection with any such claim or liability: *Provided*, however, That no such person shall be indemnified against, or be reimbursed for any expenses incurred in connection with, any claim or liability arising out of his or her own willful misconduct or gross negligence.

(2) The amount paid to any officer or Board Member by way of indemnification shall not exceed his or her actual liabilities and actual, reasonable, and necessary expenses incurred in connection with the matter involved. Expenses incurred in defending a civil or criminal action, suit, or proceeding may be paid by the Fund in advance of the final disposition of such action, suit, or proceeding as authorized by the Board in the specific case upon receipt of an undertaking by or on behalf of the Board Member or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Fund as authorized herein.

(3) The indemnification provided by this section shall continue as to a person who has ceased to be a Board Member or officer and shall inure to the benefit of the heirs, executors, and administrators of such a person. The right of indemnification hereinabove provided for shall not be exclusive of any rights to which any Board Member or officer of the Fund may otherwise be entitled by law.

§ 29.4 General powers.

The Fund shall have such powers as may be necessary and appropriate for the exercise of the powers herein specifically and impliedly conferred upon the Fund and all such incidental powers as are customary in non-profit corporations generally, including but not limited to the following:

(a) By resolution of the Board of Trustees, the fund shall adopt a corporate seal.

(b) The Fund may sue and be sued in its corporate name and may employ counsel to represent it.

(c) The Fund shall be a resident of the State of Alaska with its principal place of business in Alaska, and the Board of Trustees shall establish a business office or offices as deemed necessary for the operation of the Fund.

(d) In any civil action for the recovery of damages resulting from an incident, the Fund shall waive personal jurisdiction upon being furnished with a copy of the summons and complaint in the action.

(e) The Board of Trustees of the Fund, by a majority of those present and voting, shall adopt and may amend and repeal by-laws governing the performance of its statutory duties.

(f) The Fund shall do all things necessary and proper in conducting its activities as Trustee including

(1) Receipt of fee collections pursuant to section 204(c)(6) of the Act;

(2) Payment of costs and expenses reasonably necessary to the administration of the Fund as well as costs required to satisfy claims against the Fund;

(3) Investment of all sums not needed for administration and the satisfaction of claims in income-producing securities as hereinafter provided; and

(4) Seeking recovery of any monies to which it is entitled as subrogee under circumstances set forth in section 204(c)(8) of the Act.

(g) The Fund shall determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid. The Board of Trustees shall establish an annual budget, subject to the approval of the Secretary.

(h) All costs and expenses reasonably necessary to the administration of the Fund, including costs and expenses incident to the termination, settlement, or payment of claims, are properly chargeable as expenses and payable out of fees or other income of the Fund.

§ 29.5 Officers and employees.

(a) The Administrator is the Chief Executive Officer of the Fund and is responsible for carrying out all executive and administrative functions as authorized by the Board of Trustees in accordance with the Act including the receipt and verification of fees collected from Owners of TAPS oil pursuant to § 29.6(a), the investment of Fund assets in securities according to guidelines approved by the Board of Trustees and consistent with these regulations, and the disbursement of such assets in payment of expenses and approved claims.

(b) The Fund may employ such other persons as may be necessary to carry out its functions.

§ 29.6 Financing, accounting, and audit.

(a)(1) The Operator of the Pipeline shall notify each Permittee within a reasonable time as to the date of the tanker loadings and the volumes of TAPS oil loaded. The Permittee will send an invoice for transportation charges for TAPS oil (which includes five cents per barrel for the Fund) to the Owner of the oil. The Permittee will receive the five cents per barrel fee from the Owner of the oil in accordance with the terms of its particular pipeline tariff, filed with the appropriate governmental agency, and shall transfer the fee on or before the next business day to a Fund bank account designated by the Administrator. Collection of fees shall cease at the end of the month following the month in which $100 million has been accumulated in the Fund from any source. Collection of fees shall be resumed when the accumulation falls below $100 million. The Administrator shall notify the Pipeline carriers by the fifteenth of the month if fees are to be collected during the following month.

(2) The value of the Fund shall be the current market value of the Fund on

the day at the end of each month or other agreed upon accounting period.

(b) Costs of the administration shall be paid from the money received by the Fund, and all sums not needed for administration and the satisfaction of claims shall be invested in accordance with § 29.11. The interest on and the proceeds from the sale of any obligations held in the Fund shall be credited to and form a part of the Fund. Income from such securities shall be added to the principal of the Fund if not used for costs of administration or settlement of claims.

(c) At the end of each month that fees are payable under the Act, or other agreed upon accounting period, the Operator of the Pipeline shall provide the Fund with a statement of the respective volumes of crude oil transported by the Operator of the Pipeline and delivered to vessels, the amount of fees charged and collected, and the Owners of TAPS oil from whom such fees were or are due. The Administrator shall provide a copy of the statement to the Owners of the oil, and to the State of Alaska.

(d) The Fund shall undertake an annual accounting.

(e) The Fund shall be subject to an annual audit by the Comptroller General, in coordination with the Administrator and the Secretary. Authorized representatives of the Comptroller General and the Secretary shall have complete access, for purposes of the audit or otherwise, to all books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Fund and they shall be afforded full facilities for verifying among other things, transactions with the balances on securities held by depositories, fiscal agents, and custodians. A report of each audit made by the Comptroller General shall be submitted to the Congress.

§ 29.7 Imposition of strict liability.

(a) Notwithstanding the provisions of any other law, where a vessel is engaged in any segment of transportation between the terminal facilities of the Pipeline and ports under the jurisdiction of the United States, and is carrying TAPS oil, the Owner and Operator (jointly and severally), and the Fund established by section 204(c) of the Act, shall be strictly liable without regard to fault in accordance with that section for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as a result of any discharge of TAPS oil from such vessel. Strict liability under this section shall cease when the TAPS oil has first been brought ashore at a port under the jurisdiction of the United States.

(b) Strict liability shall not be imposed under this part if the Owner or Operator of the vessel, or the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under the Act with respect to the claim of a damaged party if the Owner or Operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such damaged party.

(c)(1) Strict liability for all claims arising out of any one incident shall not exceed $100 million. The Owner and Operator of the vessel shall be jointly and severally liable for the first $14 million of the claims that meet the definition of damages as provided for in these regulations. The Fund shall be liable for the balance of the claims that meet the same definition up to $100 million. If the total of these claims exceeds $100 million, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or State law.

(2) The Fund shall establish uniform procedures to determine whether claims from a TAPS oil spill might exceed $14 million and $100 million. These procedures shall provide that when a determination is made that claims may exceed $100 million, payment of claims may be withheld in full or in part for a twenty-four month period so that claims may be proportionately reduced prior to payment.

(d)(1) Each Owner or Operator of a vessel shall obtain from the Federal Maritime Commission a ''Certificate of Financial Responsibility (Alaska Pipeline)'' demonstrating compliance with the provisions of section 311(p) of the

Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(p)), and regulations promulgated pursuant to such act (33 CFR part 131). Notwithstanding inconsistent language in such act, financial responsibility in the amount of $14 million for all such vessels must be established.

(2) The certificate obtained in accordance with this subsection shall be carried on board the vessel. No TAPS oil may be loaded on any vessel which has not been issued a valid certificate which is still in effect at the time of loading.

§ 29.8 Notification and advertisement.

(a) As soon as the person in charge of a vessel has knowledge of an incident in which the vessel is involved, he shall immediately notify the Owner or Operator and the National Response Center, (800) 424–6802, of the incident. Notification under this section is in addition to any notification requirements under section 311(b)(5) of the Federal Water Pollution Control Act, as amended, and the regulations of the Coast Guard and the Environmental Protection Agency promulgated thereunder (33 CFR 153.203 and 40 CFR 110.10, respectively).

(b) Upon receiving notice of an incident, the National Response Center shall immediately notify the Fund.

(c)(1) At the time of a spill of TAPS oil, the vessel Owner and Operator shall consult with each other and identify a single contact person to both the Fund Administrator and the National Response Center as the official who is responsible for coordinating with the Fund the resolution of claims from a spill of TAPS oil. The National Response Center shall provide the identity of the contact person to appropriate officials of the Coast Guard.

(2) The Fund shall establish procedures for coordination of the handling of claims with the contact person.

(d) Pursuant to its procedures, the Fund shall ascertain if the spill may result in damage claims in excess of $14 million. If it concludes that that level may be reached, the Fund shall commence advertisement no later than 45 days from the date the Fund receives notice of the incident and shall continue advertising for a period of not less than thirty days.

(e) The advertisement must appear in one or more local newspapers of general circulation and the Fund shall establish procedures governing the format and the information to be included in the advertisement of an incident. All advertisements must include:

(1) The date and location of the incident;

(2) The name of the Owner or Operator;

(3) The name and address of the contact person or of the Fund Administrator to whom claims should be sent.

§ 29.9 Claims, settlement and adjudication.

(a)(1) Claims in accordance with this section may be submitted by any damaged party, his or her duly authorized agent, or his or her successor in interest.

(2) Claims submitted in accordance with this section must contain the following information:

(i) A detailed statement of the circumstances, if known, by which the claimed loss occurred.

(ii) A detailed listing of damages incurred, categorized according to the type of damage involved (§ 29.1(e)), and including a monetary claim for each type of damage listed.

(iii) Documentation of all monetary claims asserted.

(b) The contact person must provide copies of all claims filed with the vessel Owner or Operator to the Fund Administrator upon request of the Administrator. Once such claims are paid, the contact person shall notify the Fund and upon request of the Administrator supply any adjuster's reports.

(c) Prior to reaching $14 million in claims filed, the contact person shall notify the Fund whether the vessel Owner or Operator will assume responsibility to pay damages over the $14 million level.

(d)(1) In the event the vessel Owner or Operator refuses to pay claims over the $14 million level, the Fund shall determine if the $14 million in claims already filed meet the definition of damage as established by this section. The Fund shall pay the claims, or portion of claims, over $14 million, which have been determined to meet that definition.

(2) The Fund shall establish uniform procedures and standards for the appraisal and settlement of claims against the Fund, including but not limited to procedures for appraising claims made to the vessel Owner or Operator to determine when $14 million of claims meeting the definition of damages has been reached; procedures to determine whether claims over the $14 million level which it receives meet the definition of damages; and procedures for determining when the services of a private insurance and claims adjuster shall be used.

(e) In the event the vessel Owner or Operator refuses payment of any claims up to $14 million, the injured parties have recourse to the district court for the Federal district in which the spill occurred or the appropriate State court for the State in which the spill occurred. The Fund only becomes liable after $14 million in claims meeting the definition of damages have been paid or have been acknowledged as payable by the vessel Owner or Operator.

(f) The Fund may settle or compromise any claim presented to it.

(g) No claim may be presented, nor any action be commenced, for damages recoverable under this part unless that claim is presented to or that action is commenced against the vessel Owner or Operator, or their guarantor, or against the Fund, as to their respective liabilities, within two years from the date of discovery of the damages caused by an incident, or of the date of the incident causing the damages, whichever is earlier.

(h)(1) The Board of Trustees, by a majority vote, shall decide to allow or deny claims or settlements presented to the Fund in accordance with this section. In its discretion the Board may delegate the authority to settle classes of claims to the Administrator.

(2)(i) Where a claim is presented to the Fund by or on behalf of any person having a close business, personal or governmental association with any member of the Board of Trustees, such as to create a conflict of interest or the appearance of such conflict of interest on the part of such member of the Board of Trustees, the member involved shall excuse himself or herself from any consideration of such claim.

(ii) Where a claim presented to the Fund has previously been presented to the Owner or Operator and such Owner or Operator has a close business, personal or governmental association with any member of the Board of Trustees, such as to create a conflict of interest or the appearance of a conflict of interest on the part of such member of the Board of Trustees, the member involved shall excuse himself or herself from any consideration of such claim.

(i) Any claimant aggrieved by the Fund's decision on a claim under this section may appeal the decision in the appropriate Federal district court.

§ 29.10 Subrogation.

If the Fund pays compensation to any claimant, the Fund shall be subrogated to all rights, claims, and causes of action which that claimant has to the extent permitted by law.

§ 29.11 Investment.

(a) The monies accumulated in the Fund shall be prudently invested in the following types of income-producing obligations having a high degree of reliability and security, or in such other obligations as the Secretary may approve:

(1) Fixed income securities issued by the United States or any of its agencies, at the same interest rates and terms available to private investors; and

(2) Fixed income securities or obligations issued by a corporation or issued or guaranteed by a State or local government or any political subdivision, agency or instrumentality thereof, provided such obligations have a rating by Standard and Poors, or Moody, of ''A'' or better, or an equivalent rating, or provided further that the security or obligation is of the same priority as another security or obligation of the same issuer which has been rated ''A'' or better, and provided that the portfolio has an overall rating of ''AA.'' *Provided,* however, That no securities or obligations of the permittees or their affiliates or of any investment advisor or custodian to the Fund, or their affiliates may be purchased or held by the Fund.

(3) Time certificates of deposit and commercial paper provided that the commercial paper has a rating of either ''A1'' or ''P1'' or both.

(b) No more than two percent of the total principal amount outstanding of fixed income obligations of a single issuer may be held by the Fund at any one time, *Provided*, however, That this restriction shall not apply to obligations of the United States or any of its agencies.

§ 29.12 Borrowing.

In the event the Fund is unable to satisfy a claim determined to be justified, or is in need of money with which to initiate the operation of the Fund, the Fund may borrow the money needed from any commercial credit source at the lowest available rate of interest. If the amount to be borrowed is $500,000 or less, the Administrator may arrange to pledge the credit of the Fund pursuant to a resolution of the Board of Trustees. If the proposed borrowing exceeds $500,000, the Administrator shall, prior to issuance of a note or other security pledging the credit of the Fund, secure the approval of the Secretary. No money may be borrowed from any of the Permittees or their affiliates.

§ 29.13 Termination.

Upon termination of operations of the Pipeline, the full disposition of all claims, and the expiration of time for the filing of claims against the Fund, all assets remaining in the Fund shall be placed in a temporary trust fund account within the State of Alaska. The terms of the trust arrangement shall be determined by the Secretary. During the next succeeding session of Congress, the Secretary shall request that Congress provide for final disposition of the Fund. If Congress at any time establishes a comprehensive oil pollution liability fund which supersedes or repeals the Fund, the Fund assets and any pending claims shall be disposed of as Congress or the Secretary shall direct.

§ 29.14 Information collection.

The information collection requirements contained in 43 CFR 29.9 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned approval No. 1084–0026. The information being collected is the information required to substantiate claims submitted to the Fund. The information will be used to determine whether the claims are appropriate for payment by the Fund. Submission of this information is required of claimants before a claim can be considered.

PART 30—INDIAN PROBATE HEARINGS PROCEDURES

Subpart A—Scope of Part; Definitions

Sec.
30.100 How do I use this part?
30.101 What definitions do I need to know?
30.102 What assets will the Secretary probate?

Subpart B—Commencement of Probate Proceedings

30.110 When does OHA commence a probate case?
30.111 How does OHA commence a probate case?
30.112 What must a complete probate file contain?
30.113 What will OHA do if it receives an incomplete probate file?
30.114 Will I receive notice of the probate proceeding?
30.115 May I review the probate record?

Subpart C—Judicial Authority and Duties

30.120 What authority does the judge have in probate cases?
30.121 May a judge appoint a master in a probate case?
30.122 Is the judge required to accept the master's recommended decision?
30.123 Will the judge determine matters of status and nationality?
30.124 When may a judge make a finding of death?
30.125 May a judge reopen a probate case to correct errors and omissions?
30.126 What happens if property was omitted from the inventory of the estate?
30.127 What happens if property was improperly included in the inventory?
30.128 What happens if an error in BIA's estate inventory is alleged?

Subpart D—Recusal of a Judge or ADM

30.130 How does a judge or ADM recuse himself or herself from a probate case?
30.131 How will the case proceed after the judge's or ADM's recusal?
30.132 May I appeal the judge's or ADM's recusal decision?

Subpart E—Claims

30.140 Where and when may I file a claim against the probate estate?
30.141 How must I file a claim against a probate estate?
30.142 Will a judge authorize payment of a claim from the estate if the decedent's non-trust property was or is available?
30.143 Are there any categories of claims that will not be allowed?
30.144 May the judge authorize payment of the costs of administering the estate?
30.145 When can a judge reduce or disallow a claim?
30.146 What property is subject to claims?
30.147 What happens if there is not enough trust personalty to pay all the claims?
30.148 Will interest or penalties charged after the date of death be paid?

Subpart F—Consolidation and Settlement Agreements

30.150 What action will the judge take if the interested parties agree to settle matters among themselves?
30.151 May the devisees or eligible heirs in a probate proceeding consolidate their interests?
30.152 May the parties to an agreement waive valuation of trust property?
30.153 Is an order approving an agreement considered a partition or sale transaction?

Subpart G—Purchase at Probate

30.160 What may be purchased at probate?
30.161 Who may purchase at probate?
30.162 Does property purchased at probate remain in trust or restricted status?
30.163 Is consent required for a purchase at probate?
30.164 What must I do to purchase at probate?
30.165 Whom will OHA notify of a request to purchase at probate?
30.166 What will the notice of the request to purchase at probate include?
30.167 How does OHA decide whether to approve a purchase at probate?
30.168 How will the judge allocate the proceeds from a sale?
30.169 What may I do if I do not agree with the appraised market value?
30.170 What may I do if I disagree with the judge's determination to approve a purchase at probate?
30.171 What happens when the judge grants a request to purchase at probate?
30.172 When must the successful bidder pay for the interest purchased?
30.173 What happens after the successful bidder submits payment?
30.174 What happens if the successful bidder does not pay within 30 days?
30.175 When does a purchased interest vest in the purchaser?

Subpart H—Renunciation of Interest

30.180 May I give up an inherited interest in trust or restricted property or trust personalty?
30.181 How do I renounce an inherited interest?
30.182 Who may receive a renounced interest in trust or restricted land?
30.183 Who may receive a renounced interest of less than 5 percent in trust or restricted land?
30.184 Who may receive a renounced interest in trust personalty?
30.185 May my designated recipient refuse to accept the interest?
30.186 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?
30.187 May I revoke my renunciation?
30.188 Does a renounced interest vest in the person who renounced it?

Subpart I—Summary Probate Proceedings

30.200 What is a summary probate proceeding?
30.201 What does a notice of a summary probate proceeding contain?
30.202 May I file a claim or renounce or disclaim an interest in the estate in a summary probate proceeding?
30.203 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?
30.204 What must a summary probate decision contain?
30.205 How do I seek review of a summary probate proceeding?
30.206 What happens after I file a request for de novo review?
30.207 What happens if nobody files for de novo review?

Subpart J—Formal Probate Proceedings

NOTICE

30.210 How will I receive notice of the formal probate proceeding?
30.211 Will the notice be published in a newspaper?
30.212 May I waive notice of the hearing or the form of notice?
30.213 What notice to a tribe is required in a formal probate proceeding?
30.214 What must a notice of hearing contain?

DEPOSITIONS, DISCOVERY, AND PREHEARING CONFERENCE

30.215 How may I obtain documents related to the probate proceeding?
30.216 How do I obtain permission to take depositions?

30.217 How is a deposition taken?
30.218 How may the transcript of a deposition be used?
30.219 Who pays for the costs of taking a deposition?
30.220 How do I obtain written interrogatories and admission of facts and documents?
30.221 May the judge limit the time, place, and scope of discovery?
30.222 What happens if a party fails to comply with discovery?
30.223 What is a prehearing conference?

HEARINGS

30.224 May a judge compel a witness to appear and testify at a hearing or deposition?
30.225 Must testimony in a probate proceeding be under oath or affirmation?
30.226 Is a record made of formal probate hearings?
30.227 What evidence is admissible at a probate hearing?
30.228 Is testimony required for self-proved wills, codicils, or revocations?
30.229 When will testimony be required for approval of a will, codicil, or revocation?
30.230 Who pays witnesses' costs?
30.231 May a judge schedule a supplemental hearing?
30.232 What will the official record of the probate case contain?
30.233 What will the judge do with the original record?
30.234 What happens if a hearing transcript has not been prepared?

DECISIONS IN FORMAL PROCEEDINGS

30.235 What will the judge's decision in a formal probate proceeding contain?
30.236 How are covered permanent improvements treated?
30.237 What notice of the decision will the judge provide?
30.238 May I file a petition for rehearing if I disagree with the judge's decision in the formal probate hearing?
30.239 Does any distribution of the estate occur while a petition for rehearing is pending?
30.240 How will the judge decide a petition for rehearing?
30.241 May I submit another petition for rehearing?
30.242 When does the judge's decision on a petition for rehearing become final?
30.243 May a closed probate case be reopened?
30.244 How will the judge decide my petition for reopening?
30.245 What happens if the judge reopens the case?
30.246 When will the decision on reopening become final?

Subpart K—Miscellaneous Provisions

30.250 When does the anti-lapse provision apply?
30.251 What happens if an heir or devisee participates in the killing of the decedent?
30.252 May a judge allow fees for attorneys representing interested parties?
30.253 How must minors or other legal incompetents be represented?
30.254 What happens when a person dies without a valid will and has no heirs?

Subpart L—Tribal Purchase of Interests Under Special Statutes

30.260 What land is subject to a tribal purchase option at probate?
30.261 How does a tribe exercise its statutory option to purchase?
30.262 When may a tribe exercise its statutory option to purchase?
30.263 May a surviving spouse reserve a life estate when a tribe exercises its statutory option to purchase?
30.264 When must BIA furnish a valuation of a decedent's interests?
30.265 What determinations will a judge make with respect to a tribal purchase option?
30.266 When is a final decision issued?
30.267 What if I disagree with the probate decision regarding tribal purchase option?
30.268 May I demand a hearing regarding the tribal purchase option decision?
30.269 What notice of the hearing will the judge provide?
30.270 How will the hearing be conducted?
30.271 How must the tribe pay for the interests it purchases?
30.272 What are BIA's duties on payment by the tribe?
30.273 What action will the judge take to record title?
30.274 What happens to income from land interests during pendency of the probate?

AUTHORITY: 5 U.S.C. 301, 503; 25 U.S.C. 9, 372–74, 410, 2201 *et seq.;* 43 U.S.C. 1201, 1457.

CROSS REFERENCE: For regulations pertaining to the processing of Indian probate matters within the Bureau of Indian Affairs, see 25 CFR part 15. For regulations pertaining to the appeal of decisions of the Probate Hearings Division, Office of Hearings and Appeals, to the Board of Indian Appeals, Office of Hearings and Appeals, see 43 CFR part 4, subpart D. For regulations generally applicable to proceedings before the Hearings Divisions and Appeal Boards of the Office of Hearings and Appeals, see 43 CFR part 4, subpart B.

SOURCE: 73 FR 67289, Nov. 13, 2008, unless otherwise noted.

Subpart A—Scope of Part; Definitions

§ 30.100 How do I use this part?

(a) The following table is a guide to the relevant contents of this part by subject matter.

For provisions relating to . . .	consult . . .
(1) All proceedings in part 30	§§ 30.100 through 30.102.
(2) Claims against probate estate	§§ 30.140 through 30.148.
(3) Commencement of probate	§§ 30.110 through 30.115.
(4) Consolidation of interests	§§ 30.150 through 30.153.
(5) Formal probate proceedings before an administrative law judge or Indian probate judge.	§§ 30.210 through 30.246.
(6) Probate of estates of Indians who die possessed of trust or restricted property.	All sections except §§ 30.260 through 30.274.
(7) Purchases at probate	§§ 30.160 through 30.175.
(8) Renunciation of interests	§§ 30.180 through 30.188.
(9) Summary probate proceedings before an attorney decision maker.	§§ 30.200 through 30.207.
(10) Tribal purchase of certain property interests of decedents under special laws applicable to particular Tribes.	§§ 30.260 through 30.274.

(b) Except as limited by the provisions of this part, the regulations in part 4, subparts A and B of this subtitle apply to these proceedings.

(c) The following provisions do not apply to Alaska property interests:

(1) § 30.151;

(2) §§ 30.160 through 30.175;

(3) § 30.182 through 30.185, except for § 30.184(c);

(4) § 30.213; and

(5) § 30.214(f) and (g).

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7506, Feb. 10, 2011]

§ 30.101 What definitions do I need to know?

Act means the Indian Land Consolidation Act and its amendments, including the American Indian Probate Reform Act of 2004 (AIPRA), Public Law 108–374, as codified at 25 U.S.C. 2201 *et seq*.

Administrative law judge (ALJ) means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

Affidavit means a written declaration of facts by a person that is signed by that person, swearing or affirming under penalty of perjury that the facts declared are true and correct to the best of that person's knowledge and belief.

Agency means:

(1) The Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land and trust personalty; and

(2) Any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

Attorney decision maker (ADM) means an attorney with OHA who conducts a summary proceeding and renders a decision that is subject to de novo review by an administrative law judge or Indian probate judge.

BIA means the Bureau of Indian Affairs within the Department.

BLM means the Bureau of Land Management within the Department.

Board means the Interior Board of Indian Appeals within OHA.

Chief ALJ means the Chief Administrative Law Judge, Probate Hearings Division, OHA.

Child means a natural or adopted child.

Codicil means a supplement or addition to a will, executed with the same formalities as a will. It may explain, modify, add to, or revoke provisions in an existing will.

Consolidation agreement means a written agreement under the provisions of 25 U.S.C. 2206(e) or 2206(j)(9), entered during the probate process, approved by the judge, and implemented by the probate order, by which a decedent's heirs and devisees consolidate interests in trust or restricted land.

Covered permanent improvement means a permanent improvement (including an interest in such an improvement) that is:

(1) Owned by the decedent at the time of death; and

(2) Attached to a parcel of trust or restricted land that is also, in whole or in part, owned by the decedent at the time of death.

Creditor means any individual or entity that has a claim for payment from a decedent's estate.

Day means a calendar day.

Decedent means a person who is deceased.

Decision or order (or *decision and order*) means:

(1) A written document issued by a judge making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty;

(2) The decision issued by an ADM in a summary probate proceeding; or

(3) A decision issued by a judge finding that the evidence is insufficient to determine that a person is deceased by reason of unexplained absence.

De novo review means a process in which an administrative law judge or Indian probate judge, without regard to the decision previously issued in the case, will:

(1) Review all the relevant facts and issues in a probate case;

(2) Reconsider the evidence introduced at a previous hearing;

(3) Conduct a formal hearing as necessary or appropriate; and

(4) Issue a decision.

Department means the Department of the Interior.

Deposition means a proceeding in which a party takes testimony from a witness during discovery.

Devise means a gift of property by will. Also, to give property by will.

Devisee means a person or entity that receives property under a will.

Discovery means a process through which a party to a probate proceeding obtains information from another party. Examples of discovery include interrogatories, depositions, requests for admission, and requests for production of documents.

Eligible heir means, for the purposes of the Act, any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are:

(1) Indian;

(2) Lineal descendents within two degrees of consanguinity of an Indian; or

(3) Owners of a trust or restricted interest in a parcel of land for purposes of inheriting—by descent, renunciation, or consolidation agreement—another trust or restricted interest in such a parcel from the decedent.

Estate means the trust or restricted land and trust personalty owned by the decedent at the time of death.

Formal probate proceeding means a proceeding, conducted by a judge, in which evidence is obtained through the testimony of witnesses and the receipt of relevant documents.

Heir means any individual or entity eligible to receive property from a decedent in an intestate proceeding.

Individual Indian Money (IIM) account means an interest bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary.

Indian means, for the purposes of the Act:

(1) Any person who is a member of a federally recognized Indian tribe, is eligible to become a member of any federally recognized Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under 25 U.S.C. 479; or

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

Indian probate judge (IPJ) means an attorney with OHA, other than an ALJ, to whom the Secretary has delegated the authority to hear and decide Indian probate cases.

Interested party means:

(1) Any potential or actual heir;

(2) Any devisee under a will;

(3) Any person or entity asserting a claim against a decedent's estate;

(4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or

(5) Any co-owner exercising a purchase option.

Interrogatories means written questions submitted to another party for responses as part of discovery.

Intestate means that the decedent died without a valid will as determined in the probate proceeding.

Judge means an ALJ or IPJ.

Lockbox means a centralized system within OST for receiving and depositing trust fund remittances collected by BIA.

LTRO means the Land Titles and Records Office within BIA.

Master means a person who has been specially appointed by a judge to assist with the probate proceedings.

Minor means an individual who has not reached the age of majority as defined by the applicable law.

OHA means the Office of Hearings and Appeals within the Department.

OST means the Office of the Special Trustee for American Indians within the Department.

Per stirpes means by right of representation, dividing an estate into equal shares based on the number of decedent's surviving children and predeceased children who left issue who survive the decedent. The share of a predeceased child of the decedent is divided equally among the predeceased child's surviving children.

Probate means the legal process by which applicable tribal, Federal, or State law that affects the distribution of a decedent's estate is applied in order to:

(1) Determine the heirs;

(2) Determine the validity of wills and determine devisees;

(3) Determine whether claims against the estate will be paid from trust personalty; and

(4) Order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive them.

Purchase option at probate means the process by which eligible purchasers can purchase a decedent's interest during the probate proceeding.

Restricted property means real property whose title is held by an Indian but which cannot be alienated or encumbered without the consent of the Secretary. For the purposes of probate proceedings, restricted property is treated as if it were trust property. Except as the law may provide otherwise, the term ''restricted property'' as used in this part does not include the restricted lands of the Five Civilized Tribes of Oklahoma or the Osage Nation.

Secretary means the Secretary of the Interior or an authorized representative.

Summary probate proceeding means the consideration of a probate file without a hearing. A summary probate proceeding may be conducted if the estate involves only an IIM account that did not exceed $5,000 in value on the date of the death of the decedent.

Superintendent means a BIA Superintendent or other BIA official, including a field representative or one holding equivalent authority.

Testate means that the decedent executed a valid will as determined in the probate proceeding.

Testator means a person who has executed a valid will as determined in the probate proceeding.

Trust personalty means all tangible personal property, funds, and securities of any kind that are held in trust in an IIM account or otherwise supervised by the Secretary.

Trust property means real or personal property, or an interest therein, the title to which is held in trust by the United States for the benefit of an individual Indian or tribe.

We or *us* means the Secretary or an authorized representative as defined in this section.

Will means a written testamentary document that was executed by the decedent and attested to by two disinterested adult witnesses, and that states who will receive the decedent's trust or restricted property.

You or I means an interested party, as defined herein, with an interest in the decedent's estate unless a specific section states otherwise.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7506, Feb. 10, 2011]

§ 30.102 What assets will the Secretary probate?

(a) We will probate only the trust or restricted land or trust personalty owned by the decedent at the time of death.

(b) We will not probate the following property:

(1) Real or personal property other than trust or restricted land or trust personalty owned by the decedent at the time of death;

(2) Restricted land derived from allotments made to members of the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) in Oklahoma; and

(3) Restricted interests derived from allotments made to Osage Indians in Oklahoma (Osage Nation) and Osage headright interests owned by Osage decedents.

(c) We will probate that part of the lands and assets owned by a deceased member of the Five Civilized Tribes or Osage Nation who owned either a trust interest in land or a restricted interest in land derived from an individual Indian who was a member of a Tribe other than the Five Civilized Tribes or the Osage Nation.

[76 FR 7506, Feb. 10, 2011]

Subpart B—Commencement of Probate Proceedings

§ 30.110 When does OHA commence a probate case?

OHA commences probate of an estate when OHA receives a probate file from the agency.

[76 FR 7506, Feb. 10, 2011]

§ 30.111 How does OHA commence a probate case?

OHA commences a probate case by confirming the case number assigned by BIA, assigning the case to a judge or ADM, and designating the case as a summary probate proceeding or formal probate proceeding.

§ 30.112 What must a complete probate file contain?

A probate file must contain the documents and information described in 25 CFR 15.202 and any other relevant information.

§ 30.113 What will OHA do if it receives an incomplete probate file?

If OHA determines that the probate file received from the agency is incomplete or lacks the certification described in 25 CFR 15.204, OHA may do any of the following:

(a) Request the missing information from the agency;

(b) Dismiss the case and return the probate file to the agency for further processing;

(c) Issue a subpoena, interrogatories, or requests for production of documents as appropriate to obtain the missing information; or

(d) Proceed with a hearing in the case.

§ 30.114 Will I receive notice of the probate proceeding?

(a) If the case is designated as a formal probate proceeding, OHA will send a notice of hearing to:

(1) Potential heirs and devisees named in the probate file;

(2) Those creditors whose claims are included in the probate file; and

(3) Other interested parties identified by OHA.

(b) In a case designated a summary probate proceeding, OHA will send a notice of the designation to potential heirs and devisees and will inform them that a formal probate proceeding may be requested instead of the summary probate proceeding.

§ 30.115 May I review the probate record?

After OHA receives the case, you may examine the probate record at the relevant office during regular business hours and make copies at your own expense. Access to records in the probate file is governed by 25 U.S.C. 2216(e), the Privacy Act, and the Freedom of Information Act.

Subpart C—Judicial Authority and Duties

§ 30.120 What authority does the judge have in probate cases?

A judge who is assigned a probate case under this part has the authority to:

(a) Determine the manner, location, and time of any hearing conducted under this part, and otherwise to administer the cases;

(b) Determine whether an individual is deemed deceased by reason of extended unexplained absence or other pertinent circumstances;

(c) Determine the heirs of any Indian or eligible heir who dies intestate possessed of trust or restricted property;

(d) Approve or disapprove a will disposing of trust or restricted property;

(e) Accept or reject any full or partial renunciation of interest in either a testate or intestate proceeding;

(f) Approve or disapprove any consolidation agreement;

(g) Conduct sales at probate and provide for the distribution of interests in the probate decision and order;

(h) Allow or disallow claims by creditors;

(i) Order the distribution of trust property to heirs and devisees and determine and reserve the share to which any potential heir or devisee who is missing but not found to be deceased is entitled;

(j) Determine whether a tribe has jurisdiction over the trust or restricted property and, if so, the right of the tribe to receive a decedent's trust or restricted property under 25 U.S.C. 2206(a)(2)(B)(v), 2206(a)(2)(D)(iii)(IV), or other applicable law;

(k) Issue subpoenas for the appearance of persons, the testimony of witnesses, and the production of documents at hearings or depositions under 25 U.S.C. 374, on the judge's initiative or, within the judge's discretion, on the request of an interested party;

(l) Administer oaths and affirmations;

(m) Order the taking of depositions and determine the scope and use of deposition testimony;

(n) Order the production of documents and determine the scope and use of the documents;

(o) Rule on matters involving interrogatories and any other requests for discovery, including requests for admissions;

(p) Grant or deny stays, waivers, and extensions;

(q) Rule on motions, requests, and objections;

(r) Rule on the admissibility of evidence;

(s) Permit the cross-examination of witnesses;

(t) Appoint a guardian ad litem for any interested party who is a minor or found by the judge not to be competent to represent his or her own interests;

(u) Regulate the course of any hearing and the conduct of witnesses, interested parties, attorneys, and attendees at a hearing;

(v) Determine and impose sanctions and penalties allowed by law; and

(w) Take any action necessary to preserve the trust assets of an estate.

§ 30.121 May a judge appoint a master in a probate case?

(a) In the exercise of any authority under this part, a judge may appoint a master to do all of the following:

(1) Conduct hearings on the record as to all or specific issues in probate cases as assigned by the judge;

(2) Make written reports including findings of fact and conclusions of law; and

(3) Propose a recommended decision to the judge.

(b) When the master files a report under this section, the master must also mail a copy of the report and recommended decision to all interested parties.

§ 30.122 Is the judge required to accept the master's recommended decision?

No, the judge is not required to accept the master's recommended decision.

(a) An interested party may file objections to the report and recommended decision within 30 days of the date of mailing. An objecting party must simultaneously mail or deliver copies of the objections to all other interested parties.

(b) Any other interested party may file responses to the objections within 15 days of the mailing or delivery of the objections. A responding party must simultaneously mail or deliver a copy of his or her responses to the objecting party.

(c) The judge will review the record of the proceedings heard by the master, including any objections and responses filed, and determine whether the master's report and recommended decision are supported by the evidence of record.

(1) If the judge finds that the report and recommended decision are supported by the evidence of record and are consistent with applicable law, the judge will enter an order adopting the recommended decision.

(2) If the judge finds that the report and recommended decision are not supported by the evidence of record, the judge may do any of the following:

(i) Remand the case to the master for further proceedings consistent with instructions in the remand order;

(ii) Make new findings of fact based on the evidence in the record, make conclusions of law, and enter a decision; or

(iii) Hear the case de novo, make findings of fact and conclusions of law, and enter a decision.

(3) The judge may find that the master's findings of fact are supported by the evidence in the record but the conclusions of law or the recommended decision is not consistent with applicable law. In this case, the judge will issue an order adopting the findings of fact, making conclusions of law, and entering a decision.

§ 30.123 Will the judge determine matters of status and nationality?

(a) The judge in a probate proceeding will determine:

(1) The status of eligible heirs or devisees as Indians;

(2) If relevant, the nationality or citizenship of eligible heirs or devisees; and

(3) Whether any of the Indian heirs or devisees with U.S. citizenship are individuals for whom the supervision and trusteeship of the United States has been terminated.

(b) A judge may make determinations under this section in a current probate proceeding or in a completed probate case after a reopening without regard to a time limit.

§ 30.124 When may a judge make a finding of death?

(a) A judge may make a finding that an heir, devisee, or person for whom a probate case has been opened is deceased, by reason of extended unexplained absence or other pertinent circumstances. The judge must include the date of death in the finding. The judge will make a finding of death only on:

(1) A determination from a court of competent jurisdiction; or

(2) Clear and convincing evidence.

(b) In any proceeding to determine whether a person is deceased, the following rebuttable presumptions apply:

(1) The absent person is presumed to be alive if credible evidence establishes that the absent person has had contact with any person or entity during the 6-year period preceding the hearing; and

(2) The absent person is presumed to be deceased if clear and convincing evidence establishes that no person or entity with whom the absent person previously had regular contact has had any contact with the absent person during the 6 years preceding the hearing.

§ 30.125 May a judge reopen a probate case to correct errors and omissions?

(a) On the written request of an interested party, or on the basis of the judge's own order, at any time, a judge has the authority to reopen a probate case to:

(1) Determine the correct identity of the original allottee, or any heir or devisee;

(2) Determine whether different persons received the same allotment;

(3) Decide whether trust patents covering allotments of land were issued incorrectly or to a non-existent person; or

(4) Determine whether more than one allotment of land had been issued to the same person under different names and numbers or through other errors in identification.

(b) The judge will notify interested parties if a probate case is reopened and will conduct appropriate proceedings under this part.

§ 30.126 What happens if property was omitted from the inventory of the estate?

This section applies when, after issuance of a decision and order, it is found that trust or restricted property or an interest therein belonging to a decedent was not included in the inventory.

(a) A judge can issue an order modifying the inventory to include the omitted property for distribution under the original decision. The judge must furnish copies of any modification

order to the agency and to all interested parties who share in the estate.

(b) When the property to be included takes a different line of descent from that shown in the original decision, the judge will:

(1) Conduct a hearing, if necessary, and issue a decision; and

(2) File a record of the proceeding with the designated LTRO.

(c) The judge's modification order or decision will become final at the end of the 30 days after the date on which it was mailed, unless a timely notice of appeal is filed with the Board within that period.

(d) Any interested party who is adversely affected by the judge's modification order or decision may appeal it to the Board within 30 days after the date on which it was mailed.

(e) The judge's modification order or decision must include a notice stating that interested parties who are adversely affected have a right to appeal the decision to the Board within 30 days after the decision is mailed, and giving the Board's address. The judge's modification order or decision will become final at the end of this 30-day period, unless a timely notice of appeal is filed with the Board.

§ 30.127 What happens if property was improperly included in the inventory?

(a) When, after a decision and order in a formal probate proceeding, it is found that property has been improperly included in the inventory of an estate, the inventory must be modified to eliminate this property. A petition for modification may be filed by the superintendent of the agency where the property is located, or by any interested party. The petitioner must serve the petition on all parties whose interests may be affected by the requested modification.

(b) A judge will review the merits of the petition and the record of the title from the LTRO on which the modification is to be based, enter an appropriate decision, and give notice of the decision as follows:

(1) If the decision is entered without a formal hearing, the judge must give notice of the decision to all interested parties whose rights are affected.

(2) If a formal hearing is held, the judge must:

(i) Enter a final decision based on his or her findings, modifying or refusing to modify the property inventory; and

(ii) Give notice of the decision to all interested parties whose rights are affected.

(c) Where appropriate, the judge may conduct a formal hearing at any stage of the modification proceeding. The hearing must be scheduled and conducted under this part.

(d) The judge's decision must include a notice stating that interested parties who are adversely affected have a right to appeal the decision to the Board within 30 days after the date on which the decision was mailed, and giving the Board's address. The judge's decision will become final at the end of this 30-day period, unless a timely notice of appeal is filed with the Board.

(e) The judge must forward the record of all proceedings under this section to the designated LTRO.

§ 30.128 What happens if an error in BIA's estate inventory is alleged?

This section applies when, during a probate proceeding, an interested party alleges that the estate inventory prepared by BIA is inaccurate and should be corrected.

(a) Alleged inaccuracies may include, but are not limited to, the following:

(1) Trust property should be removed from the inventory because the decedent executed a gift deed or gift deed application during the decedent's lifetime, and BIA had not, as of the time of death, determined whether to approve the gift deed or gift deed application;

(2) Trust property should be removed from the inventory because a deed through which the decedent acquired the property is invalid;

(3) Trust property should be added to the inventory; and

(4) Trust property included in the inventory is described improperly, although an erroneous recitation of acreage alone is not considered an improper description.

(b) When an error in the estate inventory is alleged, the OHA deciding official will refer the matter to BIA for resolution under 25 CFR parts 150, 151,

or 152 and the appeal procedures at 25 CFR part 2.

(1) If BIA makes a final determination resolving the inventory challenge before the judge issues a final decision in the probate proceeding, the probate decision will reflect the inventory determination.

(2) If BIA does not make a final determination resolving the inventory challenge before the judge issues a final decision in the probate proceeding, the final probate decision will:

(i) Include a reference to the pending inventory challenge; and

(ii) Note that the probate decision is subject to administrative modification once the inventory dispute has been resolved.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7506, Feb. 10, 2011]

Subpart D—Recusal of a Judge or ADM

§ 30.130 How does a judge or ADM recuse himself or herself from a probate case?

If a judge or ADM must recuse himself or herself from a probate case under § 4.27(c) of this title, the judge or ADM must immediately file a certificate of recusal in the file of the case and notify the Chief ALJ, all interested parties, any counsel in the case, and the affected BIA agencies. The judge or ADM is not required to state the reason for recusal.

§ 30.131 How will the case proceed after the judge's or ADM's recusal?

Within 30 days of the filing of the certificate of recusal, the Chief ALJ will appoint another judge or ADM to hear the case, and will notify the parties identified in § 30.130 of the appointment.

§ 30.132 May I appeal the judge's or ADM's recusal decision?

(a) If you have filed a motion seeking disqualification of a judge or ADM under § 4.27(c)(2) of this title and the judge or ADM denies the motion, you may seek immediate review of the denial by filing a request with the Chief ALJ under § 4.27(c)(3) of this title.

(b) If a judge or ADM recuses himself from a probate case, you may not seek review of the recusal.

Subpart E—Claims

§ 30.140 Where and when may I file a claim against the probate estate?

You may file a claim against the estate of an Indian with BIA or, after the agency transfers the probate file to OHA, with OHA.

(a) In a formal probate proceeding, you must file your claim before the conclusion of the first hearing. Claims that are not filed by the conclusion of the first hearing are barred.

(b) In a summary probate proceeding, if you are a devisee or eligible heir, you must file your claim with OHA within 30 days after the mailing of the notice of summary probate proceeding. Claims of creditors who are not devisees or eligible heirs will not be considered in a summary probate proceeding unless they were filed with the agency before it transferred the probate file to OHA.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7507, Feb. 10, 2011]

§ 30.141 How must I file a claim against a probate estate?

You must file your claim under 25 CFR 15.302 through 15.305.

§ 30.142 Will a judge authorize payment of a claim from the estate if the decedent's non-trust property was or is available?

The judge will not authorize payment of a claim from the estate if the judge determines that the decedent's non-trust property was or is available to pay the claim. This provision does not apply to a claim that is secured by trust or restricted property.

[76 FR 7507, Feb. 10, 2011]

§ 30.143 Are there any categories of claims that will not be allowed?

(a) Claims for care will not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected.

(b) A claim will not be allowed if it:

(1) Has existed for such a period as to be barred by the applicable statute of limitations at the date of decedent's death;

(2) Is a tort claim that has not been reduced to judgment in a court of competent jurisdiction;

(3) Is unliquidated; or

(4) Is from a government entity and relates to payments for:

(i) General assistance, welfare, unemployment compensation or similar benefits; or

(ii) Social Security Administration supplemental security income or old-age, disability, or survivor benefits.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7507, Feb. 10, 2011]

§ 30.144 May the judge authorize payment of the costs of administering the estate?

On motion of the superintendent or an interested party, the judge may authorize payment of the costs of administering the estate as they arise and before the allowance of any claims against the estate.

§ 30.145 When can a judge reduce or disallow a claim?

The judge has discretion to decide whether part or all of an otherwise valid claim is unreasonable, and if so, to reduce the claim to a reasonable amount or disallow the claim in its entirety. If a claim is reduced, the judge will order payment only of the reduced amount.

§ 30.146 What property is subject to claims?

Except as prohibited by law, all intangible trust personalty of a decedent on hand or accrued at the date of death may be used for the payment of claims, including:

(a) IIM account balances;

(b) Bonds;

(c) Unpaid judgments; and

(d) Accounts receivable.

§ 30.147 What happens if there is not enough trust personalty to pay all the claims?

If, as of the date of death, there was not enough trust personalty to pay all allowed claims, the judge may order them paid on a pro rata basis. The unpaid balance of any claims will not be enforceable against the estate after the estate is closed.

§ 30.148 Will interest or penalties charged after the date of death be paid?

Interest or penalties charged against claims after the date of death will not be paid.

Subpart F—Consolidation and Settlement Agreements

§ 30.150 What action will the judge take if the interested parties agree to settle matters among themselves?

(a) A judge may approve a settlement agreement among interested parties resolving any issue in the probate proceeding if the judge finds that:

(1) All parties to the agreement are advised as to all material facts;

(2) All parties to the agreement understand the effect of the agreement on their rights; and

(3) It is in the best interest of the parties to settle.

(b) In considering the proposed settlement agreement, the judge may consider evidence of the respective values of specific items of property and all encumbrances.

(c) If the judge approves the settlement agreement under paragraph (a) of this section, the judge will issue an order approving the settlement agreement and distributing the estate in accordance with the agreement.

§ 30.151 May the devisees or eligible heirs in a probate proceeding consolidate their interests?

The devisees or eligible heirs may consolidate interests in trust property already owned by the devisees or heirs or in property from the inventory of the decedent's estate, or both.

(a) A judge may approve a written agreement among devisees or eligible heirs in a probate case to consolidate the interests of a decedent's devisees or eligible heirs.

(1) To accomplish a consolidation, the agreement may include conveyances among decedent's devisees or eligible heirs of:

(i) Interests in trust or restricted land in the decedent's trust inventory;

(ii) Interests of the devisees or eligible heirs in trust or restricted land which are not part of the decedent's trust inventory; and

(iii) Interests of the decedent, the devisees, or eligible heirs in any covered permanent improvements attached to a parcel of trust or restricted land in the decedent's trust inventory.

(2) The parties must offer evidence sufficient to satisfy the judge of the percentage of ownership held and offered by a party.

(3) If the decedent's devisees or eligible heirs enter into an agreement, the parties to the agreement are not required to comply with the Secretary's rules and requirements otherwise applicable to conveyances by deed.

(b) If the judge approves an agreement, the judge will issue an order distributing the estate in accordance with the agreement.

(c) In order to approve an agreement, the judge must find that:

(1) The agreement to consolidate is voluntary;

(2) All parties to the agreement know the material facts;

(3) All parties to the agreement understand the effect of the agreement on their rights; and

(4) The agreement accomplishes consolidation.

(d) An interest included in an approved agreement may not be purchased at probate without consent of the owner of the consolidated interest.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7507, Feb. 10, 2011]

§ 30.152 May the parties to an agreement waive valuation of trust property?

The parties to a settlement agreement or a consolidation agreement may waive valuation of trust property otherwise required by regulation or the Secretary's rules and requirements. If the parties waive valuation, the waiver must be included in the written agreement.

§ 30.153 Is an order approving an agreement considered a partition or sale transaction?

An order issued by a judge approving a consolidation or settlement agreement will not be considered a partition or sale transaction under 25 CFR part 152.

Subpart G—Purchase at Probate

§ 30.160 What may be purchased at probate?

An eligible purchaser may purchase, during the probate, all or part of the estate of a person who died on or after June 20, 2006.

(a) Any interest in trust or restricted property, including a life estate that is part of the estate (i.e., a life estate owned by the decedent but measured by the life of someone who survives the decedent), may be purchased at probate with the following exceptions:

(1) If an interest is included in an approved consolidation agreement, that interest may not be purchased at probate without consent of the owner of the consolidated interest; and

(2) An interest that a devisee will receive under a valid will cannot be purchased without the consent of the devisee.

(b) A purchase option must be exercised before a decision or order is entered and must be included as part of the order in the estate.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7507, Feb. 10, 2011]

§ 30.161 Who may purchase at probate?

An eligible purchaser is any of the following:

(a) Any devisee or eligible heir who is taking an interest in the same parcel of land in the probate proceeding;

(b) Any person who owns an undivided trust or restricted interest in the same parcel of land;

(c) The Indian tribe with jurisdiction over the parcel containing the interest; or

(d) The Secretary on behalf of the tribe.

§ 30.162 Does property purchased at probate remain in trust or restricted status?

Yes. The property interests purchased at probate must remain in trust or restricted status.

§ 30.163 Is consent required for a purchase at probate?

(a) Except as provided in paragraphs (b) and (c) of this section, to purchase an interest in trust or restricted land at probate you must have the consent of:

(1) The heirs or devisees of such interest; and

(2) Any surviving spouse who receives a life estate under 25 U.S.C. 2206(a)(2)(A) or (D).

(b) If you are the Tribe with jurisdiction over the parcel containing the interest, you do not need consent under paragraph (a) of this section if the following four conditions are met:

(1) The interest will pass by intestate succession;

(2) The judge determines based on our records that the decedent's interest at the time of death was less than 5 percent of the entire undivided ownership of the parcel of land;

(3) The heir or surviving spouse was not residing on the property at the time of the decedent's death; and

(4) The heir or surviving spouse is not a member of your Tribe or eligible to become a member.

(c) We may purchase an interest in trust or restricted land on behalf of the Tribe with jurisdiction over the parcel containing the interest. If we do so, we must obtain consent under paragraph (a) of this section, unless the conditions in paragraphs (b)(1) through (3) of this section are met.

[76 FR 7507, Feb. 10, 2011]

§ 30.164 What must I do to purchase at probate?

Any eligible purchaser must submit a written request to OHA to purchase at probate before the decision or order is issued.

§ 30.165 Who will OHA notify of a request to purchase at probate?

OHA will provide notice of a request to purchase at probate as shown in the following table:

OHA will provide notice to . . .	By . . .
(a) The heirs or devisees and the Indian tribe with jurisdiction over the interest.	First class mail.
(b) The BIA agency with jurisdiction over the interest.	First class mail.
(c) All parties who have submitted a written request for purchase.	First class mail.
(d) To all other eligible purchasers.	Posting written notice in: (1) At least five conspicuous places in the vicinity of the place of the hearing; and (2) One conspicuous place at the agency with jurisdiction over the parcel.

§ 30.166 What will the notice of the request to purchase at probate include?

The notice under § 30.165 will include:

(a) The type of sale;

(b) The date, time, and place of the sale;

(c) A description of the interest to be sold; and

(d) The appraised market value, determined in accordance with § 30.167(b), of the parcel containing the interest to be sold, a description of the interest to be sold, and an estimate of the market value allocated to the interest being sold.

§ 30.167 How does OHA decide whether to approve a purchase at probate?

(a) OHA will approve a purchase at probate if an eligible purchaser submits a bid in an amount equal to or greater than the market value of the interest.

(1) In cases where the sale of the interest does not require consent under § 30.163(b), OHA will sell the interest to the eligible purchaser.

(2) In all other cases, OHA will sell the interest to the eligible purchaser selected by the applicable heir, devisee, or surviving spouse.

(b) The market value of the interest to be sold at probate must be based on an appraisal that meets the standards in the Uniform Standards for Professional Appraisal Practice (USPAP), or on a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7507, Feb. 10, 2011]

§ 30.168 How will the judge allocate the proceeds from a sale?

(a) The judge will allocate the proceeds of sale among the heirs based on the fractional ownership interests in the parcel.

(b) For the sale of an interest subject to a life estate, the judge must use the ratios in 25 CFR part 179 to allocate the proceeds of the sale among the holder of the life estate and the holders of any remainder interests.

§ 30.169 What may I do if I do not agree with the appraised market value?

(a) If you are the heir whose interest is to be sold or a potential purchaser and you disagree with the appraised market value, you may:

(1) File a written objection with OHA within 30 days after the date on which the notice provided under § 30.165 was mailed, stating the reasons for the objection; and

(2) Submit any supporting documentation showing why the market value should be modified within 15 days after filing a written objection.

(b) The judge will consider your objection, make a determination of the market value, determine whether to approve the purchase under § 30.167, and notify all interested parties. The determination must include a notice stating that interested parties who are adversely affected may file written objections and request an interlocutory appeal to the Board as provided in § 30.170.

§ 30.170 What may I do if I disagree with the judge's determination to approve a purchase at probate?

(a) If you are adversely affected by the judge's determination to approve a purchase at probate under § 30.167(a), you may file a written objection with the judge within 15 days after the mailing of a determination under § 30.169(b).

(1) The written objection must state the reasons for the objection and request an interlocutory appeal of the determination to the Board.

(2) You must serve a copy of the written objection on the other interested parties and the agencies, stating that you have done so in your written objection.

(b) If the objection is timely filed, the judge must forward a certified copy of the complete record in the case to the Board, together with a table of contents for the record, for review of the determination. The judge will not issue the decision in the probate case until the Board has issued its decision on interlocutory review of the determination.

(c) If the objection is not timely filed, the judge will issue an order denying the request for review as untimely and will furnish copies of the order to the interested parties and the agencies. If you disagree with the decision of the judge as to whether your objection was timely filed, you may file a petition for rehearing under § 30.238 after the judge issues a decision under § 30.235.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7507, Feb. 10, 2011]

§ 30.171 What happens when the judge grants a request to purchase at probate?

When the judge grants a request to purchase at probate, the judge will:

(a) Notify all bidders by first class mail; and

(b) Notify OST, the agency that prepared the probate file, and the agency having jurisdiction over the interest sold, including the following information:

(1) The estate involved;

(2) The parcel and interest sold;

(3) The identity of the successful bidder; and

(4) The amount of the bid.

§ 30.172 When must the successful bidder pay for the interest purchased?

The successful bidder must pay to OST, by cashier's check or money order via the lockbox, or by electronic funds transfer, the full amount of the purchase price within 30 days after the mailing of the notice of successful bid.

§ 30.173 What happens after the successful bidder submits payment?

(a) When OST receives payment, it will notify OHA, and the judge will enter an order approving the sale and directing the LTRO to record the transfer of title of the interest to the successful bidder. The order will state

the date of the title transfer, which is the date payment was received.

(b) OST will deposit the payment in the decedent's estate account.

§ 30.174 What happens if the successful bidder does not pay within 30 days?

(a) If the successful bidder fails to pay the full amount of the bid within 30 days, the sale will be canceled and the interest in the trust or restricted property will be distributed as determined by the judge.

(b) The time for payment may not be extended.

(c) Any partial payment received from the successful bidder will be returned.

§ 30.175 When does a purchased interest vest in the purchaser?

An interest in trust or restricted property purchased under this subpart is considered to have vested in the purchaser on the date specified in § 30.173(a).

Subpart H—Renunciation of Interest

§ 30.180 May I give up an inherited interest in trust or restricted property or trust personalty?

You may renounce an inherited or devised interest in trust or restricted property, including a life estate, or in trust personalty if you are 18 years old and not under a legal disability.

§ 30.181 How do I renounce an inherited interest?

To renounce an interest under § 30.180, you must file with the judge, before the issuance of the final order in the probate case, a signed and acknowledged declaration specifying the interest renounced.

(a) In your declaration, you may retain a life estate in a specified interest in trust or restricted land and renounce the remainder interest, or you may renounce the complete interest.

(b) If you renounce an interest in trust or restricted land, you may either:

(1) Designate an eligible person or entity meeting the requirements of § 30.182 or § 30.183 as the recipient; or

(2) Renounce without making a designation.

(c) If you choose to renounce your interests in favor of a designated recipient, the judge must notify the designated recipient.

§ 30.182 Who may receive a renounced interest in trust or restricted land?

(a) If the interest renounced is an interest in land, you may renounce only in favor of:

(1) An eligible heir of the decedent;

(2) A person eligible to be a devisee of the interest, if you are a devisee of the interest under a valid will; or

(3) The tribe with jurisdiction over the interest.

(b) For purposes of paragraph (a)(2) of this section, a person eligible to be a devisee of the interest is:

(1) A lineal descendant of the testator;

(2) A person who owns a preexisting undivided trust or restricted interest in the same parcel;

(3) Any Indian; or

(4) The tribe with jurisdiction over the interest.

§ 30.183 Who may receive a renounced interest of less than 5 percent in trust or restricted land?

You may renounce an interest in trust or restricted land that is not disposed of by a valid will and that represents less than 5 percent of the entire undivided ownership of a parcel of land only in favor of:

(a) One other eligible heir;

(b) One Indian who is related to you by blood;

(c) One co-owner of another trust or restricted interest in the same parcel; or

(d) The Indian tribe with jurisdiction over the interest.

§ 30.184 Who may receive a renounced interest in trust personalty?

(a) You may renounce an interest in trust personalty in favor of any person or entity.

(b) The Secretary will maintain and continue to manage trust personalty transferred by renunciation to:

(1) A lineal descendant of the testator;

(2) A tribe; or

(3) Any Indian.

(c) The Secretary will directly disburse and distribute trust personalty transferred by renunciation to a person or entity other than those listed in paragraph (b) of this section.

§ 30.185 May my designated recipient refuse to accept the interest?

Yes. Your designated recipient may refuse to accept the interest, in which case the renounced interest passes to the devisees or heirs of the decedent as if you had predeceased the decedent. The refusal must be made in writing and filed with the judge before the judge issues the final order in the probate case.

§ 30.186 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?

Any renunciation filed and included as part of a probate decision or order issued before the effective date of the American Indian Probate Reform Act of 2004 remains valid.

§ 30.187 May I revoke my renunciation?

A written renunciation is irrevocable after the judge enters the final order in the probate proceeding. A revocation will not be effective unless the judge actually receives it before entry of a final order.

§ 30.188 Does a renounced interest vest in the person who renounced it?

No. An interest in trust or restricted property renounced under § 30.181 is not considered to have vested in the renouncing heir or devisee, and the renunciation is not considered a transfer by gift of the property renounced.

(a) If the renunciation directs the interest to an eligible person or entity, the interest passes directly to that person or entity.

(b) If the renunciation does not direct the interest to an eligible person or entity, the renounced interest passes to the heirs of the decedent as if the person renouncing the interest had predeceased the decedent, or if there are no other heirs, to the residuary devisees.

Subpart I—Summary Probate Proceedings

§ 30.200 What is a summary probate proceeding?

(a) A summary probate proceeding is the disposition of a probate case without a formal hearing on the basis of the probate file received from the agency. A summary probate proceeding may be conducted by a judge or an ADM, as determined by the supervising judge.

(b) A decedent's estate may be processed summarily if the estate involves only cash and the total value of the estate does not exceed $5,000 on the date of death.

§ 30.201 What does a notice of a summary probate proceeding contain?

The notice of summary probate proceeding under § 30.114(b) will contain the following:

(a) Notice of the right of any interested party to request that OHA handle the probate case as a formal probate proceeding;

(b) A summary of the proposed distribution of the decedent's estate, a statement of the IIM account balance, and a copy of the death certificate;

(c) A notice that the only claims that will be considered are those from eligible heirs or devisees, or from any person or entity who filed a claim with BIA before the transfer of the probate file to OHA, with a copy of any such claim;

(d) A notice that an interested party may renounce or disclaim an interest, in writing, either generally or in favor of a designated person or entity; and

(e) Any other information that OHA determines to be relevant.

§ 30.202 May I file a claim or renounce or disclaim an interest in the estate in a summary probate proceeding?

(a) Claims that have been filed with the agency before the probate file is transferred to OHA will be considered in a summary probate proceeding.

(b) If you are a devisee or eligible heir, you may also file a claim with OHA as a creditor within 30 days after the mailing of the notice of the summary probate proceeding.

(c) You may renounce or disclaim an interest in the estate within 30 days

after the mailing of the notice of the summary probate.

§ 30.203 May I request that a formal probate proceeding be conducted instead of a summary probate proceeding?

Yes. Interested parties who are devisees or eligible heirs have 30 days after the mailing of the notice to file a written request for a formal probate hearing.

§ 30.204 What must a summary probate decision contain?

The written decision in a summary probate proceeding must be in the form of findings of fact and conclusions of law, with a proposed decision and order for distribution. The judge or ADM must mail or deliver a notice of the decision, together with a copy of the decision, to each affected agency and to each interested party. The decision must satisfy the requirements of this section.

(a) Each decision must contain one of the following:

(1) If the decedent did not leave heirs or devisees a statement to that effect; or

(2) If the decedent left heirs or devisees:

(i) The names of each heir or devisee and their relationships to the decedent;

(ii) The distribution of shares to each heir or devisee; and

(iii) The names of the recipients of renounced or disclaimed interests.

(b) Each decision must contain all of the following:

(1) Citations to the law of descent and distribution under which the decision is made;

(2) A statement allowing or disallowing claims against the estate under this part, and an order directing the amount of payment for all approved claims;

(3) A statement approving or disapproving any renunciation;

(4) A statement advising all interested parties that they have a right to seek de novo review under § 30.205, and that, if they fail to do so, the decision will become final 30 days after it is mailed; and

(5) A statement of whether the heirs or devisees are:

(i) Indian;

(ii) Non-Indian but eligible to hold property in trust status; or

(iii) Non-Indian and ineligible to hold property in trust status.

(c) In a testate case only, the decision must contain a statement that:

(1) Approves or disapproves a will;

(2) Interprets provisions of the approved will; and

(3) Describes the share each devisee is to receive, subject to any encumbrances.

§ 30.205 How do I seek review of a summary probate proceeding?

(a) If you are adversely affected by the written decision in a summary probate proceeding, you may seek de novo review of the case. To do this, you must file a request with the OHA office that issued the decision within 30 days after the date the decision was mailed.

(b) The request for de novo review must be in writing and signed, and must contain the following information:

(1) The name of the decedent;

(2) A description of your relationship to the decedent;

(3) An explanation of what errors you allege were made in the summary probate decision; and

(4) An explanation of how you are adversely affected by the decision.

§ 30.206 What happens after I file a request for de novo review?

(a) Within 10 days of receiving a request for de novo review, OHA will notify the agency that prepared the probate file, all other affected agencies, and all interested parties of the de novo review, and assign the case to a judge.

(b) The judge will review the merits of the case, conduct a hearing as necessary or appropriate under the regulations in this part, and issue a new decision under this part.

§ 30.207 What happens if nobody files for de novo review?

If no interested party requests de novo review within 30 days of the date of the written decision, it will be final for the Department. OHA will send:

(a) The complete original record and the final order to the agency that prepared the probate file; and

(b) A copy of any relevant portions of the record to any other affected agency.

Subpart J—Formal Probate Proceedings

NOTICE

§ 30.210 How will I receive notice of the formal probate proceeding?

OHA will provide notice of the formal probate proceeding under § 30.114(a) by mail and by posting. A posted and published notice may contain notices for more than one hearing, and need only specify the names of the decedents, the captions of the cases and the dates, times, places, and purposes of the hearings.

(a) The notice must:

(1) Be sent by first class mail;

(2) Be sent and posted at least 21 days before the date of the hearing; and

(3) Include a certificate of mailing with the date of mailing, signed by the person mailing the notice.

(b) A presumption of actual notice exists with respect to any person to whom OHA sent a notice under paragraph (a) of this section, unless the notice is returned by the Postal Service as undeliverable to the addressee.

(c) OHA must post the notice in each of the following locations:

(1) Five or more conspicuous places in the vicinity of the designated place of hearing; and

(2) The agency with jurisdiction over each parcel of trust or restricted property in the estate.

(d) OHA may also post the notice in other places and on other reservations as the judge deems appropriate.

§ 30.211 Will the notice be published in a newspaper?

The judge may cause advance notice of hearing to be published in a newspaper of general circulation in the vicinity of the designated place of hearing. The cost of publication may be paid from the assets of the estate under § 30.144.

§ 30.212 May I waive notice of the hearing or the form of notice?

You may waive your right to notice of the hearing and the form of notice by:

(a) Appearing at the hearing and participating in the hearing without objection; or

(b) Filing a written waiver with the judge before the hearing.

§ 30.213 What notice to a tribe is required in a formal probate proceeding?

(a) In probate cases in which the decedent died on or after June 20, 2006, the judge must notify any tribe with jurisdiction over the trust or restricted land in the estate of the pendency of a proceeding.

(b) A certificate of mailing of a notice of probate hearing to the tribe at its record address will be conclusive evidence that the tribe had notice of the decedent's death, of the probate proceedings, and of the right to purchase.

§ 30.214 What must a notice of hearing contain?

The notice of hearing under § 30.114(a) must:

(a) State the name of the decedent and caption of the case;

(b) Specify the date, time, and place that the judge will hold a hearing to determine the heirs of the decedent and, if a will is offered for probate, to determine the validity of the will;

(c) Name all potential heirs of the decedent known to OHA, and, if a will is offered for probate, the devisees under the will and the attesting witnesses to the will;

(d) Cite this part as the authority and jurisdiction for holding the hearing;

(e) Advise all persons who claim to have an interest in the estate of the decedent, including persons having claims against the estate, to be present at the hearing to preserve the right to present evidence at the hearing;

(f) Include notice of the opportunity to consolidate interests at the probate hearing, including that the heirs or

devisees may propose additional interests for consolidation, and include notice of the opportunity for renunciation either generally or in favor of a designated recipient;

(g) In estates for decedents whose date of death is on or after June 20, 2006, include notice of the possibilities of purchase and sale of trust or restricted property by heirs, devisees, co-owners, a tribe, or the Secretary; and

(h) State that the hearing may be continued to another time and place.

DEPOSITIONS, DISCOVERY, AND PREHEARING CONFERENCE

§ 30.215 How may I obtain documents related to the probate proceeding?

(a) You may make a written demand to produce documents for inspection and copying. This demand:

(1) May be made at any stage of the proceeding before the conclusion of the hearing;

(2) May be made on any other party to the proceeding or on a custodian of records concerning interested parties or their trust property;

(3) Must be made in writing, and a copy must be filed with the judge; and

(4) May demand copies of any documents, photographs, or other tangible things that are relevant to the issues, not privileged, and in another party's or custodian's possession, custody, or control.

(b) Custodians of official records will furnish and reproduce documents, or permit their reproduction, under the rules governing the custody and control of the records.

(1) Subject to any law to the contrary, documents may be made available to any member of the public upon payment of the cost of producing the documents, as determined reasonable by the custodians of the records.

(2) Information within federal records will be maintained and disclosed as provided in 25 U.S.C. 2216(e), the Privacy Act, and the Freedom of Information Act.

§ 30.216 How do I obtain permission to take depositions?

(a) You may take the sworn testimony of any person by deposition on oral examination for the purpose of discovery or for use as evidence at a hearing:

(1) On stipulation of the parties; or

(2) By order of the judge.

(b) To obtain an order from the judge for the taking of a deposition, you must file a motion that sets forth:

(1) The name and address of the proposed witness;

(2) The reasons why the deposition should be taken;

(3) The name and address of the person qualified under § 30.217(a) to take depositions; and

(4) The proposed time and place of the examination, which must be at least 20 days after the date of the filing of the motion.

(c) An order for the taking of a deposition must be served upon all interested parties and must state:

(1) The name of the witness;

(2) The time and place of the examination, which must be at least 15 days after the date of the order; and

(3) The name and address of the officer before whom the examination is to be made.

(d) The officer and the time and place specified in paragraphs (c)(2) and (c)(3) of this section need not be the same as those requested in the motion under paragraph (b) of this section.

(e) You may request that the judge issue a subpoena for the witness to be deposed under § 30.224.

§ 30.217 How is a deposition taken?

(a) The witness to be deposed must appear before the judge or before an officer authorized to administer oaths by the laws of the United States or by the laws of the place of the examination, as specified in:

(1) The judge's order under § 30.216(c); or

(2) The stipulation of the parties under § 30.216(a)(1).

(b) The witness must be examined under oath or affirmation and subject to cross-examination. The witness's testimony must be recorded by the officer or someone in the officer's presence.

(c) When the testimony is fully transcribed, it must be submitted to the witness for examination and must be read to or by him or her, unless examination and reading are waived.

(1) Any changes in form or substance that the witness desires to make must be entered on the transcript by the officer, with a statement of the reasons given by the witness for making them.

(2) The transcript must then be signed by the witness, unless the interested parties by stipulation waive the signing, or the witness is unavailable or refuses to sign.

(3) If the transcript is not signed by the witness, the officer must sign it and state on the record the fact of the waiver, the unavailability of the witness, or the refusal to sign together with the reason given, if any. The transcript may then be used as if it were signed, unless the judge determines that the reason given for refusal to sign requires rejection of the transcript in whole or in part.

(d) The officer must certify on the transcript that the witness was duly sworn by the officer and that the transcript is a true record of the witness's testimony. The officer must then hand deliver or mail the original and two copies of the transcript to the judge.

§ 30.218 How may the transcript of a deposition be used?

A transcript of a deposition taken under this part may be offered by any party or the judge in a hearing if the judge finds that the evidence is otherwise admissible and if either:

(a) The witness is unavailable; or

(b) The interest of fairness is served by allowing the transcript to be used.

§ 30.219 Who pays for the costs of taking a deposition?

The party who requests the taking of a deposition must make arrangements for payment of any costs incurred. The judge may assign the costs in the order.

§ 30.220 How do I obtain written interrogatories and admission of facts and documents?

(a) You may serve on any other interested party written interrogatories and requests for admission of facts and documents if:

(1) The interrogatories and requests are served in sufficient time to permit answers to be filed before the hearing, or as otherwise ordered by the judge; and

(2) Copies of the interrogatories and requests are filed with the judge.

(b) A party receiving interrogatories or requests served under paragraph (a) of this section must:

(1) Serve answers upon the requesting party within 30 days after the date of service of the interrogatories or requests, or within another deadline agreed to by the parties or prescribed by the judge; and

(2) File a copy of the answers with the judge.

§ 30.221 May the judge limit the time, place, and scope of discovery?

Yes. The judge may limit the time, place, and scope of discovery either:

(a) On timely motion by any interested party, if that party also gives notice to all interested parties and shows good cause; or

(b) When the judge determines that limits are necessary to prevent delay of the proceeding or prevent undue hardship to a party or witness.

§ 30.222 What happens if a party fails to comply with discovery?

(a) If a party fails to respond to a request for admission, the facts for which admission was requested will be deemed to be admitted, unless the judge finds good cause for the failure to respond.

(b) If a party fails without good cause to comply with any other discovery under this part or any order issued, the judge may:

(1) Draw inferences with respect to the discovery request adverse to the claims of the party who has failed to comply with discovery or the order, or

(2) Make any other ruling that the judge determines just and proper.

(c) Failure to comply with discovery includes failure to:

(1) Produce a document as requested;

(2) Appear for examination;

(3) Respond to interrogatories; or

(4) Comply with an order of the judge.

§ 30.223 What is a prehearing conference?

Before a hearing, the judge may order the parties to appear for a conference to:

(a) Simplify or clarify the issues;

(b) Obtain stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(c) Limit the number of expert or other witnesses to avoid excessively cumulative evidence;

(d) Facilitate agreements disposing of all or any of the issues in dispute; or

(e) Resolve such other matters as may simplify and shorten the hearing.

HEARINGS

§ 30.224 May a judge compel a witness to appear and testify at a hearing or deposition?

(a) The judge can issue a subpoena for a witness to appear and testify at a hearing or deposition and to bring documents or other material to the hearing or deposition.

(1) You may request that the judge issue a subpoena for the appearance of a witness to testify. The request must state the name, address, and telephone number or other means of contacting the witness, and the reason for the request. The request must be timely. The requesting party must mail the request to all other interested parties and to the witness at the time of filing.

(2) The request must specify the documents or other material sought for production under the subpoena.

(3) The judge will grant or deny the request in writing and mail copies of the order to all the interested parties and the witness.

(4) A person subpoenaed may seek to avoid a subpoena by filing a motion to quash with the judge and sending copies to the interested parties.

(b) Anyone whose legal residence is more than 100 miles from the hearing location may ask the judge to excuse his or her attendance under subpoena. The judge will inform the interested parties in writing of the request and the judge's decision on the request in writing in a timely manner.

(c) A witness who is subpoenaed to a hearing under this section is entitled to the fees and allowances provided by law for a witness in the courts of the United States (see 28 U.S.C. 1821).

(d) If a subpoenaed person fails or refuses to appear at a hearing or to testify, the judge may file a petition in United States District Court for issuance of an order requiring the subpoenaed person to appear and testify.

§ 30.225 Must testimony in a probate proceeding be under oath or affirmation?

Yes. Testimony in a probate proceeding must be under oath or affirmation.

§ 30.226 Is a record made of formal probate hearings?

(a) The judge must make a verbatim recording of all formal probate hearings. The judge will order the transcription of recordings of hearings as the judge determines necessary.

(b) If the judge orders the transcription of a hearing, the judge will make the transcript available to interested parties on request.

§ 30.227 What evidence is admissible at a probate hearing?

(a) A judge conducting probate proceedings under this part may admit any written, oral, documentary, or demonstrative evidence that is:

(1) Relevant, reliable, and probative;

(2) Not privileged under Federal law; and

(3) Not unduly repetitious or cumulative.

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

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

(d) A judge may admit a copy of a document into evidence or may require the admission of the original document. After examining the original document, the judge may substitute a copy of the original document and return the original.

(e) The Federal Rules of Evidence do not directly apply to the hearing, but

may be used as guidance by the judge and the parties in interpreting and applying the provisions of this section.

(f) The judge may take official notice of any public record of the Department and of any matter of which federal courts may take judicial notice.

(g) The judge will determine the weight given to any evidence admitted.

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

(i) There is no privilege under this part for any communication that:

(1) Occurred between a decedent and any attorney advising a decedent; and

(2) Pertained to a matter relevant to an issue between parties, all of whom claim through the decedent.

§ 30.228 Is testimony required for self-proved wills, codicils, or revocations?

The judge may approve a self-proved will, codicil, or revocation, if uncontested, and order distribution, with or without the testimony of any attesting witness.

§ 30.229 When will testimony be required for approval of a will, codicil, or revocation?

(a) The judge will require testimony if someone contests the approval of a self-proved will, codicil, or revocation, or submits a non-self-proved will for approval. In any of these cases, the attesting witnesses who are in the reasonable vicinity of the place of hearing must appear and be examined, unless they are unable to appear and testify because of physical or mental infirmity.

(b) If an attesting witness is not in the reasonable vicinity of the place of hearing or is unable to appear and testify because of physical or mental infirmity, the judge may:

(1) Order the deposition of the attesting witness at a location reasonably near the residence of the witness;

(2) Admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will; and

(3) As evidence of the execution, admit proof of the handwriting of the testator and of the attesting witnesses, or of any of them.

§ 30.230 Who pays witnesses' costs?

Interested parties who desire a witness to testify at a hearing must make their own financial and other arrangements for the witness.

§ 30.231 May a judge schedule a supplemental hearing?

Yes. A judge may schedule a supplemental hearing if he or she deems it necessary.

§ 30.232 What will the official record of the probate case contain?

The official record of the probate case will contain:

(a) A copy of the posted public notice of hearing showing the posting certifications;

(b) A copy of each notice served on interested parties with proof of mailing;

(c) The record of the evidence received at the hearing, including any transcript made of the testimony;

(d) Claims filed against the estate;

(e) Any wills, codicils, and revocations;

(f) Inventories and valuations of the estate;

(g) Pleadings and briefs filed;

(h) Interlocutory orders;

(i) Copies of all proposed or accepted settlement agreements, consolidation agreements, and renunciations and acceptances of renounced property;

(j) In the case of sale of estate property at probate, copies of notices of sale, appraisals and objections to appraisals, requests for purchases, all bids received, and proof of payment;

(k) The decision, order, and the notices thereof; and

(l) Any other documents or items deemed material by the judge.

§ 30.233 What will the judge do with the original record?

(a) The judge must send the original record to the designated LTRO under 25 CFR part 150.

(b) The judge must also send a copy of:

(1) The order to the agency originating the probate, and

(2) The order and inventory to other affected agencies.

§ 30.234 What happens if a hearing transcript has not been prepared?

When a hearing transcript has not been prepared:

(a) The recording of the hearing must be retained in the office of the judge issuing the decision until the time allowed for rehearing or appeal has expired; and

(b) The original record returned to the LTRO must contain a statement indicating that no transcript was prepared.

DECISIONS IN FORMAL PROCEEDINGS

§ 30.235 What will the judge's decision in a formal probate proceeding contain?

The judge must decide the issues of fact and law involved in any proceeding and issue a written decision that meets the requirements of this section.

(a) In all cases, the judge's decision must:

(1) Include the name, birth date, and relationship to the decedent of each heir or devisee;

(2) State whether the heir or devisee is Indian or non-Indian;

(3) State whether the heir or devisee is eligible to hold property in trust status;

(4) Provide information necessary to identify the persons or entities and property interests involved in any settlement or consolidation agreement, renunciations of interest, and purchases at probate;

(5) Approve or disapprove any renunciation, settlement agreement, consolidation agreement, or purchase at probate;

(6) Allow or disallow claims against the estate under this part, and order the amount of payment for all approved claims;

(7) Include the probate case number that has been assigned to the case in any case management or tracking system then in use within the Department;

(8) Make any other findings of fact and conclusions of law necessary to decide the issues in the case; and

(9) Include the signature of the judge and date of the decision.

(b) In a case involving a will, the decision must include the information in paragraph (a) of this section and must also:

(1) Approve or disapprove the will;

(2) Interpret provisions of an approved will as necessary; and

(3) Describe the share each devisee is to receive under an approved will, subject to any encumbrances.

(c) In all intestate cases, including a case in which a will is not approved, and any case in which an approved will does not dispose of all of the decedent's trust or restricted property, the decision will include the information in paragraph (a) of this section and must also:

(1) Cite the law of descent and distribution under which the decision is made; and

(2) Describe the distribution of shares to which the heirs are entitled; and

(3) Include a determination of any rights of dower, curtesy, or homestead that may constitute a burden upon the interest of the heirs.

§ 30.236 How are covered permanent improvements treated?

(a) In an intestate case, under the Act, an interest in a covered permanent improvement attached to a parcel of trust or restricted land is treated as shown in the following table:

If . . .	then the covered permanent improvement passes to . . .
(1) A Tribal probate code approved under 25 CFR part 18 specifies how the covered permanent improvement will be handled.	the person(s) designated in the Tribal probate code to receive it.
(2) A consolidation agreement approved under subpart F of this part specifies how the covered permanent improvement will be handled.	the person(s) designated in the consolidation agreement to receive it.
(3) There is neither an approved Tribal probate code nor an approved consolidation agreement that specifies how the covered permanent improvement will be handled, but there is a renunciation of the trust or restricted interest in the parcel under subpart H of this part.	the recipient of the trust or restricted interest in the parcel under the renunciation.

If . . .	then the covered permanent improvement passes to . . .
(4) There is neither an approved Tribal probate code nor an approved consolidation agreement that specifies how the covered permanent improvement will be handled, and there is no renunciation of the trust or restricted interest in the parcel under subpart H of this part.	each eligible heir to whom the trust or restricted interest in the parcel descends.

(b) In a testate case, under the Act, an interest in a covered permanent improvement attached to a parcel of trust or restricted land is treated as shown in the following table:

If . . .	then the covered permanent improvement passes to . . .
(1) The will expressly states how the covered permanent improvement will be handled.	the person(s) designated in the will to receive it.
(2) The will does not expressly state how the covered permanent improvement will be handled.	the person(s) designated in the will to receive the trust or restricted interest in the parcel.

(c) The provisions of the Act apply to a covered permanent improvement:

(1) Even though it is not held in trust; and

(2) Without altering or otherwise affecting its non-trust status.

(d) The judge's decision will specifically direct the distribution only of the decedent's trust or restricted property, and not any non-trust permanent improvement attached to a parcel of trust or restricted land. However, the judge:

(1) Will include in the decision a general statement of the substantive law of descent or devise of permanent improvements; and

(2) Can approve a consolidation agreement under subpart F of this part that includes a covered permanent improvement.

[76 FR 7507, Feb. 10, 2011]

§ 30.237 What notice of the decision will the judge provide?

When the judge issues a decision, the judge must mail or deliver a notice of the decision, together with a copy of the decision, to each affected agency and to each interested party. The notice must include a statement that interested parties who are adversely affected have a right to file a petition for rehearing with the judge within 30 days after the date on which notice of the decision was mailed. The decision will become final at the end of this 30-day period, unless a timely petition for rehearing is filed with the judge.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.238 May I file a petition for rehearing if I disagree with the judge's decision in the formal probate hearing?

(a) If you are adversely affected by the decision, you may file with the judge a written petition for rehearing within 30 days after the date on which the decision was mailed under § 30.237.

(b) If the petition is based on newly discovered evidence, it must:

(1) Be accompanied by one or more affidavits of witnesses stating fully the content of the new evidence; and

(2) State the reasons for the failure to discover and present that evidence at the hearings held before the issuance of the decision.

(c) A petition for rehearing must state specifically and concisely the grounds on which it is based.

(d) The judge must forward a copy of the petition for rehearing to the affected agencies.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011, as amended at 76 FR 7508, Feb. 10, 2011]

§ 30.239 Does any distribution of the estate occur while a petition for rehearing is pending?

The agencies must not initiate payment of claims or distribute any portion of the estate while the petition is pending, unless otherwise directed by the judge.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.240 How will the judge decide a petition for rehearing?

(a) If proper grounds are not shown, or if the petition is not timely filed, the judge will:

(1) Issue an order denying the petition for rehearing and including the reasons for denial; and

(2) Furnish copies of the order to the petitioner, the agencies, and the interested parties.

(b) If the petition appears to show merit, the judge must:

(1) Cause copies of the petition and supporting papers to be served on all persons whose interest in the estate might be adversely affected if the petition is granted;

(2) Allow all persons served a reasonable, specified time in which to submit answers or legal briefs in response to the petition; and

(3) Consider, with or without a hearing, the issues raised in the petition.

(c) The judge may affirm, modify, or vacate the former decision.

(d) On entry of a final order, the judge must distribute the order as provided in this part. The order must include a notice stating that interested parties who are adversely affected have a right to appeal the final order to the Board, within 30 days of the date on which the order was mailed, and giving the Board's address.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.241 May I submit another petition for rehearing?

No. Successive petitions for rehearing are not permitted. The jurisdiction of the judge terminates when he or she issues a decision finally disposing of a petition for rehearing, except for:

(a) The issuance of necessary orders nunc pro tunc to correct clerical errors in the decision; and

(b) The reopening of a case under this part.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.242 When does the judge's decision on a petition for rehearing become final?

The decision on a petition for rehearing will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part and § 4.320 of this chapter.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.243 May a closed probate case be reopened?

(a) The judge may reopen a closed probate case as shown in the following table.

How the case can be reopened	Applicable deadline	Standard for reopening the case
(1) On the judge's own motion.	(i) Initiated within 3 years after the date of the original decision.	To correct an error of fact or law in the original decision.
	(ii) Initiated more than 3 years after the date of the original decision.	To correct an error of fact or law in the original decision which, if not corrected, would result in a manifest injustice.
(2) On a petition filed by the agency.	(i) Filed within 3 years after the date of the original decision.	To correct an error of fact or law in the original decision.
	(ii) Filed more than 3 years after the date of the original decision.	To correct an error of fact or law in the original decision which, if not corrected, would result in a manifest injustice.
(3) On a petition filed by the interested party.	(i) Filed within 3 years after the date of the original decision and within 1 year after the petitioner's discovery of an alleged error.	To correct an error of fact or law in the original decision.
	(ii) Filed more than 3 years after the date of the original decision and within 1 year after the petitioner's discovery of an alleged error.	To correct an error of act or law in the original decision which, if not corrected, would result in a manifest injustice.

(b) All grounds for reopening must be set forth fully in the petition.

(c) A petition filed by an interested party must:

(1) Include all relevant evidence, in the form of documents or affidavits, concerning when the petitioner discovered the alleged error; and

(2) If the grounds for reopening are based on alleged errors of fact, be supported by affidavit.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011, as amended at 76 FR 7508, Feb. 10, 2011]

§ 30.244 How will the judge decide my petition for reopening?

(a) If the judge finds that proper grounds are not shown, the judge will issue an order denying the petition for reopening and giving the reasons for the denial. An order denying reopening must include a notice stating that interested parties who are adversely affected have a right to appeal the order to the Board within 30 days of the date on which the order was mailed, and giving the Board's address. Copies of the judge's decision must be mailed to the petitioner, the agencies, and those persons whose rights would be affected.

(b) If the petition appears to show merit, the judge must cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate might be affected if the petition is granted. They may respond to the petition by filing answers, cross-petitions, or briefs. The filings must be made within the time periods set by the judge.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.245 What happens if the judge reopens the case?

On reopening, the judge may affirm, modify, or vacate the former decision.

(a) The final order on reopening must include a notice stating that interested parties who are adversely affected have a right to appeal the final order to the Board within 30 days of the date on which the order was mailed, and giving the Board's address.

(b) Copies of the judge's decision on reopening must be mailed to the petitioner and to all persons who received copies of the petition.

(c) By order directed to the agency, the judge may suspend further distribution of the estate or income during the reopening proceedings.

(d) The judge must file the record made on a reopening petition with the designated LTRO and must furnish a duplicate record to the affected agencies.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

§ 30.246 When will the decision on reopening become final?

The decision on reopening will become final on the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part.

[73 FR 67289, Nov. 13, 2008. Redesignated at 76 FR 7507, Feb. 10, 2011]

Subpart K—Miscellaneous Provisions

§ 30.250 When does the anti-lapse provision apply?

(a) The following table illustrates how the anti-lapse provision applies.

If . . .	And . . .	Then . . .
A testator devises trust property to any of his or her grandparents or to the lineal descendant of a grandparent.	The devisee dies before the testator, leaving lineal descendants.	The lineal descendants take the right, title, or interest given by the will per stirpes.

(b) For purposes of this section, relationship by adoption is equivalent to relationship by blood.

§ 30.251 What happens if an heir or devisee participates in the killing of the decedent?

Any person who knowingly participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of the decedent may not take, directly or indirectly, any inheritance or devise under the decedent's will. This person will be treated as if he or she had predeceased the decedent.

§ 30.252 May a judge allow fees for attorneys representing interested parties?

(a) Except for attorneys representing creditors, the judge may allow fees for attorneys representing interested parties.

(1) At the discretion of the judge, these fees may be charged against the interests of the party represented or as a cost of administration.

(2) Petitions for allowance of fees must be filed before the close of the last hearing.

(b) Nothing in this section prevents an attorney from petitioning for additional fees to be considered at the disposition of a petition for rehearing and again after an appeal on the merits. An order allowing attorney fees is subject to a petition for rehearing and to an appeal.

§ 30.253 How must minors or other legal incompetents be represented?

Minors and other legal incompetents who are interested parties must be represented by legally appointed guardians, or by guardians ad litem appointed by the judge. In appropriate cases, the judge may order the payment of fees to the guardian ad litem from the assets of the estate.

§ 30.254 What happens when a person dies without a valid will and has no heirs?

The judge will determine whether a person with trust or restricted property died intestate and without heirs, and the judge will determine whether 25 U.S.C. 2206(a) applies, as shown in the following table.

If . . .	Then . . .	Or . . .
(a) 25 U.S.C. 2206(a) applies.	The judge will order distribution of the property under § 2206(a)(2)(B)(v) through (a)(2)(C).	The judge will order distribution of the property under § 2206(a)(2)(D)(iii)(IV) through (V).
(b) 25 U.S.C. 2206(a) does not apply.	If the trust or restricted property is not on the public domain, the judge will order the escheat of the property under 25 U.S.C. 373a.	If the trust or restricted property is on the public domain, the judge will order the escheat of the property under 25 U.S.C. 373b.

Subpart L—Tribal Purchase of Interests Under Special Statutes

§ 30.260 What land is subject to a tribal purchase option at probate?

Sections 30.260 through 30.274 apply to formal Indian probate proceedings that relate to the tribal purchase of a decedent's interests in trust and restricted land under the statutes shown in the following table.

Location of trust or restricted land	Statutes governing purchase
(a) Yakima Reservation or within the area ceded by the Treaty of June 9, 1855 (12 Stat. 1951).	The Act of December 31, 1970 (Pub. L. 91–627; 84 Stat. 1874; 25 U.S.C. 607 (1976)), amending section 7 of the Act of August 9, 1946 (60 Stat. 968).
(b) Warm Springs Reservation or within the area ceded by the Treaty of June 25, 1855 (12 Stat. 37).	The Act of August 10, 1972 (Pub. L. 92–377; 86 Stat. 530).
(c) Nez Perce Indian Reservation or within the area ceded by the Treaty of June 11, 1855 (12 Stat. 957).	The Act of September 29, 1972 (Pub. L. 92–443; 86 Stat. 744).

§ 30.261 How does a tribe exercise its statutory option to purchase?

(a) To exercise its option to purchase, the tribe must file with the agency:

(1) A written notice of purchase; and

(2) A certification that the tribe has mailed copies of the notice on the same date to the judge and to the affected heirs or devisees.

(b) A tribe may purchase all or part of the available interests specified in the probate decision. A tribe may not, however, claim an interest less than decedent's total interest in any one individual tract.

§ 30.262 When may a tribe exercise its statutory option to purchase?

(a) A tribe may exercise its statutory option to purchase:

(1) Within 60 days after mailing of the probate decision unless a petition for rehearing has been filed under § 30.238 or a demand for hearing has been filed under § 30.268; or

(2) If a petition for rehearing or a demand for hearing has been filed, within 20 days after the date of the decision on

rehearing or hearing, whichever is applicable, provided the decision on rehearing or hearing is favorable to the tribe.

(b) On failure to timely file a notice of purchase, the right to distribution of all unclaimed interests will accrue to the heirs or devisees.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7508, Feb. 10, 2011]

§ 30.263 May a surviving spouse reserve a life estate when a tribe exercises its statutory option to purchase?

Yes. When the heir or devisee whose interests are subject to the tribal purchase option is a surviving spouse, the spouse may reserve a life estate in one-half of the interests.

(a) To reserve a life estate, the spouse must, within 30 days after the tribe has exercised its option to purchase the interest, file with the agency both:

(1) A written notice to reserve a life estate; and

(2) A certification that copies of the notice have been mailed on the same date to the judge and the tribe.

(b) Failure to file the notice on time, as required by paragraph (a)(1) of this section, constitutes a waiver of the option to reserve a life estate.

§ 30.264 When must BIA furnish a valuation of a decedent's interests?

(a) BIA must furnish a valuation report of the decedent's interests when the record reveals to the agency:

(1) That the decedent owned interests in land located on one or more of the reservations designated in § 30.260; and

(2) That one or more of the probable heirs or devisees who may receive the interests either:

(i) Is not enrolled in the tribe of the reservation where the land is located; or

(ii) Does not have the required blood quantum in the tribe to hold the interests against a claim made by the tribe.

(b) When required by paragraph (a) of this section, BIA must furnish a valuation report in the probate file when it is submitted to OHA. Interested parties may examine and copy, at their expense, the valuation report at the agency.

(c) The valuation must be made on the basis of the fair market value of the property, as of the date of decedent's death.

(d) If there is a surviving spouse whose interests may be subject to the tribal purchase option, the valuation must include the value of a life estate based on the life of the surviving spouse in one-half of such interests.

§ 30.265 What determinations will a judge make with respect to a tribal purchase option?

(a) If a tribe files a written notice of purchase under § 30.261(a), a judge will determine:

(1) The entitlement of a tribe to purchase a decedent's interests in trust or restricted land under the applicable statute;

(2) The entitlement of a surviving spouse to reserve a life estate in one-half of the surviving spouse's interests that have been purchased by a tribe; and

(3) The fair market value of such interests, as determined by an appraisal or other valuation method developed by the Secretary under 25 U.S.C. 2214, including the value of any life estate reserved by a surviving spouse.

(b) In making a determination under paragraph (a)(1) of this section, the following issues will be determined by the official tribal roll, which is binding on the judge:

(1) Enrollment or refusal of the tribe to enroll a specific individual; and

(2) Specification of blood quantum, where pertinent.

(c) For good cause shown, the judge may stay the probate proceeding to permit an interested party who is adversely affected to pursue an enrollment application, grievance, or appeal through the established procedures applicable to the tribe.

§ 30.266 When is a final decision issued?

This section applies when a decedent is shown to have owned land interests in any one or more of the reservations designated in § 30.260.

(a) The probate proceeding relative to the determination of heirs, approval or disapproval of a will, and the claims of creditors must first be concluded as

final for the Department under this part. This decision is referred to in this section as the ''probate decision.''

(b) At the formal probate hearing, a finding must be made on the record showing those interests in land, if any, that are subject to the tribal purchase option.

(1) The finding must be included in the probate decision and must state:

(i) The apparent rights of the tribe as against affected heirs or devisees; and

(ii) The right of a surviving spouse whose interests are subject to the tribal purchase option to reserve a life estate in one-half of the interests.

(2) If the finding is that there are no interests subject to the tribal purchase option, the decision must so state.

(3) A copy of the probate decision, together with a copy of the valuation report, must be distributed to all interested parties under § 30.237.

[73 FR 67289, Nov. 13, 2008, as amended at 76 FR 7508, Feb. 10, 2011]

§ 30.267 What if I disagree with the probate decision regarding tribal purchase option?

If you are an interested party who is adversely affected by the probate decision, you may, within 30 days after the date on which the probate decision was mailed, file with the judge a written petition for rehearing under this part.

§ 30.268 May I demand a hearing regarding the tribal purchase option decision?

Yes. You may file with the judge a written demand for hearing if you are an interested party who is adversely affected by the exercise of the tribal purchase option or by the valuation of the interests in the valuation report.

(a) The demand for hearing must be filed by whichever of the following deadlines is applicable:

(1) Within 30 days after the date of the probate decision;

(2) Within 30 days after the date of the decision on rehearing; or

(3) Within 20 days after the date on which the tribe exercises its option to purchase available interests.

(b) The demand for hearing must:

(1) Include a certification that copies of the demand have been mailed on the same date to the agency and to each interested party; and

(2) State specifically and concisely the grounds on which it is based.

§ 30.269 What notice of the hearing will the judge provide?

On receiving a demand for hearing, the judge must:

(a) Set a time and place for the hearing after expiration of the 30-day period fixed for the filing of the demand for hearing as provided in § 30.268; and

(b) Mail a notice of the hearing to all interested parties not less than 20 days in advance of the hearing.

§ 30.270 How will the hearing be conducted?

(a) At the hearing, each party challenging the tribe's claim to purchase the interests in question or the valuation of the interests in the valuation report will have the burden of proving his or her position.

(b) On conclusion of the hearing, the judge will issue a decision that determines all of the issues including, but not limited to:

(1) The fair market value of the interests purchased by the tribe; and

(2) Any adjustment to the fair market value made necessary by the surviving spouse's decision to reserve a life estate in one-half of the interests.

(c) The decision must include a notice stating that interested parties who are adversely affected have a right to appeal the decision to the Board within 30 days after the date on which the decision was mailed, and giving the Board's address.

(d) The judge must:

(1) Forward the complete record relating to the demand for hearing to the LTRO as provided in § 30.233;

(2) Furnish a duplicate record thereof to the agency; and

(3) Mail a notice of such action together with a copy of the decision to each interested party.

§ 30.271 How must the tribe pay for the interests it purchases?

(a) A tribe must pay the full fair market value of the interests purchased, as set forth in the appraisal or

other valuation report, or as determined after hearing under § 30.268, whichever is applicable.

(b) Payment must be made within 2 years from the date of decedent's death or within 1 year from the date of notice of purchase, whichever is later.

§ 30.272 What are BIA's duties on payment by the tribe?

On payment by the tribe of the interests purchased, the Superintendent must:

(a) Issue a certificate to the judge that payment has been made; and

(b) File with the certificate all supporting documents required by the judge.

§ 30.273 What action will the judge take to record title?

After receiving the certificate and supporting documents, the judge will:

(a) Issue an order that the United States holds title to the interests in trust for the tribe;

(b) File the complete record, including the decision, with the LTRO as provided in § 30.233;

(c) Furnish a duplicate copy of the record to the agency; and

(d) Mail a notice of the action together with a copy of the decision to each interested party.

§ 30.274 What happens to income from land interests during pendency of the probate?

During the pendency of the probate, there may be income received or accrued from the land interests purchased by the tribe, including the payment from the tribe. This income will be credited to the estate and paid to the heirs. For purposes of this section, pendency of the probate ends on the date of transfer of title to the United States in trust for the tribe under § 30.273.

PART 32—GRANTS TO STATES FOR ESTABLISHING YOUNG ADULT CONSERVATION CORPS (YACC) PROGRAM

Sec.

32.1 Introduction.
32.2 Definitions.
32.3 Program purpose and objectives.
32.4 Program operation requirements.
32.5 Administrative requirements.
32.6 Request for grant.
32.7 Application format, instructions, and guidelines.
32.8 Program reporting requirements.
32.9 Consideration and criteria for awarding grants.

AUTHORITY: Pub. L. 95–93, sec. 806, 91 Stat. 630 (29 U.S.C. 801).

SOURCE: 43 FR 12266, Mar. 23, 1978, unless otherwise noted.

§ 32.1 Introduction.

(a) The Young Adult Conservation Corps (YACC) is authorized by title I of the Youth Employment and Demonstration Projects Act of 1977 (Pub. L. 95–93), which amends the Comprehensive Employment and Training Act (CETA) of 1973 by adding a new title VIII.

(b) The Young Adult Conservation Corps (YACC) is a year-round employment program for young men and women aged 16 through 23 inclusive. Financial assistance is available through grants-in-aid for employment and work to be performed on projects affecting both Federal and non-Federal public lands and waters or projects limited to non-Federal public lands and waters. YACC grants do not require matching.

(c) The YACC grant program is jointly managed by the Secretaries of the Interior and Agriculture under an interagency agreement with the Secretary of Labor.

(d) Thirty percent of the sums appropriated to carry out the YACC program for any fiscal year will be available for grants during such year. Grant funds will be allocated on the basis of the total youth population within each State. State YACC programs must consist of both residential and nonresidential projects. At least 25 percent of the State YACC program must be residential by September 30, 1978.

§ 32.2 Definitions.

The terms used in these regulations are defined as follows:

(a) *Act*. The Comprehensive Employment and Training Act of 1973, as amended.

(b) *YACC*. Young Adult Conservation Corps.

(c) *Secretaries*. The Secretaries of the Interior and Agriculture or their designated representatives. The YACC program is managed within Interior by the Office of Youth Programs, and within Agriculture, by the Forest Service.

(d) *State*. Any of the several States of the United States, District of Columbia, Commonwealth of Puerto Rico, Virgin Islands, Guam, American Samoa, and The Trust Territories of the Pacific Islands and the Northern Marianas.

(e) *Refugee/parolee*. An alien who is admitted into the United States under the Immigration and Nationality Act, and who is legally authorized to take permanent employment in the United States.

(f) *Enrollee*. An individual enrolled in the YACC grant program.

(g) *Grant*. Funding furnished by the Secretaries to a State pursuant to the Act in order to carry out the YACC program.

(h) *Grantee*. Any State recipient of a grant for the operation of a YACC program affecting both Federal and non-Federal public lands and waters, or projects limited to non-Federal public lands and waters as designated by the Governor in each State.

(i) *Subgrantee*. Any unit of general local government or any public agency or organization or any private non-profit agency or organization which has been in existence at least 2 years which has successfully applied to a State for funds to operate a YACC project affecting both Federal and non-Federal public lands and waters within that State or projects limited to non-Federal public lands and waters.

(j) *Contractor*. Any public agency or organization, or any private non-profit agency or organization which has been in existence for at least 2 years and is under contract with the grantee or subgrantee for the conduct of a YACC project affecting both Federal and non-Federal public lands or waters, or projects limited to non-Federal public lands and waters.

(k) *State grant program*. The YACC program consisting of one or more projects operated by a State with Federal Funding.

(l) *Project*. A YACC residential camp operation or nonresidential project:

(1) *Residential camp*. A YACC facility established and maintained to provide 7 days-per-week, 24 hours-per-day residential support services for enrollees.

(2) *Nonresidential project*. A designated area from which daily work activities are assigned and to/from which nonresidential enrollees commute daily.

(m) *In consultation with*. Advance discussion shall occur on the matter under consideration.

(n) *Non-Federal public lands and waters*. Any lands or waters within the territorial limits of a State owned either in fee simple by a State or political subdivision thereof or over which a State or political subdivision thereof has, as determined by the Secretaries, sufficient long-term jurisidiction so that improvements made as the result of a grant will accrue primarily to the benefit of the public as a whole. Federally owned public lands and waters administered by a State or political subdivision thereof under agreements with a Department or Agency of the Federal Government are eligible under such definition if the Secretaries determine that the State or political subdivision thereof is entitled or is likely to retain administrative responsibility for an extended period of time sufficient to justify treatment as non-Federal public lands or waters.

(o) *Total youth population*. Number of youth in a State ages 16 through 23, consistent with the most current Bureau of Census estimate.

(p) *Labor*. U.S. Department of Labor.

(q) *Interior*. U.S. Department of the Interior.

(r) *Forest Service*. Agency within the U.S. Department of Agriculture.

§ 32.3 Program purpose and objectives.

It is the purpose of the Young Adult Conservation Corps to provide employment and other benefits to youths of both sexes from all social, economic and racial classifications who would not otherwise be currently productively employed. The youths will be employed for a period of service during which they engage in useful conservation work which would otherwise be accomplished if adequate funding were made available.

§ 32.4 Program operation requirements.

(a) The State agencies cooperating with Interior and Forest Service having natural resource management responsibilities should be involved in the planning and implementation of the program.

(b) Grantees shall be responsible for the management of each Corps camp and project, final selection of enrollees, determination of enrollee work assignments, training, discipline and termination, and camp operations in accordance with this part and guidelines issued by Interior and Forest Service.

(1) Grantees shall assure that YACC program activities will not result in the displacement of employed workers (including partial displacement such as reduction in the hours of non-overtime work or wages or employment benefits), or impair existing contracts for services, or result in the substitution of YACC funds for other funds in connection with work that would otherwise be performed, or substitute jobs assisted under YACC for existing Federally-assisted jobs, or result in the hiring of any youth when any other person is on layoff from the same or any substantially equivalent job.

(2) Grantees shall assure that the activities in which the YACC enrollees are employed will result in an increase in employment opportunities over those opportunities which would otherwise be available.

(3) In addition, Grantees shall see that YACC enrollees do not, at the same time, share common facilities or property with, or work with members of the Job Corps, under title IV of the Act, except in emergency situations as outlined in paragraph (l)(4)(i) of this section.

(c) Enrollee eligibility: Membership in the Corps will be limited to youths between the ages of 16 to 23, inclusive who are unemployed at the time of application. Citizens, lawfully permanent residents of the United States, or lawfully admitted refugees, or parolees, may apply for enrollment. Applicants also must be capable of carrying out the work of the Corps for the estimated duration of their enrollment.

(d) Candidate recruitment and referral: (1) Interested youth may apply to their local Employment Service/Job Service for enrollment. State Employment Security Agencies (SESA) and their local Employment Service/Job Service (ES/JS) offices shall take applications for YACC from all interested youth and shall refer all candidates who self-certify that they meet eligibility requirements to Grantees for selection of those to be enrolled. Self-certification by applicants ages 16 through 18 who have left school shall include an assurance that they did not leave school for the purpose of enrolling in the Corps. Such referrals shall include all interested youth, including veterans, from both sexes, and all social, economic and racial classifications. Labor shall recruit candidates for YACC through the SESA and their local ES/JS offices, prime sponsors qualified under section 102 of the act, sponsors of Native-American programs qualified under section 302 of the act, sponsors of migrant and seasonal farmworkers programs under section 303 of the act, Interior and Agriculture and such other agencies and organizations as deemed appropriate by Labor. All candidates must be referred through the local ES/JS offices.

(2) An equitable proportion of candidates shall be referred from each State, based on the State's total youth population. For YACC program purposes, total youth population is the number of youth, 16 through 23, as determined on the basis of the best available data. Youth of both sexes and of all social, economic, and racial classifications shall be referred equitably.

(e) Enrollee selection: Grantees shall—(1) Notify ES offices when openings are available;

(2) Select enrollees for the Corps only from those candidates referred by Labor and, in selection and assignment, shall provide, to the extent feasible, for equitable participation for youth of both sexes and of all social, economic, and racial classifications, and for equitable participation of youth from each State;

(3) Notify selected applicants of the date, time and place to which they should report for work, and that enrollees must provide their own transportation to and from the project or camp;

(4) Require that enrollees complete physical examinations prior to official enrollment (expenses, if any, for the physical examination will be borne by the prospective enrollee);

(5) Require parental consent for those youth who have not reached the age of majority as defined by State law;

(6) Require enrollees to provide their own clothing, with the exception of certain safety equipment which will be furnished;

(7) Notify the referring ES/JS office as soon as possible but no later than 30 days after receipt of application, which applicants have been selected and have reported for employment and which have not been so selected.

Preference in enrollee selection shall be given to applicants in rural and urban areas having substantial unemployment rates equal to or in excess of 6.5 per centum as determined by the Department of Labor. Grantees shall comply with section 808 of the act, concerning antidiscrimination.

(f) Enrollment duration: (1) Grantees shall assure that no individual is enrolled in the Corps for a total period of more than 12 months. Such period may be completed in up to three separate enrollment periods so long as the youth meets the eligibility requirements at the time of each separate enrollment. An individual who attains age 24 while enrolled may remain in the program to complete the current period of enrollment.

(2) No youth shall be enrolled if he or she desires such enrollment only for the normal periods between school terms.

(g) Corpsmember activities. Grantees shall assure that work project activities on which YACC enrollees are employed are consistent with the Forest and Rangeland Renewable Resource Planning Act of 1974, as amended by the National Forest Management Act of 1976. Enrollees will be assigned to work projects which are designed to diminish the backlog of work in such fields as:

(1) Tree nursery operations, planting, pruning, thinning and other silvicultural measures;

(2) Wildlife habitat improvement and preservation;

(3) Range management improvements;

(4) Recreation development, rehabilitation and maintenance;

(5) Fish habitat and culture measures;

(6) Forest insect and disease prevention and control;

(7) Road and trail maintenance and improvements;

(8) General sanitation, cleanup, and maintenance and improvements;

(9) Erosion control and flood damage;

(10) Drought damage measures; and

(11) Other natural disaster damage measures.

(h) Project criteria. YACC projects will be operated on a residential and nonresidential basis. Each project location will be jointly approved by Interior and Forest Service through their Regional/Area Offices. To the maximum extent practicable, projects shall:

(1) Be labor-intensive;

(2) Be projects for which work plans exist or can be readily developed;

(3) Be able to be initiated promptly;

(4) Be productive with positive impacts on both the Enrollee as well as the Corps from the standpoint of work performed and benefit to participating youth;

(5) Provide work experience to participants in skill areas required for the projects;

(6) If a residential camp, to the maximum extent feasible, be located in areas where existing residential facilities are available. The use of existing but unoccupied or underutilized Federal, State, and local government facilities and equipment shall be maximized; such utilization is subject to the approval of the Federal agency, State or local government having administrative control thereof;

(7) If a non-residential project, be located within acceptable normal commuting distance from the geographic center of areas of substantial unemployment as designated by Labor;

(8) Be similar to activities of persons employed in seasonal and part-time work by Federal natural resource agencies.

(i) Cooperation with agencies and institutions: (1) Grantees shall, to the extent feasible, arrange for local linkages

with educational systems, CETA and other employment and training programs, employment service offices, local apprenticeship sponsors and information centers, and employers, in order to arrange for the provision of available services to enrollees, both during non-work hours while enrolled, and after termination from YACC. Grantees shall establish procedures to ensure that enrollees are made aware of established linkages and related information and opportunities.

(2) Grantees shall notify appropriate local ES/JS offices regarding enrollee status, in advance of the end of the enrollment period or upon termination and shall, to the extent feasible, assist the enrollee in making contact with ES/JS or other organizations to enhance the possibilities for placement.

(3) Labor shall work with the Department of Health, Education, and Welfare to make suitable arrangements whereby academic credit may be awarded by educational institutions and agencies for competencies derived from work experience obtained through the YACC program. Labor shall also encourage Grantees, through Interior and Forest Service, to make necessary arrangements with local education agencies so that academic credit for such work experience may be granted.

(j) Enrollee wages and hours of work: (1) Grantees shall assure that enrollees in the State Grant Program are paid at the Federal minimum wage rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. As an exception, Grantees shall provide for an additional cost-of-living adjustment for enrollees in the State of Alaska, not to exceed 25 percent of the Federal Wage Rate.

(2) Wages in the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and the Northern Marianas shall be consistent with provisions of Federal, State, or local laws, otherwise applicable. Wages in the Trust Territory of the Pacific Islands shall be consistent with local law, except on Eniwetok and Kwajalein Atoll where section 6(a)(1) of the Fair Labor Standards Act applies.

(3) As an incentive, Grantees may authorize incremental increases, above the minimum wage, for a limited number of enrollees, to reflect additional responsibilities or competencies. For this purpose, two promotional categories may be established: (i) Enrollee Leader, and (ii) Enrollee Assistant Leader. No more than 15 percent of the enrollment of any individual camp or project shall be given such increases. For each enrollee thus compensated, the wage increase shall be 50 percent for the enrollee leader and 15 percent for the enrollee assistant leader, of the applicable basic hourly minimum wage.

(4) Grantees shall reduce enrollee wages for each hour of unexcused absence.

(5) Enrollees assigned to residential camps may be required to assume responsibility for housekeeping and maintenance duties. Such duties shall not be considered compensable, unless scheduled during the regular work day, in which case enrollees shall be paid at the same rate as for regular work assignments.

(6) Enrollees may not be required to work more than 8 hours per day or 40 hours per week, except that Grantees may authorize overtime which shall not exceed 10 hours per week per enrollee, in which event they shall pay them at his or her regular rate.

(7) Enrollees assigned to residential camps shall be charged for daily food and lodging as follows: 75 cents per meal furnished and 75 cents per day lodging. Grantees shall arrange for payment of such charges by payroll deduction.

(8) Grantees shall establish a collection procedure for collecting payments made by program staff and visitors for meals, lodging, or other items requiring reimbursement. Amounts collected shall be treated as program income and shall be netted against total YACC program outlays by Grantees.

(9) Income taxes shall be withheld from enrollee wages pursuant to the Federal Internal Revenue Code of 1954 (26 U.S.C. 1 *et seq.*), and such State income tax laws as are applicable. Grantees shall provide each enrollee with the forms required to effect income tax deductions and withholding exemptions and shall assure that appropriate wage and tax statements are provided to enrollees.

(10) Interior and Forest Service shall assure that the payroll procedures for both the Federal and State programs are the same. State and local grantees shall utilize the payroll forms used by the Federal Government for payment of enrollees in accordance with the guidelines issued by Forest Service and Interior as appropriate.

(11) Grantees may utilize the payroll services of the Administrative Service Center (ASC), Bureau of Reclamation, P.O. Box 11568, Salt Lake City, Utah 84147 for enrollee pay at no direct cost to the Grantee. Grantees may elect to payroll the enrollees through their own payroll system if the payroll system is consistent with regulations contained herein. Those Grantees electing to payroll enrollees through ASC will be furnished appropriate forms and instructions.

(k) Enrollee leave: (1) Grantees shall provide enrollees with paid annual leave at a rate of 4 hours for every full pay period which shall consist of 2 normal work weeks. Accrual shall commence at the beginning of the first full pay period after the day of official enrollment, and shall end on the date of official termination. Such leave may be accrued up to a maximum of 13 days for 52 weeks of uninterrupted enrollment: Enrollees may use accrued leave at any time, subject to approval by the Grantee, but shall use all accrued leave prior to each formal termination. Accrued leave may be used for such purposes as personal business and sick time. The date of formal termination shall be the final date upon which the youth is eligible to receive pay, whether this is a work day or an accrued but unused leave day. Compensation shall not be paid for unused accrued leave.

(2) Grantees may grant administrative leave with pay for enrollee participation in job search and employment development activities. Such leave with pay is to be counted as time in employment.

(3) Emergency or administrative leave, without pay may be granted at the discretion of the Grantee. Such leave without pay shall not be counted as time in employment.

(4) Grantees shall pay enrollees for all regular State holidays, if they are in a pay status for 8 hours on the workdays immediately preceding and following the holiday. Approved leave with pay shall count as time in employment for approved paid holidays. Such holidays shall not count as annual leave.

(l) Federal status of enrollees: Except as otherwise specifically provided in this subpart, YACC enrollees in the State Grant Program shall not be deemed Federal employees, and shall not be subject to the provisions of law relating to Federal employment including those regarding hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits. Enrollees in the State Grant Program shall be considered Federal employees for the following purposes:

(1) For purposes of section 5911 of title 5 of the U.S. Code, relating to allowances for living quarters, enrollees whose housing is provided by the Federal Government shall be deemed civil employees of the United States within the meaning of the term ''employee'' as defined in that section, and provisions of that section shall apply.

(2) For purposes of the Internal Revenue code of 1954 (26 U.S.C. 1 *et seq.*) and title II of the Social Security Act (42 U.S.C. 401 *et seq.*), enrollees shall be deemed employees of the United States, and any service performed by a person as an enrollee shall be deemed to be performed in the employ of the United States.

(3) For purposes of chapter 171 of title 28 of the U.S. Code, relating to tort claims procedures, enrollees in the State Grant Program shall be deemed employees of the United States within the meaning of the term ''employee of the Government'' as defined in section 2671 of title 28 U.S. Code, and provisions of that chapter shall apply.

(i) In the event an enrollee is alleged to be involved in the damage, loss or destruction of the property of others or of causing personal injury to or the death of other individual(s) while in the performance of duty, claims may be filed by the owner(s) of the property, the injured person(s) or by a duly authorized agent or legal representative of the claimant to the Grantee who shall collect all of the facts and submit the claim to the Regional/Area Offices,

Interior and Forest Service for appropriate action.

(ii) Tort claims shall be made on Standard Form 95, Claim for Damage or Injury form or a similar document, supported by necessary justification.

(4) For purposes of subchapter 1 of chapter 81 of title 5 of the U.S. Code, relating to compensation to Federal employees for work injuries, enrollees in the State Grant Program shall be deemed employees of the United States within the meaning of the term ''employee'' as defined in section 8101 of title 5 U.S. Code and provisions of that subchapter shall apply, except that the term ''performance of duty'' shall not include any act of an enrollee while absent without authorization from the enrollee's assigned post of duty, but shall include time spent participating in an activity (including an activity while on pass or during travel to or from such post of duty) authorized by or under the direction of YACC program staff.

(i) Residential enrollees are generally considered under Federal Employees' Compensation Act to be Federal employees from the time each begins Government authorized travel to the assigned YACC camp, to the time each completes Government authorized travel after termination from the program. Residential enrollees shall be generally considered in ''performance of duty'' at all times during any and all of their activities, 24 hours a day, 7 days a week, except when they are absent without authorization from their assigned post of duty. Whether a residential enrollee is in ''performance of duty'' shall be determined by the Office of Workers' Compensation Programs (OWCP).

(ii) Nonresidential enrollees, after official enrollment are generally considered, under Federal Employees Compensation Act (FECA), to be in ''performance of duty'' as Federal employees from the time they arrive daily at the designated area from which activities are assigned, until they leave such designated area or activity. Nonresidential enrollees are generally not covered by FECA while commuting between a designated area/authorized activity and their residence. Whether a nonresidential enrollee is in ''performance of duty'' shall be determined by OWCP.

(iii) Whenever an enrollee is injured, develops an occupation related illness, or dies while in the performance of duty, the Grantee shall immediately comply with the procedures set out in the Employment Standards Administration regulations of 20 CFR chapter 1. The Grantee shall also see that a thorough investigation of the circumstances, and a medical evaluation are made, and shall see that required forms are submitted to the Regional/Area Offices, Interior and Forest Service, for appropriate action.

(iv) If an enrollee dies, the Grantee, in addition to making proper notifications, in accordance with procedures established by Interior and Forest Service shall:

(A) Notify the appropriate district office of Workers' Compensation Programs (OWCP) through the Regional/Area Office, Interior and Forest Service of the death and the circumstances surrounding it, and file appropriate forms with that office.

(B) Be responsible for assuring that the next of kin is informed of benefits which may be available from Federal Employees' Compensation;

(C) Consult the decedent's family as to the final disposition of the remains before any final action is taken in this regard; and

(D) If the next of kin refuses to accept the remains, arrange for burial at a site close to the camp/project and at a cost not to exceed the amount authorized in section 8134(a) of the Federal Employees' Compensation Act (FECA).

(v) Safety and health: (A) Grantees shall assure that enrollees are not required or permitted to work or receive services in buildings or surroundings or under condition which are unsanitary, hazardous, or lack proper ventilation. Such work or services shall be conducted or provided in accordance with the standards set forth in the regulations under the Occupational Safety and Health Act of 29 CFR parts 1910, 1926, and 1960 subpart B.

(B) Grantees shall conduct safety and health inspections of every residential camp and work project area connected

therewith, at least annually, consistent with the requirements of 29 CFR 1960.26(d).

(C) Grantees shall issue such items of protective and safety clothing and equipment to enrollees as are necessary and appropriate to insure a maximum of safety in field and construction activities, including, at a minimum, hard hats, gloves, and boots. Grantees shall also see that proper use of such clothing and equipment is taught to enrollees and enforced. Enrollees are expected to provide all other clothing.

(D) Grantees shall provide complete safety orientation to enrollees in all work situations to alert them to any hazards to which they may be exposed.

(vi) Residential living conditions: (A) Grantees shall provide for residential support facilities and services which ensure healthful and secure living conditions, 7 days a week, 24 hours a day.

(B) Grantees shall assure that all residential facilities are well maintained and shall comply with applicable Federal, State and local safety, health, and housing codes for multipurpose group residences. Adequate supervision and assistance are to be provided for the safety and welfare of the enrollees.

(vii) Enrollee services: Grantees shall provide enrollees with such transportation related to camp and/or project operations, lodging, subsistence, medical treatment and other services, supplies, equipment and faciliies as may be needed consistent with this part.

(viii) Enrollee complaints: Grantees shall establish procedures for resolving enrollee complaints and issues which arise between the grantee and any enrollee regarding adverse action, civil rights, equal employment opportunity, enrollment, or upgrading from the time at which their referrals are received from ES/JS to the time of formal termination. Such procedure shall:

(*1*) Provide the enrollee with the opportunity for an informal conference,

(*2*) Provide prior notice of intended adverse action against the enrollee setting forth the grounds and permitting response,

(*3*) Provide an opportunity for a formal hearing, and if the enrollee is not satisfied, with an opportunity for an appeal and

(*4*) Provide an offer of assistance in preparation for hearings and appeals.

(ix) Emergency disaster work: (A) Grantees may utilize enrollees aged 18 years and over to perform work in emergency disaster situations. Enrollees may volunteer but may not be required to participate while natural disasters are occurring; enrollees may, however, be required to perform work on damage which has been caused by such disasters. The use of YACC enrollees in such activities must provide for qualified supervision and training for the enrollee. All such activity shall be conducted in accordance with regular Grantee policy: and procedures shall meet health, safety and work standards established by Labor in 29 CFR parts 97B, 22, 23, 24, and 25.

(B) Such enrollees shall be used only to supplement compensated firefighters, and shall be paid at the rates set by the Grantee as established in pay plans for emergency firefighters, in accordance with established policies, procedures and practices.

(C) No YACC enrollee is required to work for a greater number of hours per day than other firefighters.

(D) Cost incurred in using YACC enrollees in emergency disaster situations shall be borne by the funds of the benefitting organizations whenever possible; however, YACC funds may be used to provide such assistance subject to the approval of the Secretaries.

(E) Grantees shall see that the work activity of enrollees under age 18 is in compliance with Hazardous Occupation Orders issued pursuant to the Fair Labor Standards Act (29 CFR 570.50 *et seq.*).

(F) All YACC work and services are to be conducted consistent with the requirement of the Occupational Health & Safety Act (29 CFR parts 1910, 1926, and 1960 subpart B).

(x) Prohibited activities: Grantees shall not permit YACC enrollees to participate in emergency relief in connection with labor stoppages, strikes, riots, or civil disturbances. Enrollees shall not participate in activities on private property except as incidental to emergency work provided for in paragraph (i) of this section.

(xi) Transportation: Grantees shall assign selected enrollees to the residential camps nearest to their home as practicable; and to nonresidential projects within normal commuting distance from their homes. Daily transportation to and from home and work site for nonresidential enrollees may not be provided, except from established staging areas to work site and return to staging area. YACC will not pay the initial transportation from home to residential camp; however, residential YACC enrollees may be advanced a portion of their wages for the purpose of traveling to the camp upon a determination by the grantee that the youth is in need thereof. Grantees shall arrange for repayment of such advances by payroll deduction.

(xii) Project identification: Buildings, campgrounds and other permanent projects shall be marked with appropriate signs identifying each project as built by or under construction by the YACC.

(xiii) Post termination assistance: Grantees shall notify appropriate local ES/JS offices regarding enrollee status, in advance of the end of the enrollment period or upon termination, and shall, to the extent feasible, assist the enrollee in making contact with ES/JS or other organizations to enhance the possibilities for placement.

§ 32.5 Administrative requirements.

(a) The Governor in each State shall designate the State agency having program administration responsibility as the recipient YACC grantee. The non-Federal component of YACC in each State will be carried out by the designated agency. Other State agencies, lower tier governmental organizations, units of local government, any public agency or organization or any private nonprofit agency or organization which has been in operation at least 2 years, may apply to the designated State agency for a YACC sub-grant or contract.

(b) At least 25 percent of the enrollees in each State YACC program must be residential by September 30, 1978. However, the Secretaries may waive this residential requirement where State funding allocations provide for minimum enrollment numbers. Cost per enrollee limitations imposed on Interior and Forest Service in the total program will also be applicable to Grantee programs; limitation information will be furnished through planning advice to Grantees.

(c) All grantee camp/project site selections/locations shall be approved by Interior and Forest Service through their Regional/Area Offices.

(d) Federal Management Circular (FMC) 74–4 and Office of Management and Budget Circular (OMB) A–102 (formerly FMC 74–7) are applicable to all grants, agreements, and contracts entered into under this part. Copies of these documents can be obtained through any of the several regional offices of the Secretaries.

(e) Grantees shall establish procedures to insure that operational directives, guidelines, controls, and records, including appropriate and sufficient enrollee records, are established, promulgated, and maintained, in accordance with established policies and procedures contained herein and consistent with the requirements in Attachment C to OMB Circular A–102.

(f) ''Request for advance or reimbursement'' as outlined in Attachment H to OMB Circular A–102 will be used to obtain advance funding or for reimbursement. Advances are limited to 30-day needs and may not be made before approval of the grant application.

(g) Except where specifically excluded in Circulars 74–4 and A–102, grantees shall impose the requirements of this part on all State and local government subgrantees and contractors. Grantees are responsible for administering their subgrants and contracts under these guidelines, and shall make a periodic review of all non-Federal YACC projects under its administrative control during each operating year.

§ 32.6 Request for grant.

(a) All States will be given an opportunity to participate in the program. Thirty percent of each appropriation will be allocated among the States on the basis of total youth population as defined in § 32.2(o) of this part.

(b) States may apply for grants under the program in accordance with Attachment M of OMB Circular A–102.

Forms and instructions may be obtained from either Forest Service or Interior Regional/Area locations throughout the country.

(c) The Grantee shall submit a consolidated application for all YACC projects included in its program.

(d) Allocated grant funds not needed by a State may be reallocated to another State at the discretion of the Secretaries. The Secretaries may choose to reallocate such funds to any one or several of the applicants in order to maximize employment. Section 32.9 of this part shall also apply to fund reallocation.

(e) The Secretaries have designated officials at their respective Regional/Area Offices to receive and approve State applications for YACC grants. These officials must jointly act on all applications and will furnish technical assistance and advice concerning all YACC program matters. The names and addresses of these designated Federal officials will be furnished to each State.

(f) The initial YACC State Grant Program year shall be from April 1, 1978, to March 31, 1979. Program years beginning in FY 79 will be consistent with the Federal fiscal year (October 1 to September 30).

§ 32.7 Application format, instructions, and guidelines.

Grant Applications will be made using the Office of Management and Budget approved form entitled ''Application for Federal Assistance'' (short form)—Attachment M. Exhibit M–5 of OMB Circular A–102, Uniform Administrative Requirements for Grants-in-Aid to States and Local Governments. The application form consists of 4 parts. The application shall be prepared in accordance with Attachment M and the following supplemental criteria:

(a) Part III—Program Narrative Statement. Complete a consolidated description of all Grant projects summarizing all Grantee, Sub-grantees, and Contractor projects.

Complete a separate profile for each project location and each residential or non-residential project which will include the following information:

Name of Grantee, Sub-grantee or Contractor for each project.

Type project—Residential or Nonresidential.

The name of the Project Manager/Camp Director.

The project number—Number projects consecutively.

The name and address for the project.

The project location—Show county, nearest city or town, and State.

The land ownership class(es) benefiting from the program—State, county, municipal or other non-Federal public (identify).

The number of enrollees at full project capacity.

The planned start-up date.

The type of work enrollees will engage in—State the primary mission of the project, brief explanation of units of expected accomplishments and any hazards that might be encountered.

The staff—Show official position titles, the tour of duty days and hours, and a brief description of the duties and/or responsibilities for all project staff.

Health and safety—A statement as to the project's conformance to health and safety policies and procedures which are consistent with the standards set forth in the Secretaries' Regulations.

(b) Priority should be given to project proposals according to the following general work categories.

(1) Conservation projects which protect or expand the availability of natural resources and/or enhance the care and use thereof.

(2) Projects designed for general sanitation, clean-up maintenance and/or improvements.

§ 32.8 Program reporting requirements.

Grantees shall submit the following reports to the Secretaries quarterly within 15 days after the end of December, March, June, and September. In addition, a final report is required within 60 days from the end of each grant period. Forms for completing the reports will be supplied to the grantee at time of grant award. The required reports are:

(a) Quarterly Financial and Program Progress Reports: (1) *Financial Status*. Grantees shall submit a quarterly accrual basis ''Financial Status Report'' and a final report.

(2) *Enrollee Characteristics and Program Progress*. Based on the payroll data system, Administrative Service Center (ASC) provides a quarterly summary of enrollee characteristics and

program progress to Forest Service, Departments of the Interior, and Labor within 15 days of the end of the quarter. For States not using the ASC, the same data is required to be submitted to the ASC. All States shall submit the required final report.

(b) ''YACC Work Accomplishment'' (YACC Form 5): The purpose of this form is to provide program data such as enrollee man-years worked and quantity of work accomplished as expressed in normal units of measure. Instructions regarding this report will accompany the form.

(c) The reporting requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

§ 32.9 Consideration and criteria for awarding grants.

(a) The decision by the Secretaries' designated officials for award of YACC grants will consider the following:

(1) Amount of grant funds appropriated and available.

(2) The total youth population ages 16 to 23, inclusive, in each State in relation to the total for all States.

(3) The ability of State agencies to operate at the funding level provided in any given Federal fiscal year.

(4) The quality of each proposed project in terms of meeting program objectives as reflected in each application. After the initial grant year, actual performance of the Grantee in administering the YACC program in prior years will be considered.

(5) The cost to the Federal Government of the State program in relation to the quality and quantity of projects proposed.

(6) The following imposed limitations: (i) National average cost per enrollee, (ii) Percent in residential program.

(7) The capability and past performance by Grantees in meeting their responsibilities as required by FMC 74–4 and OMB Circular A–102.

(8) Project Location Approval. Each project location will be approved by Forest Service and Interior through their Regional/Area Offices.

(b) The demonstrated capability of the Grantee to establish and implement an effective mechanism to assure equal employment opportunity in staff hiring by the Grantee or any subgrantees will be considered prior to award. If the Grantee's performance is found to be so unsatisfactory or inadequate as to warrant denial, suspension, modification or termination, then appropriate action will be taken in accordance with the regulations implementing title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d.

PART 33—ALLOCATION OF DUTY-FREE WATCHES FROM THE VIRGIN ISLANDS, GUAM, AND AMERICAN SAMOA [NOTE]

NOTE: Public Law 89–805 (19 U.S.C. 1202) authorizes the Secretary of the Interior and the Secretary of Commerce to issue joint regulations governing the allocation of duty-free quotas for watches and watch movements assembled in the Virgin Islands, Guam, and American Samoa. For the text of these joint regulations, see 15 CFR part 303, published at 42 FR 62907, Dec. 14, 1977, and revised at 49 FR 17740, Apr. 25, 1984.

PART 34—REQUIREMENTS FOR EQUAL OPPORTUNITY DURING CONSTRUCTION AND OPERATION OF THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

Sec.

34.1 Statement of purpose.
34.2 Applicability.
34.3 Definitions.
34.4 Discrimination prohibited.
34.5 Assurances.
34.6 Equal opportunity clause.
34.7 Incorporation by operation of law.
34.8 Affirmative action plans.
34.9 Compliance reporting.
34.10 Compliance reviews.
34.11 Enforcement sanctions.

AUTHORITY: Sec. 17, Pub. L. 94–586, 15 U.S.C. 719 (1976).

SOURCE: 45 FR 31104, May 12, 1980, unless otherwise noted.

§ 34.1 Statement of purpose.

The purpose of these regulations is to implement both section 17 of the ANGTA and Condition 11 of the President's *Decision*.

§ 34.2 Applicability.

These regulations apply to all activities including, but not limited to, contracting for goods and services, employment, and any other benefits that flow from activities conducted under permits, rights-of-way, public land orders, and other Federal authorizations granted or issued pursuant to ANGTA, by recipients of those authorizations, their agents, contractors, and subcontractors, including labor unions or other persons.

§ 34.3 Definitions.

(a) As used in this part, the term, *ANGTA* means the Alaska Natural Gas Transportation Act of 1976, Public Law 94–586, 15 U.S.C. 719.

(b) *ANGTS* means the Alaska Natural Gas Transportation System as designated and described in the President's *Decision and Report to Congress on the Alaska Natural Gas Transportation System,* September 1977, pursuant to section 7(a) of ANGTA, S.J. Res. 82, 91 Stat. 1268 (1977).

(c) The term *affirmative action plan* means a statement of those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal opportunity in employment, procurement, and the provision of services, financial aid or other benefits, and includes goals for achieving equal opportunity and a description of specific result-oriented procedures to which the recipient, contractor or subcontractor commits itself to apply a good faith effort in order to achieve the goals.

(d) The term *applicant* means a person who has applied for and is seeking Federal authorization under ANGTA to construct and operate the ANGTS, but has not received or been denied the authorization sought.

(e) The term *contract* means any agreement or arrangement (in which the parties do not stand in the relationship of employer and employee) between a recipient or an applicant and any person for the furnishing of supplies or services to a recipient or applicant, or for the use of real or personal property including lease arrangements by a recipient or applicant. The term contract also includes any agreement or arrangement, whether oral or written, express or implied, between two persons and which is related in any way to the activities conducted under any certificate, permit, right-of-way, lease or other Federal authorization granted or issued pursuant to ANGTA, or in any way connected with ANGTS.

(f) The term *contractor* means a person who is a party to a contract with a recipient or an applicant.

(g) The term *discrimination* means an action or a failure to act which has the effect or would tend to have the effect of excluding a person from participation, denying a person benefits, subjecting a person to unequal treatment, or harassing a person because of and on the basis of race, creed, color, national origin or sex.

(h) The term *Federal Inspector* means the official appointed by the President pursuant to section 7(a)(5) of ANGTA to coordinate governmental actions with respect to ANGTS, including the monitoring and enforcement of the terms and conditions attached to government authorizations issued under ANGTA. The term also includes authorized representatives of the Federal Inspector.

(i) The term *female business enterprise* (FBE) means a sole proprietorship, partnership, unincorporated association, joint venture or corporation that is owned and controlled by women. To qualify as an enterprise owned and controlled by women, 51% of the beneficial ownership interests and 51% of the voting interests must be held and actually voted by women. Further, the enterprise must in fact be controlled and managed by women.

(j) The terms *minority* and *minority groups* include:

(1) Black, all persons having origins in any of the Black African racial groups not of Hispanic origin;

(2) Hispanic, all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin regardless of race;

(3) Asian and Pacific Islander, all persons having origins in any of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands including persons having origin, for example, in China, India, Japan, Korea, the Philippine Islands, Samoa; and

(4) American Indian or Alaskan Native, all persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification.

(k) The term *minority business enterprise* (MBE) means a sole proprietorship, partnership, unincorporated association, joint venture or corporation that is owned and controlled by minorities. To qualify as an enterprise owned and controlled by minorities, 51% of the beneficial ownership interest and 51% of the voting interests must be held and actually voted by minority people. Further, the enterprise must in fact be controlled and managed by minority people.

(l) The term *person* includes recipients, contractors, subcontractors, governmental agencies, corporations, associations, firms, partnerships, joint stock companies, labor unions, employment agencies, and individuals.

(m) The term *President's Decision* means the President's *Decison and Report to Congress on the Alaska Natural Gas Transportation System*, September 1977, pursuant to section 7(a) of ANGTA, approved and adopted S.J. Res. 82, 91 Stat. 1268 (1977).

(n) The term *procurement* means the acquisition (and directly related matters) of personal property and nonpersonal services (including construction) by such means as purchasing, renting, leasing, (including real property) contracting, or bartering, but not by condemnation or donation.

(o) The term *procurement practice* means any course of conduct or activity taken to effect procurement.

(p) The term *recipient* means any corporation association, joint stock company, partnership, firm, agency or individual who receives a certificate, permit, right-of-way, lease, or other Federal authorization granted or issued under ANGTA to construct and operate the ANGTS, whether directly or through another recipient including any successor, assignee or transferee thereof.

(q) The term *subcontract* means any agreement or arrangement between a contractor and any person, regardless of tier, (in which the parties do not stand in the relationship of employer and employee) in any way related to the performance of any one or more contracts as defined above.

(r) The term *vendor* means a person who sells or provides goods or services for the construction and operation of ANGTS. A vendor may be a contractor or subcontractor.

§ 34.4 Discrimination prohibited.

(a) *General.* No person shall, on the grounds of race, creed, color, national origin, or sex, be discriminated against or excluded from receiving any benefit from or participating in any activity conducted under any certificates, permits, rights-of-way, leases, and other Federal authorizations to which this part applies.

(b) *Specific actions in which discrimination is prohibited.* No person shall directly or through contractural or other arrangements, discriminate in any activity to which this part applies, including the following:

(1)(i) Employment policies and practices of employers, including advertising, hiring or firing, up-grading, promotion, or demotion, transfer, layoff, or termination, rates of pay, and other forms of compensation or benefits, or other terms and conditions of employment;

(ii) Employment policies and practices of labor unions, including, acceptance of applications for membership, enrolling or expelling members, classification of members, referrals for employment, training and apprenticeship programs, and the provision of other benefits of membership;

(iii) Employment policies and practices of employment agencies including acceptance of applications for employment services, referrals for employment, classification of individuals for employment, and the provision of other benefits and services.

(2) Procurement practices, including manner of procurement, qualification for contracting or placement on procurement source lists, the composition of sources solicited, the use of pre-bid conferences, solicitation for proposals or bids, the designation of quantities, delivery schedules or other specifications, selection procedures, or performance standards.

(3) The provision of services, financial aid and other benefits provided in whole or in part, under any Federal authorization to which this part applies, more specifically including actions that result in the:

(i) Denial to an individual or establishment of any service, financial aid, or other benefits;

(ii) Provision of any service, financial aid, or other benefit to an individual, or establishment which is different, or is provided in a different manner, from that provided to others;

(iii) Subjection of an individual to segregation or separate treatment in any matter related to the receipt of any service, financial aid, or other benefits;

(iv) Restriction of an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit;

(v) Treatment of an individual that is different from others in the determination of any admission, enrollment, eligibility, membership requirements or other conditions which individuals must meet in order to be provided any service, financial aid, or other benefit;

(vi) Denial to an individual of an opportunity to participate in any activity that is different from that afforded others;

(vii) Denial to an individual of the opportunity to participate as a member of any planning or advisory body that participates in the provision of any service, financial aid, or other benefit;

(viii) Use of criteria or methods of administration which have the effect of subjecting individuals or establishments to discrimination in the determination of the types of services, financial aid, or other benefits, or the facilities that will be provided; or the class of individuals or establishments to which, or the situation in which, such services, financial aids, other benefits, or facilities will be provided; or the class of individuals or establishments to be provided an opportunity to participate in any activity; and

(ix) Selection of a site or location for facilities for the provision of services, financial aid, or other benefits, with the purpose or effect of substantially impairing the objectives of section 17, the President's *Decision*, and implementing rules, regulations, and orders.

(c) *Scope of prohibited discrimination.* (1) The enumeration of specific forms of prohibited discrimination in paragraph (b) of this section does not limit the general prohibition in paragraph (b) of this section.

(2) Action taken in compliance with an affirmative action plan developed pursuant to these regulations shall not be deemed a violation of this section.

§ 34.5 Assurances.

Every application for a certificate, permit, right-of-way, lease, public land order, or other Federal authorization to which this part applies, filed after the effective date of these regulations, and every contract covered hereunder to provide goods, services, or facilities in the amount of $10,000 or more to a recipient, contractor, or subcontractor to which this Part applies, must contain an assurance that the recipient, contractor, or subcontractor does not and will not maintain any segregated facilities, and that all requirements imposed by or pursuant to section 17, Condition 11 of the President's *Decision* and implementing rules, regulations, and orders shall be met, and that it will require a similar assurance in every subcontract of $10,000 or more.

§ 34.6 Equal opportunity clause.

Each certificate, permit, right-of-way, lease, or other Federal authorization to which this part applies, shall include the following Equal Opportunity Clause:

(a) The recipient, contractor, or subcontractor hereby agrees that it will not discriminate directly or indirectly against any individual or establishment in offering or providing procurements, employment, services, financial aid, other benefits, or other activities to which these regulations apply. The recipient, contractor, or subcontractor will take affirmative action to utilize business enterprises owned and controlled by minorities and/or women in its procurement practices; to assure that applicants for employment are employed, and that employees are treated during employment, without discrimination on the basis of race, creed, color, national origin, or sex;

and to assure that individuals and establishments are offered and provided services, financial aid, and other benefits without discrimination on the basis of race, creed, color, national origin, or sex. The recipient, contractor, or subcontractor agrees to post in conspicuous places available to contractors, subcontractors, employees, and other interested individuals, notices which set forth these equal opportunity terms; and to notify interested individuals, such as bidders, contractors, purchasers, and labor unions or representatives of workers with whom it has collective bargaining agreements, of its obligations under section 17, Condition 11 of the President's *Decision,* and the implementing rules, regulations, and orders thereunder;

(b) The recipient, contractor, or subcontractor will comply with all rules, regulations, and orders which implement section 17 and Condition 11 of the President's *Decision*;

(c) The recipient, contractor, or subcontractor will furnish all information and reports required by or pursuant to rules, regulations, and orders implementing section 17 and Condition 11 of the President's *Decision,* and will permit access to its facilities, books, records, and accounts by the Federal Inspector for purposes of ascertaining compliance with such rules, regulations, and orders;

(d) In the event of a recipient's, contractor's, or subcontractor's noncompliance with these equal opportunity terms, compliance may be effected through procedures authorized by ANGTA and set forth in implementing rules, regulations, and orders, or by any other means authorized by law;

(e) The recipient, contractor, or subcontractor will include the provisions of paragraphs (a) to (e) of this section in all agreements to assign authorizations, all contracts over $10,000, and all contracts of indefinite quantity, unless there is reason to believe that the amount to be ordered in any year under the contract will not exceed $10,000. The recipient, contractor, or subcontractor will take such action with respect to any contract or purchase order that the Federal Inspector may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event the recipient, contractor, or subcontractor becomes involved in or is threatened with litigation with a subcontractor or vendor, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(f) Any project labor agreement which may be entered into between the applicants and any union must be consistent with the provisions of these regulations and must contain an Equal Opportunity Clause.

§ 34.7 Incorporation by operation of law.

(a) The Equal Opportunity Clause shall be deemed incorporated into every Federal authorization, agreement to assign an authorization, contract and subcontract where § 34.6(e) of these regulations requires the inclusion of such a clause whether or not the clause is physically incorporated in such Federal authorization, agreement to assign authorization, contract or subcontract, and whether or not the agreement or contract is written.

(b) The affirmative action plans prepared pursuant to this part shall be deemed incorporated into the Federal authorizations, contracts, and subcontracts to which these regulations apply.

§ 34.8 Affirmative action plans.

(a)(1) Within one hundred and twenty (120) days after the effective date of this part, applicants or recipients shall have an acceptable affirmative action plan which has been approved by the Federal Inspector pursuant to paragraph (d) of this section and which conforms to the requirements of paragraph (c) of this section. The affirmative action plan must set forth overall goals and timetables for the employment of minorities and women and the utilization of MBE's and FBE's in the construction and operation of the applicant's or recipient's segment of the Alaska Natural Gas Transportation System. The approved goals and timetables shall be published in accordance with paragraph (d)(4) of this section

and included in contract bid specifications in accordance with paragraph (b)(1) of this section.

(2) Each contractor and subcontractor with fifty (50) or more employees and with a contract of $1,000,000 or more that is in effect on the effective date of this part shall, within one hundred and fifty (150) days after the effective date of this part, submit an affirmative action plan to the Federal Inspector for approval pursuant to paragraph (d) of this section. All contractors and subcontractors, with fifty (50) or more employees, which are awarded contracts for $1,000,000 or more after the effective date of this part shall submit an affirmative action plan to the Federal Inspector pursuant to paragraph (d) of this section at the time the contract is awarded or 150 days after the effective date of this part, whichever is later.

(b)(1) In addition, recipients and each of their contractors and subcontractors shall require, as one of the specifications for all bids for contracts in the amount of $50,000 or more, that all bidders which have, or would have if awarded the contract, a workforce of 50 or more employees, must develop a written affirmative action plan consistent with paragraphs (c) (1) and (2) of this section prior to bidding, unless an exemption under paragraph (d)(5) of this section has been obtained by the bidder. Such a plan must apply to each of the bidder's facilities which are associated with any activities conducted pursuant to Federal authorizations to which this part applies. A summary of such plan should be included with the bid submitted to the contractor or subcontractor. The ability of the bidder to comply with these regulations shall be a factor considered in evaluating the bid. The plan must be included in the contract which is executed between the contractor or subcontractor and the bidder subject to whatever revision may be required by the Federal Inspector.

(2) The requirements of paragraph (b)(1) of this section also apply to any bidder which has previously been awarded a contract or contracts where the total amount of such contract or contracts taken together with the amount of the contract upon which the bid is to be made total $50,000 or more and the bidder has a workforce of 50 or more employees.

(3) All bidders for contracts of $150,000 or more must develop a written affirmative action plan under paragraph (c)(3) of this section regarding procurement and contracting practices. All such plans developed under paragraph (c)(3) of this section must be submitted to the Federal Inspector for approval at the time the contract is awarded.

(c) An acceptable affirmative action plan must include an analysis of all areas of operation of the recipient, contractor, or subcontractor in which it could be deficient in offering services, opportunities, or benefits to minority groups and women, all areas of employment in which it could be deficient in the utilization of minority groups and women, and all areas of procurement in which it could be deficient in the utilization of MBE's and FBE's; and, further, the plan must include specific goals and specific timetables to which the recipient, contractor, or subcontractor will direct its best efforts and undertake specific action to correct all deficiencies, and to materially increase the participation of minorities and women in all aspects of its operation. Such plans shall be updated annually.

In addition, the affirmative action plan shall include the following:

(1) *Services, financial aid, and other benefits*. The recipient, contractor, or subcontractor is required to specifically address and analyze all areas of its operation in which services, financial aid, and other benefits are offered or provided at each of its facilities to which this part applies. The analysis should include:

(i) An identification of services, financial aid, and other benefits that the recipient, contractor or subcontractor provides or may provide;

(ii) A description of the population eligible to be served or to participate, by race, color, national origin, and sex;

(iii) An identification of specific actions that will be taken to assure that no discrimination occurs in providing services, financial aid, and other benefits;

(iv) If relevant, the location of all existing or proposed facilities connected

with the services, financial aid, or other benefits, as well as related information adequate for determining whether the location has or could have the effect of denying access to any individual on the basis of prohibited discrimination;

(v) Where relocation of facilities is involved, the steps that will be taken to guard against adverse socioeconomic effects on individuals on the basis of race, color, creed, national origin, or sex;

(vi) Information on all areas of the recipient's, contractor's, or subcontractor's operations that require change to assure that specific actions prohibited in paragraph (b)(3) of this section do not occur in the provision of any of its services, financial aid, or benefits;

(vii) A monitoring system to assure that no discrimination occurs.

(2) *Employment practices.* (i) The affirmative action plan shall address all aspects of employment in construction and non-construction operations and shall contain the analysis and commitments which are required in regulations promulgated by the Department of Labor pursuant to Executive Order 11246, specifically, those at 41 CFR 60–4.3(a)(7), (13), and (14) for the employment of construction employees, and those at 41 CFR 60–2.21, 60–2.22, 60–2.24, 60–2.26 for the employment of non-construction employees.

(ii)(A) The affirmative action plan of the applicants or recipients shall contain goals and timetables applicable to each segment of the ANGTS, employing the method of analysis set forth at 41 CFR 60–2.11(b). In developing goals the standards set out at 41 CFR 60–2.12(a)–(j) should be followed as well as the specific guidelines set forth below:

(*1*) Current national statistics, such as those available from the U.S. Bureau of the Census, should be used to determine the available minority and female workforce populations unless it can be shown that a particular part of the project can be reasonably expected to draw labor only from a small area. If such a showing is made then statistics from such smaller area shall be employed in setting goals for that part of the project.

(*2*) Goals should be set separately for each minority group, as set out in paragraph (j) of this section, and for women, by each job group.

(*3*) Goals should be set in proportion to the group's general availability in the population taking into consideration

(*i*) The number of group members currently available in that job group,

(*ii*) The reason members of the group are not available in that job group in proportion to their existence in the general population, and

(*iii*) The degree to which the provision of training could be expected to increase the availability of the group's members in the particular job group within the time available.

(B) The affirmative action plan of each contractor and subcontractor shall contain goals and timetables based upon the overall goals and timetables set by the applicant or recipient for the segment of the ANGTS upon which the contractor or subcontractor will work.

(iii) It shall not be a violation of this part for a recipient, contractor or subcontractor to extend a preference in employment consistent with 41 CFR 60–2.12(j). For the purpose of this section the term ''reservation'' in Alaska shall be the same as in 25 CFR 80.1, 91.1, and 93.1.[1]

(3) *Procurement and contracting practices.* (i) Applicants or recipients and each of their contractors and subcontractors with contracts of $150,000 or more shall develop for the Federal Inspector's approval an affirmative action plan that identifies specific actions which the applicant or recipient, contractor or subcontractor, will take to afford MBE's and FBE's the maximum practicable opportunity to participate in the construction and operation of ANGTS.

(ii) The affirmative action plan of the applicant or recipient shall contain specific dollar goals set separately for MBE's and FBE's, and timetables for achieving these goals. The applicant's or recipient's goals and timetables shall be applicable to all procurement

[1] EDITORIAL NOTE: In the March 30, 1982, FEDERAL REGISTER, these sections were redesignated as 25 CFR 286.1, 101.1, and 103.1, respectively.

and contracting on its respective segment of the ANGTS. In setting goals the following factors should be considered:

(A) The availability and capability of existing MBE's and FBE's in each procurement and contracting area;

(B) The anticipated levels of procurement and contracting activities;

(C) The extent to which procurement and contracting procedures can be amended to utilize contract breakouts and other methods, as described in paragraph (c)(3)(iii)(D)(*2*) of this section, to increase opportunities for MBE's and FBE's;

(D) The extent to which new firms can be organized and the capability of existing firms expanded either through the efforts of the applicant or recipient and its contractors and subcontractors or through the efforts of government or other organizations and institutions.

(iii) Affirmative action plans developed and submitted pursuant to paragraph (c)(3)(i) of this section shall contain the following elements:

(A) An in-depth analysis of all areas of procurement and contracting procedures to determine if these procedures offer maximum opportunity for the utilization of MBE's and FBE's. All deficiencies must be identified along with steps that will be taken to correct them.

(B) A description of all contracting opportunities to be offered in the succeeding year, or for such longer period of time for which projections are available. The plan shall identify the types of services and supplies for which contracts are to be let, with as much specificity as possible, indicating the anticipated dollar amounts of such contracts.

(C) Specific dollar goals for MBE's and FBE's and timetables for achieving such goals based upon the overall goals and timetables set by the applicant or recipient for the segment of ANGTS upon which the contractor or subcontractor will work.

(D) A description of all actions that will be taken to provide the maximum practicable opportunity for MBE's and FBE's to participate in the construction and operation of the ANGTS including the following:

(*1*) The appointment of a liaison officer who will administer the MBE and FBE program, the identification of that officer, and a description of the officer's duties and authority;

(*2*) Identification of steps that will be taken to insure timely and full consideration of MBE's and FBE's in all procurement and contracting decisions, and the identification of how those procedures will be implemented. This shall include procedures relevant to (*i*) the arrangement of solicitations, (*ii*) time for preparation of bids, (*iii*) quantity requirements, (*iv*) determination of specifications, (*v*) determination of delivery schedules, (*vi*) the determination of the manner of contracting, and (*vii*) breaking out contracts into smaller subcontracts;

(*3*) An identification of contracting arrangements that will be adopted to increase the use of MBE's and FBE's, including analysis of the circumstances in which and the extent to which the following types of contracting practices can be used: (*i*) Noncompetitive contracting, (*ii*) contracting based upon competition between a limited number of enterprises, and (*iii*) negotiated contracts;

(*4*) Specific procedures for identifying capable MBE's and FBE's and for the dissemination of information on business opportunities and procurement practices to minority and women's business organizations and associations, in sufficient detail, and affording sufficient time, to offer full opportunities for participation by MBE's and FBE's;

(*5*) An identification of financial assistance, such as investment in Minority Enterprise Small Business Investment Companies (MESBIC) and direct investment in MBE's and FBE's, that the recipient, contractor, or subcontractor determines to be feasible and financially appropriate to offer MBE's and FBE's;

(*6*) The identification and elimination of non-essential technical requirements and procedures, including non-essential bonding and insurance requirements;

(*7*) Holding regularly scheduled meetings with procurement and contracting officials of the recipient, contractor, or

subcontractor to explain MBE and FBE policies and procedures;

(*8*) Identification of specific procedures for certifying and verifying ownership and control of companies identified as MBE's and FBE's. The plan shall include the requirements that firms submit affidavits as to their status as MBE's and FBE's as defined in § 34.3.

(E) As an integral part of the affirmative action plan, develop and maintain separate source listings of MBE's and FBE's. Such lists or files should contain whenever possible the following information on each company:

(*1*) A description of each business, including the type of organization,

(*2*) The product or service offered,

(*3*) Information on ownership and control,

(*4*) All relevant data and affidavits which establish that the enterprise is in fact owned, controlled, and managed by minorities and/or women.

(4) *Complaint system for affirmative action plans.* (i) The affirmative action plan must include a grievance mechanism for resolving disputes arising from the implementation of the plan.

(ii) A copy of all complaints, related records, and specific resolutions must be maintained.

(5) *Data to support affirmative action plans and access to plans.* (i) Data supporting the analyses and plans required by these regulations shall be compiled and maintained as part of the affirmative action plan.

(ii) Copies of the affirmative action plan and supporting data shall be made available to the Federal Inspector upon his request as may be appropriate for the fulfillment of the Inspector's responsibilities under these regulations.

(d) *Review of affirmative action plan.* (1) Applicants and their contractors and subcontractors which are required by paragraphs (a) and (b) of this section to submit affirmative action plans to the Federal Inspector for approval shall provide the Federal Inspector with the following information at the time the affirmative action plan is submitted:

(i) A brief description of pending applications to any Federal agency for Federal financial assistance or the award of a government contract, as well as any Federal assistance being received, or any government contracts or subcontracts being performed;

(ii) Whether the applicant, contractor, or subcontractor has been the subject of a compliance review conducted by the Department of Labor pursuant to 41 CFR part 60–1 within the preceding twelve months;

(iii) Whether any Federal, State or local government agency has found the applicant, contractor, or subcontractor in non-compliance or has found reasonable cause to believe the applicant, contractor, or subcontractor is in violation of, or in non-conpliance with, any civil rights requirements;

(iv) A description of the methods by which the applicant, contractor, or subcontractor will insure that its contractors and subcontractors comply with the provisions of the affirmative action plans during the term of the contracts;

(2) The Federal Inspector shall consider conducting an on-site review before the award of any Federal authorizations, agreements to assign Federal authorizations, contracts or subcontracts under which substantial employment or procurement opportunities will be offered;

(3) The Federal Inspector will determine whether the affirmative action plans are adequate. If deficiencies are found to exist in a plan, the recipient, contractor, or subcontractor shall correct the deficiencies in consultation with the Federal Inspector. If deficiencies are not corrected to the satisfaction of the Federal Inspector, the Inspector may enforce compliance with this section through measures authorized by ANGTA or any other provision of law.

(4) Upon approval of the affirmative action plan—including the goals and timetables—of the applicants or recipients, the Federal Inspector shall publicize the goals and timetables which are approved for each segment. Notice should be sent to all parties who submitted comments to the Department of the Interior in response to the Notice of Proposed Rulemaking issued about these regulations on October 12, 1979 (44 FR 59096).

(5) The Federal Inspector may, upon request, grant exemptions from the requirements of paragraph (b) of this section to any bidder which can demonstrate that no significant employment opportunities will result from an award of a contract to the bidder.

§ 34.9 Compliance reporting.

(a) *Records, reports, and access to books.* Each recipient, contractor, or subcontractor to which these regulations apply shall submit to the Federal Inspector reports in the form and manner that the Federal Inspector determines to be necessary to insure compliance with the rules, regulations, and orders implementing section 17 and Condition 11 of the President's *Decision.*

(b) *Access to sources of information.* Each person to whom this part applies shall permit access by the Federal Inspector during normal business hours to books, records, accounts, and other sources of information, and to facilities, as the Federal Inspector determines to be necessary to insure compliance with the rules, regulations, and orders implementing section 17 and the President's *Decision.*

(c) *Failure to submit reports.* Failure to file timely, complete, and accurate reports, or failure to permit access to sources of information as required constitutes non-compliance with the Equal Opportunity Clause and with these regulations and, therefore, constitutes grounds for action by the Federal Inspector, recipient, contractor, or subcontractor to enforce compliance or levy sanctions as authorized by ANGTA, by the implementing rules, regulations, and orders thereunder, by contractual agreement, or by any other means authorized by law.

(d) *Information for beneficiaries and participants.* Each recipient or other entity required to develop an affirmative action plan pursuant to these regulations shall make the plan available for inspection by employees, participants, beneficiaries, local, State, and Federal government officials, and members of the public upon request. A copy of the plan shall be maintained at each place of employment, and a notice posted at each such place to advise employees and members of the public that the plan is available for inspection upon request.

§ 34.10 Compliance reviews.

(a) *Periodic compliance procedures.* (1) The Federal Inspector will review the practices of recipients, contractors, or subcontractors, which offer significant opportunities for employment or procurement, to determine whether such recipient, contractor, or subcontractor are complying with its affirmative action plans and the rules, regulations, and orders implementing section 17 and Condition 11 of the President's *Decision.* The review will consist of a comprehensive analysis of all aspects of the recipient's, contractor's, or subcontractor's operations and practices and the conditions resulting therefrom. The review will include an on-site visit if the Federal Inspector determines that such a review is necessary.

(2) The Federal Inspector will continually monitor and verify the status of MBE's and FBE's through procedures as the Inspector may determine appropriate.

(b) *Complaints.* (1) Complaints alleging discrimination or non-compliance with affirmative action plans shall be filed with the Federal Inspector.

(2) A complaint must be filed within 180 days from the date of the alleged discrimination, unless the time for filing is extended by the Federal Inspector for good cause shown.

(3) The complaint should include the name, address, and telephone number of the complainant; the name and address of the person alleged to have discriminated; a description of the alleged discriminatory acts; and any other pertinent information which will assist the investigation and resolution of the complaint. The complaint should be signed by the complainant or his or her authorized representative.

(4) The filing of a complaint with the Federal Inspector shall not constitute the filing of a complaint pursuant to title VII of the Civil Rights Act of 1964 with the Equal Opportunity Commission unless, by agreement between the two agencies, the Federal Inspector and the Equal Employment Opportunity Commission so provide.

(c) *Investigations.* The Federal Inspector will make a prompt investigation

whenever information indicates that a person may have failed to comply with section 17 or Condition 11 of the President's *Decision* or the implementing rules, regulations, or orders thereunder. The investigation should include, where appropriate, a review of the pertinent practices and policies of the person under investigation, the circumstances under which the possible noncompliance occurred, and other factors relevant to determine whether the person has failed to comply with section 17, Condition 11 of the President's *Decision*, or the implementing rules, regulations, and orders thereunder.

(d) *Resolution of complaints and investigations*. (1) In exercising the broad authority to enforce these regulations, the Federal Inspector shall, within 90 days of the effective date of these regulations, establish the procedures to be followed in enforcing these regulations. These regulations shall thereafter be amended to incorporate these procedures. The procedures shall, to the extent consistent with ANGTA, be similar to those proposed to be adopted by the Department of Energy to resolve complaints of violations of title VI of the Civil Rights Act of 1964. See regulations proposed to be codified at 10 CFR 1040.104, (Nov. 16, 1978). At a minimum the procedures must incorporate the following paragraphs (d) (2) through (5) of this section.

(2) The Federal Inspector will initiate action upon all complaints within 35 days of the date the complaint is filed with the Federal Inspector.

(3) If an investigation pursuant to paragraphs (a) through (c) of this section indicates probable non-compliance with section 17, Condition 11 of the President's *Decision*, or the implementing rules, regulations, or orders thereunder, the Federal Inspector will attempt to resolve the matter by informal methods of conference, conciliation, and persuasion.

(4) Resolution shall be effected through a written agreement between the Federal Inspector, the complainant, if any, and the person who has failed to comply. The agreement shall contain commitments to promptly eliminate all discriminatory conditions, shall identify the precise remedial actions to be taken and dates for completion of remedial actions, and shall include a provision that breath of the agreement may result in further enforcement actions by the Federal Inspector. The Federal Inspector will then certify compliance, on condition that the commitments are kept. Such certification will not preclude a subsequent determination by the Federal Inspector that the full facts were not known at the time agreement was executed, or the commitments undertaken are not sufficient to correct deficiencies.

(5) If the Federal Inspector's investigation does not warrant enforcement action, the Federal Inspector shall so inform the complainant, if any, and the person who was investigated. The complainant shall also be notified of any action taken including the achievement of voluntary compliance.

(6) Between the period of these effective dates of these regulations and the effective date of the enforcement procedures established by the Federal Inspector, pursuant to paragraph (d)(1) of this section, the Federal Inspector shall at a minimum adhere to paragraphs (d)(2) through (5) of this section.

(e) *Acts of intimidation or retaliation prohibited*. No person shall intimidate, threaten, coerce, harass, or retaliate against any individual for the purpose of interfering with any right or privilege secured by section 17, Condition 11 the President's *Decision*, and implementing rules, regulations, orders, because such individual has opposed a practice prohibited by section 17 or by this part, made a complaint, testified, assisted in, benefited from, or participated in any manner in an investigation, compliance review, proceeding or hearing, conducted pursuant to these regulations. The identity of complainants may be kept confidential except to the extent necessary to carry out the purpose of this part, including investigatory actions, hearings, or judicial proceedings.

§ 34.11 Enforcement sanctions.

The provisions of section 17, the President's *Decision*, and implementing rules, regulations, and orders, as appropriate, will be enforced through:

(a) The issuance of a compliance order by the Federal Inspector pursuant to section 11 of ANGTA; or

(b) The commencement of a civil action for appropriate relief, including a permanent or temporary injunction, or a civil penalty not to exceed $25,000 per day; or

(c) By any other means authorized by law.

PART 35—ADMINISTRATIVE REMEDIES FOR FRAUDULENT CLAIMS AND STATEMENTS

Sec.
35.1 Basis and purpose.
35.2 Definitions.
35.3 Basis for civil penalties and assessments.
35.4 Investigation.
35.5 Review by reviewing official.
35.6 Prerequisites for issuing a complaint.
35.7 Complaint.
35.8 Service of complaint.
35.9 Answer.
35.10 Default upon failure to file an answer.
35.11 Referral of complaint and answer to the ALJ.
35.12 Notice of hearing.
35.13 Parties to the hearing.
35.14 Separation of functions.
35.15 Ex parte contacts.
35.16 Disqualification of reviewing official or ALJ.
35.17 Rights of parties.
35.18 Authority of the ALJ.
35.19 Pre-hearing conferences.
35.20 Disclosure of documents.
35.21 Discovery.
35.22 Exchange of witness lists, statements and exhibits.
35.23 Subpoenas for attendance at hearing.
35.24 Protective order.
35.25 Fees.
35.26 Form, filing and service of papers.
35.27 Computation of time.
35.28 Motions.
35.29 Sanctions.
35.30 The hearing and burden of proof.
35.31 Determining the amount of penalties and assessments.
35.32 Location of hearing.
35.33 Witnesses.
35.34 Evidence.
35.35 The record.
35.36 Post-hearing briefs.
35.37 Initial decision.
35.38 Reconsideration of initial decision.
35.39 Appeal to the Secretary of the Interior.
35.40 Stays ordered by the Department of Justice.
35.41 Stay pending appeal.
35.42 Judicial review.
35.43 Collection of civil penalties and assessments.
35.44 Right to administrative offset.
35.45 Deposit in Treasury of United States.
35.46 Compromise or settlement.
35.47 Limitations.

AUTHORITY: 5 U.S.C. 301; 31 U.S.C. 3801–3812.

SOURCE: 53 FR 4160, Feb. 12, 1988, unless otherwise noted.

§ 35.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Public Law 99–509, sections 6101–6104, 100 Stat. 1874 (Oct. 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 35.2 Definitions.

As used in this part:

(a) *ALJ* means an administrative law judge in the Department of the Interior appointed pursuant to 5 U.S.C. 3105 or detailed to the Department of the Interior pursuant to 5 U.S.C. 3344.

(b) *Benefit* means, in the context of ''statement'', anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(c) *Claim* means any request, demand, or submission—

(1) Made to the Department of the Interior for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from the Department of the Interior or to a party to a contract with the Department of the Interior—

(i) For property or services if the United States—

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the Department of the Interior which has the effect of decreasing an obligation to pay or account for property, services, or money.

(d) *Complaint* means the administrative complaint served by the reviewing official on the defendant under § 35.7 of this part.

(e) *Defendant* means any person alleged in a complaint under § 35.7 to be liable for a civil penalty or assessment under § 35.3 of this part.

(f) *Department* means the Department of the Interior.

(g) *Director* means the Director of the Office of Hearings and Appeals, Office of the Secretary, who is the designee of the Secretary of the Interior authorized to consider and decide finally for the Department appeals under this part. The authority delegated to the Director includes the authority to redelegate appellate review authority to an *ad hoc* board of appeals appointed in accordance with 43 CFR 4.1(b)(4). Appeals to the Secretary under this part should be mailed or delivered to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203. Documents will be considered filed when received in the office of the Director.

(h) *Government* means the U.S. Government.

(i) *Individual* means a natural person.

(j) *Initial decision* means the written decision of the ALJ required by § 35.10 or § 35.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration

(k) *Investigating official* means the Inspector General of the Department of the Interior or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(l) *Knows or has reason to know,* means that a person, with respect to a claim or statement—

(1) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(3) Acts in reckless disregard of the truth or falsity of the claim or statement.

(m) *Makes,* wherever it appears, shall include the terms ''presents,'' ''submits,'' and ''causes to be made, presented, or submitted.'' As the context requires, ''making'' or ''made'', shall likewise include the corresponding forms of such terms.

(n) *Person* means any individual, partnership, corporation, association, or private oganization, and includes the plural of that term.

(o) *Representative* means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, or other representative meeting the qualifications of a non-attorney representative found at 43 CFR 1.3 and designated in writing.

(p) *Reviewing official* means the Solicitor of the Department of the Interior or his designated representative, who is:

(1) Not subject to supervision by, or required to report to, the investigating official; and

(2) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(q) *Secretary* means the Secretary of the Interior or his designated representative.

(r) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for)—

(i) A contract with, or a bid or proposal for a contract with; or

(ii) A grant, loan, or benefit from, the Department of the Interior, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

[53 FR 4160, Feb. 12, 1988, as amended at 67 FR 4369, Jan. 30, 2002; 67 FR 12885, Mar. 20, 2002]

§ 35.3 Basis for civil penalties and assessments.

(a) *Claims*. (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent,

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the Department, a recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or Territory, or political subdivision thereof, acting for or on behalf of the Department, recipient, or party.

(4) Each claim for property, services or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements*. (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the Department when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or Territory, or political subdivision thereof, acting for or on behalf of the Department.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 35.4 Investigation.

(a) If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit the investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of the investigating official to report violations of criminal law to the Attorney General.

§ 35.5 Review by reviewing official.

(a) If, based on the report of the investigating official under § 35.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 35.3, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 35.7 of this part.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money, or the value of property, services, or other benefits, requested or demanded in violation of § 35.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 35.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 35.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 35.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money, or the value of property or services, demanded or requested in violation of § 35.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 35.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 35.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 35.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 35.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. *Service is complete upon receipt.*

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgement of receipt by the defendant or his or her representative.

§ 35.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 35.11. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 35.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 35.9(a) of this part, the reviewing official may refer the complaint to the Office of Hearings and Appeals, Hearings Division, Department of the Interior, for assignment to an ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 35.8 of this part, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under § 35.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 35.38 of this part.

(h) The defendant may appeal the decision denying a motion to reopen by filing a notice of appeal with the Director within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the appeal is decided.

(i) If the defendant files a timely notice of appeal with the Director, the ALJ shall forward the record of the proceeding to the Director.

(j) The Director shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the Director decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the Director shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Director decides that the defendant's failure to file a timely answer is not excused, the Director shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the Director issues such decision.

§ 35.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing offical shall file the complaint and answer with the Office of Hearings and Appeals, Hearings Division, Department of the Interior, for assignment to an ALJ. The reviewing official shall include the name, address, and telephone number of a representative for the Government.

§ 35.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 35.8 of this part. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 35.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Department of the Interior.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 35.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Department who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Department, including in the offices of either the investigating official or the reviewing official.

§ 35.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 35.16 Disqualification of reviewing official or ALJ.

(a) A reviewing offical or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Director may determine the matter only as part of the review of the initial decision upon appeal, if any.

§ 35.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 35.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 35.19 Pre-hearing conferences.

(a) The ALJ may schedule pre-hearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one pre-hearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use pre-hearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a pre-hearing conference.

§ 35.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 35.4(b) of this part are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 35.5 of this part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 35.9 of this part.

§ 35.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purposes of this section and §§ 35.22 and 35.23 of this part, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery*. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 35.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 35.24 of this part.

(e) *Depositions*. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 35.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 35.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 35.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 35.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 35.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 35.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, or commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 35.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in U.S. District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Department, a check for witness fees and mileage need not accompany the subpoena.

§ 35.26 Form, filing and service of papers.

(a) *Form.* (1) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(2) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(3) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof

that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 35.8 shall be made by delivering a copy, or by placing a copy of the document in the U.S. mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 35.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 35.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a pre-hearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginnings of the hearing.

§ 35.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 35.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 35.3 of this part and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for food cause shown.

§ 35.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Director, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Director in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation.

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the Director from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 35.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 35.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 35.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 35.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 35.24.

§ 35.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Director.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 35.24 of this part.

§ 35.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 35.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 35.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 35.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Director. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Secretary, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Department and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 35.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Department and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Secretary in accordance with § 35.39 of this part.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Department and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Secretary in accordance with § 35.39 of this part.

§ 35.39 Appeal to the Secretary of the Interior.

(a) Any defendant who as filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Secretary by filing a notice of appeal with the Director in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 35.38 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Director may extend the initial 30 day period for an additional 30 days if the defendant files with the Director a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Director and the time for filing motions for reconsideration under § 35.38 of this part has expired, the ALJ shall forward the record of the proceeding to the Director.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Director.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Director shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Director that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Director shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The Director may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The Director shall promptly serve each party to the appeal with a copy of the Department's decision and a statement describing the right of any person determined to be liable for a civil penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Director serves the defendant with a copy of the Department's decision, a determination that a defendant is liable under § 35.33 of this part is final and is not subject to judicial review.

§ 35.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Secretary a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Secretary shall stay the process immediately. The Secretary may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 35.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Secretary.

(b) No administrative stay is available following a final decision of the Secretary.

§ 35.42 Judicial review.

Section 3805 of title 31, U.S. Code, authorizes judicial review by an appropriate U.S. District Court of a final decision of the Secretary imposing penalties or assessment under this part

and specifies the procedures for such review.

§ 35.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, U.S. Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 35.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 35.42 or § 35.43, or any amount agreed upon in a compromise or settlement under § 35.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 35.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 35.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The Secretary has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 35.42 or during the pendency of any action to collect penalties and assessments under § 35.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 35.42 of this part or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the Secretary, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Secretary, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 35.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 35.8 of this part within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 35.10(b) of this part shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 36—TRANSPORTATION AND UTILITY SYSTEMS IN AND ACROSS, AND ACCESS INTO, CONSERVATION SYSTEM UNITS IN ALASKA

Sec.

36.1 Applicability and scope.
36.2 Definitions.
36.3 Preapplication.
36.4 Filing of application.
36.5 Application review.
36.6 NEPA compliance and lead agency.
36.7 Decision process.
36.8 Administrative appeals.
36.9 Issuing permit.
36.10 Access to inholdings.
36.11 Special access.
36.12 Temporary access.
36.13 Special provisions.

AUTHORITY: 16 U.S.C. 1, 3, 668dd *et seq.*, and 3101 *et seq.;* 43 U.S.C. 1201.

SOURCE: 51 FR 31629, Sept. 4, 1986, unless otherwise noted.

§ 36.1 Applicability and scope.

(a) The regulations in this part apply to any application for access in the following forms within any conservation system unit (CSU), national recreation area or national conservation area

within the State of Alaska which is administered by the Bureau of Land Management (BLM), Fish and Wildlife Service (FWS) or National Park Service (NPS):

(1) A transportation or utility system (TUS) is any portion of the route of the system within any of the aforementioned areas and the system is not one which the Department or agency having jurisdiction over the unit or area is establishing incident to its management of the unit or area;

(2) Access to inholdings within these areas, as well as within public lands administered by the BLM designated as wilderness study areas;

(3) Special access within these areas, as well as within public lands administered by the BLM designated as wilderness study areas;

(4) Temporary access within the aforementioned areas, as well as the National Petroleum Reserve in Alaska and public lands administered by the BLM designated as wilderness study areas or managed to maintain the wilderness character or potential thereof.

(b) Except as specifically provided in this part, applicable law shall apply with respect to the authorization and administration of TUSs.

§ 36.2 Definitions.

As used in this part, the term:

(a) *ANILCA* means the Alaska National Interest Lands Conservation Act (94 Stat. 2371; Pub. L. 96–487).

(b) *Applicable law* means a law or regulation of general applicability, other than title XI of ANILCA, under which a Federal department or agency has jurisdiction to grant an authorization (including but not limited to, a right-of-way permit, license, lease or certificate) without which a TUS cannot, in whole or in part, be established or operated.

(c) *Applicant* means an individual, partnership, corporation, association or other business entity, and a Federal, State or local government entity including a municipal corporation submitting an application under this part.

(d) *Appropriate Federal agency* means a Federal agency (or the agency official to whom the authority has been delegated) that has jurisdiction to grant any authorization without which a TUS cannot, in whole or in part, be established or operated.

(e) *Area* means a CSU, National Recreation Area, or National Conservation Area in Alaska administered by the NPS, the FWS or the BLM.

(f) *Compatible with the purposes for which the unit was established* means that the system will not significantly interfere with or detract from the purposes for which the area was established.

(g) *Conservation System Unit* (CSU) means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System or the National Wilderness Preservation System administered by the NPS, the FWS or the BLM.

(h) *Economically feasible and prudent alternative route* means a route either within or outside an area that is based on sound engineering practices and is economically practicable, but does not necessarily mean the least costly alternative route.

(i) *Improved right-of-ways* means routes which are of a permanent nature and would involve substantial alteration of the terrain or vegetation such as grading and graveling of surfaces or other such construction. Trail right-of-ways which are annually or periodically marked, brushed, or broken for off-road vehicles are excluded.

(j) *Incident to its management of the unit or area* means a type of TUS which is used directly or indirectly in support of authorized activities, and which is built by or for the Federal agency which has jurisdiction over the area.

(k) *Other system of general transportation* means private and commercial transportation of passengers and/or shipment of goods or materials.

(l) *Public values* means those values relating to the purposes for which the area was established as defined by the enabling legislation for the area.

(m) *Related structures and facilities* means those structures, facilities and right-of-ways which are reasonably and minimally necessary for the construction, operation and maintenance of a TUS, and which are listed as part of the TUS on the consolidated application form, Standard Form 299, ''Application for Transportation and Utility

Systems and Facilities on Federal Lands'' (SF 299).

(n) *Right-of-way permit* means a right-of-way permit, lease, license, certificate or other authorization for all or part of a TUS in an area.

(o) *Secretary* means the Secretary of the Interior.

(p) *Transportation or utility system* (TUS) means any of the systems listed in paragraphs (p) (1) through (7) of this section, if a portion of the route of the system will be within an area and the system is not one that the Department or agency having jurisdiction over the area is establishing incident to its management of the area. The systems shall include related structures and facilities.

(1) Canals, ditches, flumes, laterals, pipes, pipelines, tunnels and other systems for the transportation of water.

(2) Pipelines and other systems for the transportation of liquids other than water, including oil, natural gas, synthetic liquid and gaseous fuels and any refined product produced therefrom.

(3) Pipelines, slurry and emulsion systems and conveyor belts for the transportation of solid materials.

(4) Systems for the transmission and distribution of electric energy.

(5) Systems for transmission or reception of radio, television, telephone, telegraph and other electronic signals and other means of communication.

(6) Improved rights-of-way for snowmachines, air cushion vehicles and other all-terrain vehicles.

(7) Roads, highways, railroads, tunnels, tramways, airports, landing strips, docks and other systems of general transportation.

[51 FR 31629, Sept. 4, 1986, as amended at 62 FR 52510, Oct. 8, 1997]

§ 36.3 Preapplication.

(a) Anyone interested in obtaining approval of a TUS is encouraged to establish early contact with each appropriate Federal agency so that filing procedures and details may be discussed, resource concerns and potential constraints may be identified, the proposal may be considered in agency planning, preapplication activities may be discussed and processing of an application may be tentatively scheduled.

(b) Reasonable preapplication activities in areas shall be permitted following a determination by the appropriate Federal agency that the activities are necessary to obtain information for filing the SF 299, that the activities would not cause significant or permanent damage to the values for which the area was established or unreasonably interfere with other authorized uses or activities and that it would not significantly restrict subsistence uses. In areas administered by the NPS or the FWS, a permit shall be obtained from the appropriate agency prior to engaging in any preapplication activities. Prior to approval and issuance of such a permit, the appropriate Federal agencies must find that the proposed preapplication activity is compatible with the purposes for which the area was established.

§ 36.4 Filing of application.

(a) A SF 299, which may be obtained from an appropriate Federal agency, shall be completed by the applicant according to the instructions on the form. The form shall be filed on the same day (except in compliance with paragraph (c) of this section) with each appropriate Federal agency from which an authorization, such as a permit, license, lease or certificate is required for the TUS. Filing with any appropriate Interior agency in Alaska shall be considered to be a filing with all of its agencies. Any filing fee required by the appropriate Federal agency pursuant to applicable law must be paid at the time of filing.

(b) Prior to filing the SF 299, the applicant shall determine whether additional information to that requested on the form is required by the appropriate Federal agencies. If so, the applicant shall file the additional information as an attachment to the SF 299.

(c) When, because of separate filing points, an applicant is not able to file with each appropriate Federal agency on the same day, the applicant shall file all applications as soon as possible. All applications must be filed within a 15 calendar day period. For purposes of the time requirements provided for in this part, the application shall not be considered to have been filed until the

last appropriate Federal agency receives the application. The lead agency, determined pursuant to § 36.5(a), shall determine the date of filing or that the application was not filed within the 15 day period and inform all appropriate Federal agencies.

(d) The information collection requirements contained in these regulations have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance numbers 1024–0026 and 1004–0060. The information collected by the appropriate Federal agency will be used to determine whether or not to issue a permit to obtain a benefit. A response is required to obtain or retain a benefit.

§ 36.5 Application review.

(a) When there is more than one appropriate Federal agency, the Federal agency having management jurisdiction over the longest lineal portion of the right-of-way requested in the TUS application shall be the lead agency for the purpose of coordinating appropriate Federal agency actions in the review and processing of the SF 299, as well as for the purpose of compliance with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*

(1) By agreement among the appropriate Federal agencies, a different Federal agency may be designated the lead agency for any or all parts of the review, processing or NEPA compliance.

(2) Upon identification of the lead agency, other involved agencies will provide assistance as requested by the lead agency.

(b) Upon receipt of an application, the lead agency will review it and determine the filing date pursuant to § 36.4. If it is determined that the applicant has not met the 15 calendar day filing deadline, pursuant to § 36.4(c) of this part, the lead agency shall notify each appropriate Federal agency to return the application to the applicant without further action.

(c) Within 60 days of the date of filing, each appropriate Federal agency shall inform the applicant and the lead agency, in writing, whether the application on its face:

(1) Contains the required information; or

(2) Is insufficient, together with a specific listing of the additional information the applicant must submit.

(d) When the application is insufficient, the applicant must furnish the specific information requested within 30 days of receipt of notification of deficiency:

(1) If the applicant needs more time to obtain information, additional time may be granted by the appropriate Federal agency upon request of the applicant, provided the applicant agrees that the application filing date will change to the date of filing of the specific additional information.

(2) Unless extended pursuant to the provisions of paragraph (d)(1) of this section, failure of the applicant to respond within the 30 day period will result in return of the application without further action.

(3) The lead agency shall keep all appropriate Federal agencies informed of actions occurring under paragraphs (d)(1) and (2) of this section, in order that such agencies may note their application records accordingly.

(e) Within 30 days of the receipt of additional information requested by the appropriate Federal agency, the applicant shall be notified in writing whether the supplemental information is sufficient.

(1) If the applicant fails to provide all the requested information, the application shall be rejected and returned to the applicant along with a list of the specific deficiencies.

(2) When the applicant furnishes the additional information, the application will be reinstated, and it will be considered filed as of the date the final supplemental information is actually received by the appropriate Federal agency.

(3) The lead agency shall notify appropriate Federal agencies of any final rejection under paragraph (e)(1) of this section.

§ 36.6 NEPA compliance and lead agency.

(a) The provisions of NEPA and the Council for Environmental Quality regulations (40 CFR parts 1500–1508) will be

applied to determine whether an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) is required, or that a categorical exclusion applies.

(1) The lead agency, with cooperation of all appropriate Federal agencies, shall complete an EA or a draft environmental impact statement (DEIS) within nine months of the date the SF 299 was filed.

(2) If the lead agency determines, for good cause, that the nine-month period is insufficient, it may extend such period for a reasonable specific time. Notification of the extension, together with the reasons therefore, shall be provided to the applicant and published in the FEDERAL REGISTER at least 30 days prior to the end of the nine-month period.

(3) If the lead agency determines that an EIS is not required, a Finding of No Significant Impact (FONSI) will be prepared.

(4) If an EIS is determined to be necessary, the lead agency shall hold a public hearing on the joint DEIS in Washington, DC, and at least one location in Alaska.

(5) The appropriate Federal agencies shall solicit and consider the views of other Federal departments and agencies, the Alaska Land Use Council, the State, affected units of local government in the State and affected corporations formed pursuant to the Alaska Native Claims Settlement Act. After public notice, the agencies shall receive and consider statements and recommendations regarding the application submitted by interested individuals and organizations.

(6) The lead agency shall ensure compliance with section 810 of ANILCA.

(b) When an EIS is determined to be necessary, within three months of completing the DEIS or within one year of the filing of the application, whichever is later, the lead agency shall complete the EIS and publish a notice of its availability in the FEDERAL REGISTER.

(c) Cost reimbursement. (1) The costs to the United States of application processing, other than costs for EIS preparation and review as provided in paragraph (c)(2) of this section, shall be reimbursed by the applicant, if such reimbursement is required pursuant to the applicable law and procedures of the appropriate Federal agency incurring the costs.

(2) The reasonable administrative and other costs of EIS preparation shall be reimbursed by the applicant, according to the BLM's cost recovery procedures and regulations implementing section 304 of FLPMA, 43 U.S.C. 1734.

§ 36.7 Decision process.

There are two separate decision processes. The first is used when the appropriate Federal agencies have an applicable law to issue a right-of-way permit and the area involved is outside the National Wilderness Preservation System. The second is used when an area involved in the application is within the National Wilderness Preservation System or an appropriate Federal agency has no applicable law with respect to issuing a right-of-way permit across all or any area covered by a TUS application.

(a) When the appropriate Federal agencies have an applicable law and the area involved is outside the National Wilderness Preservation System:

(1) Within four months of the date of the notice of availability of a FONSI or final EIS, each appropriate Federal agency shall make a decision based on applicable law to approve or disapprove the TUS and so notify the applicant in writing.

(2) Each appropriate Federal agency in making its decision shall consider and make detailed findings supported by substantial evidence as to the portion of the TUS, within that agency's jurisdiction, with respect to:

(i) The need for and economic feasibility of the TUS;

(ii) Alternative routes and modes of access, including a determination with respect to whether there is any economically feasible and prudent alternative to routing the system through or within an area and, if not, whether there are alternate routes or modes which would result in fewer or less severe adverse impacts upon the area;

(iii) The feasibility and impacts of including different TUSs in the same area;

(iv) Short and long term social, economic and environmental impacts of national, State or local significance, including impacts on fish and wildlife and their habitat and on rural, traditional lifestyles;

(v) The impacts, if any, on the national security interests of the United States, that may result from approval or denial of the application for the TUS;

(vi) Any impacts that would affect the purposes for which the Federal unit or area concerned was established;

(vii) Measures which should be instituted to avoid or minimize negative impacts;

(viii) The short and long term public values which may be adversely affected by approval of the TUS versus the short and long term public benefits which may accrue from such approval; and

(ix) Impacts, if any, on subsistence uses.

(3) To the extent the appropriate Federal agencies agree, the decisions may be developed jointly, singularly or in some combination thereof.

(4) If an appropriate Federal agency disapproves any portion of the TUS, the application in its entirety is disapproved and the applicant may file an administrative appeal pursuant to section 1106(a) of ANILCA.

(b) When an area involved is within the National Wilderness Preservation System or an appropriate Federal agency has no applicable law with respect to granting all or any part of a TUS application:

(1) Within four months of the date of publication of the notice of the availability of the final EIS or FONSI, each appropriate Federal agency shall determine whether to tentatively approve or disapprove each right-of-way permit within its jurisdiction that applies with respect to the TUS and the Secretary of the Interior shall make notification pursuant to section 1106(b) of ANILCA.

(i) The Federal agency having jurisdiction over a portion of a TUS for which there is no applicable law shall recommend approval of that portion of the TUS if it is determined that:

(A) Such system would be compatible with the purposes for which the area was established; and

(B) There is no economically feasible and prudent alternate route for the system.

(ii) If there is applicable law for a portion of the TUS which is outside the National Wilderness Preservation System, the applicable law shall be applied in making the determination to approve or disapprove that portion of the TUS.

(2) The notification shall be accompanied by a statement of the reasons and findings supporting each appropriate Federal agency's position. The findings shall include, but not be limited to, the findings required in paragraph (a)(2) of this section. The notification shall also be accompanied by the final EIS, the EA or statement that a categorical exclusion applies and any comments of the public and other Federal agencies.

§ 36.8 Administrative appeals.

(a) If any appropriate Federal agency disapproves a TUS application pursuant to § 36.7(a), the applicant may appeal the denial pursuant to section 1106(a) of ANILCA.

(b) There is no administrative appeal for a denial issued under the provisions of § 36.7(b).

§ 36.9 Issuing permit.

(a) Once an application is approved under the provisions of § 36.7(a), a right-of-way permit will be issued by the appropriate Federal agency or agencies, according to that agency's authorizing statutes and regulations or, if approved pursuant to the provisions of § 36.7(b), according to the provisions of title V of the Federal Land Policy Management Act of 1976 (43 U.S.C. 1701) or other applicable law. The permit shall not be issued until all fees and other charges have been paid in accordance with applicable law.

(b) All TUS right-of-way permits shall include, but not be limited to, the following terms and conditions:

(1) Requirements to ensure that to the maximum extent feasible, the right-of-way is used in a manner compatible with the purposes for which the

affected area was established or is managed;

(2) Requirements for restoration, revegetation and curtailment of erosion of the surface of the land;

(3) Requirements to ensure that activities in connection with the right-of-way will not violate applicable air and water quality standards and related facility siting standards established pursuant to law;

(4) Requirements, including the minimum necessary width, designed to control or prevent:

(i) Damage to the environment (including damage to fish and wildlife habitat);

(ii) Damage to public or private property; and

(iii) Hazards to public health and safety.

(5) Requirements to protect the interests of individuals living in the general area of the right-of-way permit who rely on the fish, wildlife and biotic resources of the area for subsistence purposes; and

(6) Requirements to employ measures to avoid or minimize adverse environmental, social or economic impacts.

(c) Any TUS approved pursuant to this part which occupies, uses or traverses any area within the boundaries of a unit of the National Wild and Scenic Rivers System shall be subject to such conditions as may be necessary to assure that the stream flow of, and transportation on, such river are not interfered with or impeded and that the TUS is located and constructed in an environmentally sound manner.

(d) In the case of a pipeline described in section 28(a) of the Mineral Leasing Act of 1920, a right-of-way permit issued pursuant to this part shall be issued in the same manner as a right-of-way is granted under section 28, and the provisions of subsections (c) through (j), (1) through (q), and (u) through (y) of section 28 shall apply to right-of-way permits issued pursuant to this part.

§ 36.10 Access to inholdings.

(a) This section sets forth the procedures to provide adequate and feasible access to inholdings within areas in accordance with section 1110(b) of ANILCA. As used in this section, the term:

(1) *Adequate and feasible access* means a route and method of access that is shown to be reasonably necessary and economically practicable but not necessarily the least costly alternative for achieving the use and development by the applicant on the applicant's non-federal land or occupancy interest.

(2) *Area* also includes public lands administered by the BLM designated as wilderness study areas.

(3) *Effectively surrounded by* means that physical barriers prevent adequate and feasible access to State or private lands or valid interests in lands except across an area(s). Physical barriers include but are not limited to rugged mountain terrain, extensive marsh areas, shallow water depths and the presence of ice for large periods of the year.

(4) *Inholding* means State-owned or privately owned land, including subsurface rights of such owners underlying public lands or a valid mining claim or other valid occupancy that is within or is effectively surrounded by one or more areas.

(b) It is the purpose of this section to ensure adequate and feasible access across areas for any person who has a valid inholding. A right-of-way permit for access to an inholding pursuant to this section is required only when this part does not provide for adequate and feasible access without a right-of-way permit.

(c) Applications for a right-of-way permit for access to an inholding shall be filed with the appropriate Federal agency on a SF 299. Mining claimants who have acquired their rights under the General Mining Law of 1872 may file their request for access as a part of their plan of operations. The appropriate Federal agency may require the mining claimant applicant to file a SF 299, if in its discretion, it determines that more complete information is needed. Applicants should ensure that the following information is provided:

(1) Documentation of the property interest held by the applicant including, for claimants under the General Mining Law of 1872, as amended (30 U.S.C. 21–54), a copy of the location notice and recordations required by 43 U.S.C. 1744;

(2) A detailed description of the use of the inholding for which the applied for right-of-way permit is to serve; and

(3) If applicable, rationale demonstrating that the inholding is effectively surrounded by an area(s).

(d) The application shall be filed in the same manner as under § 36.4 and shall be reviewed and processed in accordance with §§ 36.5 and 36.6.

(e)(1) For any applicant who meets the criteria of paragraph (b) of this section, the appropriate Federal agency shall specify in a right-of-way permit the route(s) and method(s) of access across the area(s) desired by the applicant, unless it is determined that:

(i) The route or method of access would cause significant adverse impacts on natural or other values of the area and adequate and feasible access otherwise exists; or

(ii) The route or method of access would jeopardize public health and safety and adequate and feasible access otherwise exists; or

(iii) The route or method is inconsistent with the management plan(s) for the area or purposes for which the area was established and adequate and feasible access otherwise exists; or

(iv) The method is unnecessary to accomplish the applicant's land use objective.

(2) If the appropriate Federal agency makes one of the findings described in paragraph (e)(1) of this section, another alternate route(s) and/or method(s) of access that will provide the applicant adequate and feasible access shall be specified by that Federal agency in the right-of-way permit after consultation with the applicant.

(f) All right-of-way permits issued pursuant to this section shall be subject to terms and conditions in the same manner as right-of-way permits issued pursuant to § 36.9.

(g) The decision by the appropriate Federal agency under this section is the final administrative decision.

§ 36.11 Special access.

(a) This section implements the provisions of section 1110(a) of ANILCA regarding use of snowmachines, motorboats, nonmotorized surface transportation, aircraft, as well as off-road vehicle use.

As used in this section, the term:

(1) *Area* also includes public lands administered by the BLM and designated as wilderness study areas.

(2) *Adequate snow cover* shall mean snow of sufficient depth, generally 6–12 inches or more, or a combination of snow and frost depth sufficient to protect the underlying vegetation and soil.

(b) Nothing in this section affects the use of snowmobiles, motorboats and nonmotorized means of surface transportation traditionally used by rural residents engaged in subsistence activities, as defined in Tile VIII of ANILCA.

(c) The use of snowmachines (during periods of adequate snow cover and frozen river conditions) for traditional activities (where such activities are permitted by ANILCA or other law) and for travel to and from villages and homesites and other valid occupancies is permitted within the areas, except where such use is prohibited or otherwise restricted by the appropriate Federal agency in accordance with the procedures of paragraph (h) of this section.

(d) Motorboats may be operated on all area waters, except where such use is prohibited or otherwise restricted by the appropriate Federal agency in accordance with the procedures of paragraph (h) of this section.

(e) The use of nonmotorized surface transportation such as domestic dogs, horses and other pack or saddle animals is permitted in areas except where such use is prohibited or otherwise restricted by the appropriate Federal agency in accordance with the procedures of paragraph (h) of this section.

(f) *Aircraft*. (1) Fixed-wing aircraft may be landed and operated on lands and waters within areas, except where such use is prohibited or otherwise restricted by the appropriate Federal agency, including closures or restrictions pursuant to the closures of paragraph (h) of this section. The use of aircraft for access to or from lands and waters within a national park or monument for purposes of taking fish and wildlife for subsistence uses therein is prohibited, except as provided in 36 CFR 13.45. The operation of aircraft resulting in the harassment of wildlife is prohibited.

(2) In imposing any prohibitions or restrictions on fixed-wing aircraft use the appropriate Federal agency shall:

(i) Publish notice of prohibition or restrictions in ''Notices to Airmen'' issued by the Department of Transportation; and

(ii) Publish permanent prohibitions or restrictions as a regulatory notice in the United States Flight Information Service ''Supplement Alaska.''

(3) Except as provided in paragraph (f)(3)(i) of this section, the owners of any aircraft downed after December 2, 1980, shall remove the aircraft and all component parts thereof in accordance with procedures established by the appropriate Federal agency. In establishing a removal procedure, the appropriate Federal agency is authorized to establish a reasonable date by which aircraft removal operations must be complete and determine times and means of access to and from the downed aircraft.

(i) The appropriate Federal agency may waive the requirements of this paragraph upon a determination that the removal of downed aircraft would constitute an unacceptable risk to human life, or the removal of a downed aircraft would result in extensive resource damage, or the removal of a downed aircraft is otherwise impracticable or impossible.

(ii) Salvaging, removing, possessing or attempting to salvage, remove or possess any downed aircraft or component parts thereof is prohibited, except in accordance with a removal procedure established under this paragraph and as may be controlled by the other laws and regulations.

(4) The use of a helicopter in any area other than at designated landing areas pursuant to the terms and conditions of a permit issued by the appropriate Federal agency, or pursuant to a memorandum of understanding between the appropriate Federal agency and another party, or involved in emergency or search and rescue operations is prohibited.

(g) *Off-road vehicles*. (1) The use of off-road vehicles (ORV) in locations other than established roads and parking areas is prohibited, except on routes or in areas designated by the appropriate Federal agency in accordance with Executive Order 11644, as amended or pursuant to a valid permit as prescribed in paragraph (g)(2) of this section or in § 36.10 or § 36.12.

(2) The appropriate Federal agency is authorized to issue permits for the use of ORVs on existing ORV trails located in areas (other than in areas designated as part of the National Wilderness Preservation System) upon a finding that such ORV use would be compatible with the purposes and values for which the area was established. The appropriate Federal agency shall include in any permit such stipulations and conditions as are necessary for the protection of those purposes and values.

(h) *Closure procedures*. (1) The appropriate Federal agency may close an area on a temporary or permanent basis to use of aircraft, snowmachines, motorboats or nonmotorized surface transportation only upon a finding by the agency that such use would be detrimental to the resource values of the area.

(2) *Temporary closures*. (i) Temporary closures shall not be effective prior to notice and hearing in the vicinity of the area(s) directly affected by such closures and other locations as appropriate.

(ii) A temporary closure shall not exceed 12 months.

(3) Permanent closures shall be published by rulemaking in the FEDERAL REGISTER with a minimum public comment period of 60 days and shall not be effective until after a public hearing(s) is held in the affected vicinity and other locations as deemed appropriate by the appropriate Federal agency.

(4) Temporary and permanent closures shall be: (i) Published at least once in a newspaper of general circulation in Alaska and in a local newspaper, if available; posted at community post offices within the vicinity affected; made available for broadcast on local radio stations in a manner reasonably calculated to inform residents in the affected vicinity; and designated on a map which shall be available for public inspection at the office of the appropriate Federal agency and other places convenient to the public; or

(ii) Designated by posting the area with appropriate signs; or

(iii) Both.

(5) In determining whether to open an area that has previously been closed pursuant to the provisions of this section, the appropriate Federal agency shall provide notice in the FEDERAL REGISTER and shall, upon request, hold a hearing in the affected vicinity and other locations as appropriate prior to making a final determination.

(6) Nothing in this section shall limit the authority of the appropriate Federal agency to restrict or limit uses of an area under other statutory authority.

(i) Except as otherwise specifically permitted under the provisions of this section, entry into closed areas or failure to abide by restrictions established under this section is prohibited.

(j) Any person convicted of violating any provision of the regulations contained in this section, or as the same may be amended or supplemented, may be punished by a fine or by imprisonment in accordance with the penalty provisions applicable to the area.

[51 FR 31629, Sept. 4, 1986; 51 FR 36011, Oct. 8, 1986]

§ 36.12 Temporary access.

(a) For the purposes of this section, the term:

(1) *Area* also includes public lands administered by the BLM designated as wilderness study areas or managed to maintain the wilderness character or potential thereof, and the National Petroleum Reserve—Alaska.

(2) *Temporary access* means limited, short-term (i.e., up to one year from issuance of the permit) access which does not require permanent facilities for access to State or private lands.

(b) This section is applicable to State and private landowners who desire temporary access across an area for the purposes of survey, geophysical, exploratory and other temporary uses of such non-federal lands, and where such temporary access is not affirmatively provided for in §§ 36.10 and 36.11. State and private landowners meeting the criteria of § 36.10(b) are directed to use the procedures of § 36.10 to obtain temporary access.

(c) A landowner requiring temporary access across an area for survey, geophysical, exploratory or similar temporary activities shall apply to the appropriate Federal agency for an access permit by providing the relevant information requested in the SF 299.

(d) The appropriate Federal agency shall grant the desired temporary access whenever it is determined, after compliance with the requirements of NEPA, that such access will not result in permanent harm to the area's resources. The area manager shall include in any permit granted such stipulations and conditions on temporary access as are necessary to ensure that the access granted would not be inconsistent with the purposes for which the area was established and to ensure that no permanent harm will result to the area's resources and section 810 of ANILCA is complied with.

§ 36.13 Special provisions.

(a) *Gates of the Arctic National Park and Preserve.* (1) Access for surface transportation purposes across Gates of the Arctic National Park and Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road (Dalton Highway)) shall be permitted in accordance with the provisions of this section.

(2) Upon the filing of an application in accordance with § 36.4 for a right-of-way across the western (Kobuk River) unit of the preserve, including the Kobuk Wild River, the Secretary shall give notice in the FEDERAL REGISTER, and other such notice as may be appropriate, of a 30 day period for other applicants to apply for access. The original application and any additional applications received during the 30 day period will be reviewed in accordance with § 36.5.

(3) The Secretary and the Secretary of Transportation shall jointly prepare an environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way and terms and conditions which may be required for the issuance of that right-of-way. This analysis shall be completed within one year and the draft thereof within nine months of the receipt of the application and shall be prepared in lieu of an EIS which would otherwise be required under section 102(2)(C) of NEPA. This analysis

shall be deemed to satisfy all requirements of that Act and shall not be subject to judicial review. This analysis shall be prepared in accordance with the procedural requirements of §36.6.

(4) The Secretaries, in preparing this analysis, shall consider the following:

(i) Alternate routes including the consideration of economically feasible and prudent alternate routes across the preserve which would result in fewer, or less severe, adverse impacts upon the preserve.

(ii) The environmental, social and economic impacts of the right-of-way including impacts upon wildlife, fish, and their habitat, and rural and traditional lifestyles including subsistence activities and measures which should be instituted to avoid or minimize negative impacts and enhance positive impacts.

(5) Within 60 days of the completion of the enviornmental and economic analysis, the Secretaries shall jointly agree upon a route for issuance of the right-of-way across the preserve. Such right-of-way shall be issued in accordance with the provisions of §36.9.

(b) *Yukon-Charley Rivers National Preserve.* (1) Any application filed by Doyon, Limited, for a right-of-way to provide access in a southerly direction across the Yukon River from its landholdings in the watersheds of the Kandik and Nation Rivers shall be processed in accordance with this part.

(2) No right-of-way shall be granted which would cross the Charley River or which would involve any lands within the watershed of the Charley River.

(3) An application shall be approved by the appropriate Federal agency if it is determined that there exists no economically feasible or otherwise reasonably available alternate route.

(c) *Oil and Gas Pipelines—Arctic Slope Regional Corporation.* (1) Upon the filing by Arctic Slope Regional Corporation for an oil and gas TUS across lands identified in section 1431(j) of ANILCA, the appropriate Federal agency shall review the filing, determine the alignment and location of facilities across/on Federal lands, and issue such authorizations as are necessary with respect to the establishment of the TUS.

(2) No environmental document pursuant to NEPA shall be required.

(3) Investigations as to the proper final alignment of the pipeline and location of related facilities are at the discretion of the Federal agency and the costs associated with such investigations are not recoverable under §36.6.

(d) *Forty Mile Component of National Wild and Scenic Rivers System.* The classification of segments of the Forty Mile Components as Wild Rivers shall not preclude access across those river segments where the appropriate Federal agency determines such access is necessary to permit commercial development of asbestos deposits in the North Fork drainage.

[51 FR 31629, Sept. 4, 1986; 51 FR 36011, Oct. 8, 1986]

PART 37—CAVE MANAGEMENT

Subpart A—Cave Management—General

Sec.
37.1 Purpose.
37.2 Policy.
37.3 Authority.
37.4 Definitions.
37.5 Collection of information.

Subpart B—Cave Designation

37.11 Nomination, evaluation, and designation of significant caves.
37.12 Confidentiality of cave location information.

AUTHORITY: 16 U.S.C. 4301–4309; 43 U.S.C. 1740.

SOURCE: 58 FR 51554, Oct. 1, 1993, unless otherwise noted.

Subpart A—Cave Management—General

§37.1 Purpose.

The purpose of this part is to provide the basis for identifying and managing significant caves on Federal lands administered by the Secretary of the Interior.

§37.2 Policy.

It is the policy of the Secretary that Federal lands be managed in a manner which, to the extent practical, protects and maintains significant caves and cave resources. The type and degree of protection will be determined through

the agency resource management planning process with full public participation.

§ 37.3 Authority.

Section 4 of the Federal Cave Resources Protection Act of 1988 (102 Stat. 4546; 16 U.S.C. 4301) authorizes the Secretary to issue regulations providing for the identification of significant caves. Section 5 authorizes the Secretary to withhold information concerning the location of significant caves under certain circumstances.

§ 37.4 Definitions.

(a) *Authorized officer* means the agency employee delegated the authority to perform the duties described in this part.

(b) *Cave* means any naturally occurring void, cavity, recess, or system of interconnected passages beneath the surface of the earth or within a cliff or ledge, including any cave resource therein, and which is large enough to permit a person to enter, whether the entrance is excavated or naturally formed. Such term shall include any natural pit, sinkhole, or other feature that is an extension of a cave entrance or which is an integral part of the cave.

(c) *Cave resources* means any materials or substances occurring in caves on Federal lands, including, but not limited to, biotic, cultural, mineralogic, paleontologic, geologic, and hydrologic resources.

(d) *Federal lands*, as defined in the Federal Cave Resources Protection Act, means lands the fee title to which is owned by the United States and administered by the Secretary of the Interior.

(e) *Secretary* means the Secretary of the Interior.

(f) *Significant cave* means a cave located on Federal lands that has been determined to meet the criteria in § 37.11(c).

§ 37.5 Collection of information.

(a) The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance numbers 1004–0165 (cave nominations) and 1004–0166 (confidential information). The information provided for the cave nominations will be used to determine which caves will be listed as ''significant'' and the information in the requests to obtain confidential cave information will be used to decide whether to grant access to this information. Response to the call for cave nominations is voluntary. No action may be taken against a person for refusing to supply the information requested. Response to the information requirements for obtaining confidential cave information is required to obtain a benefit in accordance with Section 5 of the Federal Cave Resources Protection Act of 1988 (102 Stat. 4546; 16 U.S.C. 4301).

(b) The public reporting burden is estimated to average 3 hours per response for the cave nomination and one-half hour per response for the confidential cave information request. The estimated response time for both of the information burdens includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Bureau of Land Management Clearance Officer, WO–873, Mail Stop 401 LS, 1849 C Street NW., Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project 1004–0165/6, Washington, D.C. 20503.

Subpart B—Cave Designation

§ 37.11 Nomination, evaluation, and designation of significant caves.

(a) *Nominations for initial and subsequent listings.* The authorized officer will give governmental agencies and the public, including those who utilize caves for scientific, educational, and recreational purposes, the opportunity to nominate potential significant caves. The authorized officer will give public notice, including a notice published in the FEDERAL REGISTER, calling for nominations for the initial listing, including procedures for preparing and submitting the nominations. Nominations for subsequent listings will be accepted from governmental

agencies and the public by the agency that manages the land where the cave is located as new cave discoveries are made or as new information becomes available. Nominations not approved for designation during the listing process may be resubmitted if better documentation or new information becomes available.

(b) *Evaluation for initial and subsequent listings.* The evaluation of the nominations for significant caves will be carried out in consultation with individuals and organizations interested in the management and use of cave resources, within the limits imposed by the confidentiality provisions of § 37.12 of this part. Nominations will be evaluated using the criteria in § 37.11(c).

(c) *Criteria for significant caves.* A significant cave on Federal lands shall possess one or more of the following features, characteristics, or values.

(1) *Biota.* The cave provides seasonal or yearlong habitat for organisms or animals, or contains species or subspecies of flora or fauna that are native to caves, or are sensitive to disturbance, or are found on State or Federal sensitive, threatened, or endangered species lists.

(2) *Cultural.* The cave contains historic properties or archaeological resources (as described in 36 CFR 60.4 and 43 CFR 7.3) or other features that are included in or eligible for inclusion in the National Register of Historic Places because of their research importance for history or prehistory, historical associations, or other historical or traditional significance.

(3) *Geologic/Mineralogic/Paleontologic.* The cave possesses one or more of the following features:

(i) Geologic or mineralogic features that are fragile, or that exhibit interesting formation processes, or that are otherwise useful for study.

(ii) Deposits of sediments or features useful for evaluating past events.

(iii) Paleontologic resources with potential to contribute useful educational and scientific information.

(4) *Hydrologic.* The cave is a part of a hydrologic system or contains water that is important to humans, biota, or development of cave resources.

(5) *Recreational.* The cave provides or could provide recreational opportunities or scenic values.

(6) *Educational or Scientific.* The cave offers opportunities for educational or scientific use; or, the cave is virtually in a pristine state, lacking evidence f contemporary human disturbance or impact; or, the length, volume, total depth, pit depth, height, or similar measurements are notable.

(d) *National Park Service policy.* The policy of the National Park Service, pursuant to its Organic Act of 1916 (16 U.S.C. 1, *et seq.*) and Management Policies (Chapter 4:20, Dec. 1988), is that all caves are afforded protection and will be managed in compliance with approved resource management plans. Accordingly, all caves on National Park Service-administered lands are deemed to fall within the definition of ''significant cave.''

(e) *Special management areas.* Within special management areas that are designated wholly or in part due to cave resources found therein, all caves within the so-designated special management area shall be determined to be significant.

(f) *Designation and documentation.* If the authorized officer determines that a cave nominated and evaluated under paragraphs (a) and (b) of this section meets one or more of the criteria in paragraph (c), the authorized officer will designate the cave as significant. The authorized officer will designate all caves identified in paragraphs (d) and (e) of this section to be significant. The authorized officer will notify the nominating party of the results of the evaluation and designation. Each agency Field Office will retain appropriate documentation for all significant caves located within its administrative boundaries. At a minimum, documentation shall include a statement of finding signed and dated by the authorized officer, and the information used to make the determination. This documentation will be retained as a permanent record in accordance with the confidentiality provision in § 37.12 of this part.

(g) *Decision final.* Decisions to designate or not designate a cave as significant are made at the sole discretion of the authorized officer and are not

subject to further administrative review or appeal under 43 CFR part 4.

(h) If a cave is determined to be significant, its entire extent, including passages not mapped or discovered at the time of the determination, is deemed significant. This includes caves that extend from lands managed by any Federal agency into lands managed by one or more other bureaus or agencies of the Department of the Interior, as well as caves initially believed to be separate for which interconnecting passages are discovered after significance is determined.

§ 37.12 Confidentiality of cave location information.

(a) *Information disclosure*. No Department of the Interior employee shall disclose information that could be used to determine the location of any significant cave or cave under consideration for determination, unless the authorized officer determines that disclosure will further the purposes of the Act and will not create a substantial risk to cave resources of harm, theft, or destruction.

(b) *Requesting confidential information*. Notwithstanding paragraph (a) of this section, the authorized officer may make confidential cave information available to a Federal or State governmental agency, bona fide educational or research institute, or individual or organization assisting the land managing agency with cave management activities. To request confidential cave information, such entities shall make a written request to the authorized officer that includes the following:

(1) Name, address, and telephone number of the individual responsible for the security of the information received.

(2) A legal description of the area for which the information is sought.

(3) A statement of the purpose for which the information is sought, and

(4) Written assurances that the requesting party will maintain the confidentiality of the information and protect the cave and its resources.

(c) *Decision final*. Decisions to permit or deny access to confidential cave information are made at the sole discretion of the authorized officer and are not subject to further administrative review or appeal under 5 U.S.C. 552 or 43 CFR parts 2 or 4.

PART 38—PAY OF U.S. PARK POLICE—INTERIM GEOGRAPHIC ADJUSTMENTS

Sec.
38.1 Definitions.
38.2 Computation of hourly, daily, weekly, and biweekly adjusted rates of pay.
38.3 Administration of adjusted rates of pay.

AUTHORITY: 104 Stat. 1462.

SOURCE: 56 FR 33719, July 23, 1991, unless otherwise noted.

§ 38.1 Definitions.

In this subpart: *Adjusted annual rate of pay* means an employee's scheduled annual rate of pay multiplied by 1.08 and rounded to the nearest whole dollar, counting 50 cents and over as a whole dollar.

Employee means a U.S. Park Police officer whose official duty station is located in an interim geographic adjustment area.

Interim geographic adjustment area means any of the following Consolidated Metropolitan Statistical Areas (CMSAs) as defined by the Office of Management and Budget (OMB).

(1) New York-Northern New Jersey-Long Island, NY-NJ-CT; and

(2) San Francisco-Oakland-San Jose, CA.

Official duty station means the duty station for an employee's position of record as indicated on his or her most recent notification of personnel action.

Scheduled annual rate of pay means—

(1) The U.S. Park Police rate of basic pay for the employee's rank and step, exclusive of additional pay of any kind;

(2) A retained rate of pay, where applicable, exclusive of additional pay of any kind.

§ 38.2 Computation of hourly, daily, weekly, and biweekly adjusted rates of pay.

When it is necessary to convert the adjusted annual rate of pay to an hourly, daily, weekly, or biweekly rate, the following methods apply:

(a) To derive an hourly rate, divide the adjusted annual rate of pay by 2,087

and round to the nearest cent, counting one-half cent and over as a whole cent;

(b) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required;

(c) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

§ 38.3 Administration of adjusted rates of pay.

(a) An employee is entitled to be paid the greater of—

(1) The adjusted annual rate of pay; or

(2) His or her rate of basic pay (including a local special salary rate, where applicable), without regard to any adjustment under this section.

(b) An adjusted rate of pay is considered basic pay for purposes of computing:

(1) Retirement deductions and benefits;

(2) Life insurance premiums and benefits;

(3) Premium pay;

(4) Severance pay;

(c) When an employee's official duty station is changed from a location not in an interim geographic adjustment area to a location in an interim geographic adjustment area, payment of the adjusted rate of pay begins on the effective date of the change in official duty station.

(d) An adjusted rate of pay is paid only for those hours for which an employee is in a pay status.

(e) An adjusted rate of pay shall be adjusted as of the effective date of any change in the applicable scheduled rate of pay.

(f) Except as provided in paragraph (g) of this section, entitlement to an adjusted rate of pay under this subpart terminates on the date.

(1) An employee's official duty station is no longer located in an interim geographic adjustment area;

(2) An employee moves to a position not covered;

(3) An employee separates from Federal service; or

(4) An employee's local special salary rate exceeds his or her adjusted rate of pay.

(g) In the event of a change in the geographic area covered by a CMSA, the effective date of a change in an employee's entitlement to an adjusted rate of pay under this subpart shall be the first day of the first pay period beginning on or after the date on which a change in the definition of a CMSA is made effective.

(h) Payment of or an increase in, an adjusted rate of pay is not an equivalent increase in pay.

(i) An adjusted rate of pay is included in an employee's ''total remuneration,'' and ''straight time rate of pay,'' for the purpose of computations under the Fair Labor Standards Act of 1938, as amended.

(j) Termination of an adjusted rate of pay under paragraph (f) of this section is not an adverse action.

PART 39—COLLECTION OF DEBTS BY ADMINISTRATIVE WAGE GARNISHMENT

Sec.

39.1 Procedures for collection of debts by administrative wage garnishment.
39.2 Requests for Hearings.

AUTHORITY: 31 U.S.C. 3720D.

SOURCE: 70 FR 44513, Aug. 3, 2005, unless otherwise noted.

§ 39.1 Procedures for collection of debts by administrative wage garnishment.

The Department hereby adopts the administrative wage garnishment rules issued by the Department of the Treasury at 31 CFR 285.11.

§ 39.2 Requests for Hearings.

Any request for a hearing under 31 CFR 285.11 must be filed with the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203.

PART 41—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.
41.100 Purpose and effective date.
41.105 Definitions.
41.110 Remedial and affirmative action and self-evaluation.
41.115 Assurance required.
41.120 Transfers of property.
41.125 Effect of other requirements.
41.130 Effect of employment opportunities.
41.135 Designation of responsible employee and adoption of grievance procedures.
41.140 Dissemination of policy.

Subpart B—Coverage

41.200 Application.
41.205 Educational institutions and other entities controlled by religious organizations.
41.210 Military and merchant marine educational institutions.
41.215 Membership practices of certain organizations.
41.220 Admissions.
41.225 Educational institutions eligible to submit transition plans.
41.230 Transition plans.
41.235 Statutory amendments.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

41.300 Admission.
41.305 Preference in admission.
41.310 Recruitment.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

41.400 Education programs or activities.
41.405 Housing.
41.410 Comparable facilities.
41.415 Access to course offerings.
41.420 Access to schools operated by LEAs.
41.425 Counseling and use of appraisal and counseling materials.
41.430 Financial assistance.
41.435 Employment assistance to students.
41.440 Health and insurance benefits and services.
41.445 Marital or parental status.
41.450 Athletics.
41.455 Textbooks and curricular material.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

41.500 Employment.
41.505 Employment criteria.
41.510 Recruitment.
41.515 Compensation.
41.520 Job classification and structure.
41.525 Fringe benefits.
41.530 Marital or parental status.
41.535 Effect of state or local law or other requirements.
41.540 Advertising.
41.545 Pre-employment inquiries.
41.550 Sex as a bona fide occupational qualification.

Subpart F—Procedures

41.600 Notice of covered programs.
41.605 Enforcement procedures.

AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52891, Aug. 30, 2000, unless otherwise noted.

Subpart A—Introduction

§41.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be September 29, 2000.

§41.105 Definitions.

As used in these Title IX regulations, the term:

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

Admission means selection for part-time, full-time, special, associate,

transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Applicant means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

Designated agency official means Deputy Assistant Secretary for Workforce Diversity.

Educational institution means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

Institution of professional education means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

Institution of undergraduate higher education means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a

technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Student means a person who has gained admission.

Title IX means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

Title IX regulations means the provisions set forth at §§41.100 through 41.605.

Transition plan means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

[65 FR 52865, 52891, 52892, Aug. 30, 2000]

§41.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of September 29, 2000:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§41.115 Assurance required.

(a) *General.* Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a

specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 41.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ 41.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ 41.205 through 41.235(a).

§ 41.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

§41.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§41.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§41.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§41.300 through 41.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to §41.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of September 29, 2000 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

Subpart B—Coverage

§ 41.200 Application.

Except as provided in §§ 41.205 through 41.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

§ 41.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 41.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 41.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 41.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 41.225 and 41.230, and §§ 41.300 through 41.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 41.300 through .310.* Except as provided in paragraphs (d) and (e) of this section, §§ 41.300 through 41.310 apply to each recipient. A recipient to which §§ 41.300 through 41.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 41.300 through 41.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 41.300 through 41.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§ 41.300 through 41.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ 41.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 41.300 through 41.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 41.300 through 41.310.

§ 41.230 Transition plans.

(a) *Submission of plans.* An institution to which § 41.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 41.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 41.300 through 41.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 41.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 41.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a ''program or activity'' subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 41.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be

subjected to discrimination in admission, by any recipient to which §§ 41.300 through §§ 41.310 apply, except as provided in §§ 41.225 and §§ 41.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 41.300 through 41.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 41.300 through 41.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 41.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 41.305 Preference in admission.

A recipient to which §§ 41.300 through 41.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 41.300 through 41.310.

§ 41.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 41.300 through 41.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 41.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 41.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 41.300 through 41.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ 41.300 through 41.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 41.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that

receives Federal financial assistance. Sections 41.400 through 41.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ 41.300 through 41.310 do not apply, or an entity, not a recipient, to which §§ 41.300 through 41.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 41.400 through 41.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 41.405 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 41.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 41.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

§ 41.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§ 41.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or

other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 41.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 41.450.

§ 41.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 41.500 through 41.550.

§ 41.440 Health and insurance benefits and services.

Subject to § 41.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 41.500 through 41.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ 41.445 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 41.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 41.450 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill

or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

§ 41.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 41.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 41.500 through 41.550, including relationships with employment and referral agencies, with labor unions, and

with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application*. The provisions of §§ 41.500 through 41.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 41.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 41.510 Recruitment.

(a) *Nondiscriminatory recruitment and hiring*. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns*. A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ 41.500 through 41.550.

§ 41.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§ 41.520 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for

similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § 41.550.

§ 41.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 41.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 41.530 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to § 41.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 41.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§ 41.500 through 41.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 41.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§ 41.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 41.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 41.500 through 41.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F—Procedures

§ 41.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

§ 41.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (''Title VI'') are hereby adopted and applied to these Title IX regulations. These procedures may be found at 10 CFR 4.21 through 4.75.

[65 FR 52892, Aug. 30, 2000]

PART 44—FINANCIAL ASSISTANCE, LOCAL GOVERNMENTS

Sec.

GENERAL INFORMATION

44.10 What is the purpose of this subpart?
44.11 What are the definitions of terms used in this subpart?
44.12 Who is eligible to receive PILT payments?

PAYMENTS TO LOCAL GOVERNMENTS CONTAINING ENTITLEMENTS LANDS

44.20 How does the Department process payments to local governments whose jurisdictions contain entitlement lands?
44.21 How does the Department calculate payments to local governments whose jurisdictions contain entitlement lands?
44.22 Are there any special circumstances that affect the way the Department calculates PILT payments?
44.23 How does the Department certify payment computations?
44.30 How does the Department make payments for acquired lands?
44.31 How does the Department calculate payments for acquired lands?

PAYMENTS TO LOCAL GOVERNMENTS FOR INTEREST IN LANDS IN THE REDWOOD NATIONAL PARK OR LAKE TAHOE BASIN

44.40 How does the Department process payments for lands in the Redwood National Park or Lake Tahoe Basin?
44.41 How does the Department calculate payments for lands in the Redwood National Park or Lake Tahoe Basin?

STATE AND LOCAL GOVERNMENTS' RESPONSIBILITIES AFTER THE DEPARTMENT DISTRIBUTES PAYMENTS

44.50 What are the local governments' responsibilities after receiving payments under this part?
44.51 Are there general procedures applicable to all PILT payments?
44.52 May a State enact legislation to reallocate or redistribute PILT payments?
44.53 What will the Department do if a State enacts distribution legislation?
44.54 What happens if a State repeals or amends distribution legislation?
44.55 Can a unit of general local government protest the results of payment computations?

44.56 How does a unit of general local government file a protest?
44.57 Can a unit of general local government appeal a rejection of a protest?

AUTHORITY: Public Law 94–565, 90 Stat. 2662, as amended, 31 U.S.C. 6901–6907.

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GENERAL INFORMATION

§ 44.10 What is the purpose of this subpart?

This subpart sets forth procedures the Department of the Interior uses in disbursing Federal payments in lieu of taxes to local governments for entitlement lands within their boundaries.

§ 44.11 What are the definitions of terms used in this subpart?

Entitlement land means land owned by the United States:

(1) That is in the National Park System or the National Forest System, including wilderness areas, and national forest lands in northern Minnesota described in 16 U.S.C. 577d–577d–1;

(2) That is administered by the Secretary of the Interior through the Office of the Secretary;

(3) That is dedicated to the use of the Government for water resource development projects;

(4) On which there are semiactive or inactive installations, excluding industrial installations, that the Department of Army keeps for mobilization and reserve component training;

(5) That is a dredge disposal area under the jurisdiction of the Army Corps of Engineers;

(6) That is located in the vicinity of Purgatory River Canyon and Pinon Canyon, Colorado, and was acquired by the United States after December 23, 1981, to expand the Fort Carson military installation; or

(7) That is a reserve area as defined in 16 U.S.C. 715s(g)(3), which is an area of land withdrawn from the public domain and administered, either solely or primarily, by the Secretary of the Interior, through the Fish and Wildlife Service.

Local government means a unit of general local government, which can include any of the following:

(1) A county, parish, township, borough, or city, (other than in Alaska), where the city is independent of any other unit of general local government, that:

(i) Is within the class(es) of such political subdivision in a State that the Secretary of the Interior determines, in his or her discretion, to be the principal provider(s) of governmental services within the State; and

(ii) Is a unit of general local government, as determined by the Secretary of the Interior on the basis of the same principles as were used by the Secretary of Commerce on January 1, 1983, for general statistical purposes;

(2) Any area in Alaska that is within the boundaries of a census area used by the Secretary of Commerce in the decennial census, but that is not included within the boundaries of a governmental entity described under paragraph (1) of this definition; or

(3) The Governments of the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Payments in lieu of taxes (PILT) means Federal payments disbursed to local governments to compensate for the exemption of real estate taxes on entitlement lands within their boundaries.

Section 6902 (31 U.S.C. 6902) payments means Federal payments disbursed to local governments containing entitlement lands.

Section 6904 (31 U.S.C. 6904) payments means Federal payments disbursed to local governments for acquisitions or interest in lands acquired for addition to the National Park System or National Forest Wilderness Areas.

Section 6905 (31 U.S.C. 6905) payments means Federal payments disbursed to local governments for lands in the Redwood National Park or Lake Tahoe Basin.

§ 44.12 Who is eligible to receive PILT payments?

(a) Each local government containing entitlement lands may receive a PILT payment.

(b) A local government may not receive a payment for land owned or administered by a State or local government that was exempt from real estate taxes when the land was conveyed to the United States. However, a local

government may receive a PILT payment for land when:

(1) A State or local government acquires from a private party to donate to the United States within eight years of acquisition;

(2) A State acquires through an exchange with the United States if the land acquired was entitlement land; or

(3) In the State of Utah, that the United States acquires for Federal land, royalties or other assets if, at the time of acquisition, a local government was entitled to receive payments in lieu of taxes from the State of Utah for the land; provided that the payment to the local government does not exceed the payment the State would have disbursed if the land had not been acquired.

PAYMENTS TO LOCAL GOVERNMENTS CONTAINING ENTITLEMENT LANDS

§ 44.20 How does the Department process payments to local governments whose jurisdictions contain entitlement lands?

This section describes how the Department processes payments to local governments whose jurisdictions contain entitlement lands (section 6902 payments).

(a) The Department:

(1) Determines the eligibility of each local government, conferring when necessary with the Bureau of the Census, officials of appropriate State and local governments, and officials of the agency administering the entitlement land;

(2) Computes the amount of the payment disbursed to each local government; and

(3) Certifies the amount of the payment disbursed to each local government.

(b) The Department disburses a payment each fiscal year to each local government containing entitlement lands.

(c) The State of Alaska is required to distribute the payment it receives to home rule cities and general law cities (as such cities are defined by the State) that are located within the boundaries of the local government entitled to the payment.

§ 44.21 How does the Department calculate payments to local governments whose jurisdictions contain entitlement lands?

(a) To calculate section 6902 payments, the Department obtains the necessary data on Federal and State payments from several sources:

(1) Federal agencies provide the amount of entitlement land within the boundaries of each local government as of the last day of the fiscal year preceding the fiscal year for which the Department disburses the payment;

(2) The Governor or designated official provides the amount of money transfers (land revenue sharing payments) disbursed by the State during the previous fiscal year to eligible local governments under the payment laws listed under 31 U.S.C. 6903(a)(1) and in paragraph (d) of this section; and

(3) The Bureau of the Census provides statistics on the population of each local government.

(b) The Department consults with the affected local government and the administering agency to resolve conflicts in land records and other data sources.

(c) The Department calculates the amount of payment using:

(1) The amount of actual appropriations;

(2) The formula in 31 U.S.C. 6903(b)(1), which includes inflation adjustments; and

(3) Federal and State payments disbursed during the previous fiscal year to local governments under the land payment laws listed under 31 U.S.C. 6903(a)(1).

(d) The laws listed in 31 U.S.C. 6903(a)(1) and referred to in paragraphs (a) and (c) of this section are:

(1) The Act of June 20, 1910 (Arizona and New Mexico Enabling Acts) (ch. 310, 36 Stat 557);

(2) Section 33 of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012);

(3) The Act of May 23, 1908 (Knutson-Vandenberg Act regarding Forest Service timber sales contracts) (16 U.S.C. 500);

(4) Section 5 of the Act of June 22, 1948 (Payments to Minnesota from northern Minnesota National Forest receipts) (16 U.S.C. 577g-l);

(5) Section 401(c)(2) of the Act of June 15, 1935 (Payments to local governments from National Wildlife Refuge System receipts) (16 U.S.C. 715s(c)(2));

(6) Section 17 of the Federal Power Act (16 U.S.C. 810);

(7) Section 35 of the Act of February 25, 1920 (Mineral Leasing Act) (30 U.S.C. 191);

(8) Section 6 of the Mineral Leasing Act for Acquired Lands (30 U.S.C. 355);

(9) Section 3 of the Act of July 31, 1947 (Materials Act of 1947) (30 U.S.C. 603); and

(10) Section 10 of the Act of June 28, 1934 (Taylor Grazing Act) (43 U.S.C. 315i).

§ 44.22 Are there any special circumstances that affect the way the Department calculates PILT payments?

If a local government eligible for payments under this subpart reorganizes, the Department will:

(a) Calculate payments for the fiscal year in which the reorganization occurred as if the reorganization had not occurred; and

(b) Disburse any payment due to each new unit based on the amount of eligible acreage in that unit.

§ 44.23 How does the Department certify payment computations?

(a) The Department will certify a payment computation only after receiving a statement showing all land revenue sharing payments that each local government received from the State during the previous fiscal year. As used in this paragraph, ''land revenue sharing payments'' means payments made from revenues derived from the payment laws listed under 31 U.S.C. 6903(a)(1). The statement must:

(1) Be signed by the Governor or a designated official of the State in which the local government is located; and

(2) Be accompanied by a certification, signed by a State Auditor, an independent Certified Public Accountant, or an independent public accountant, that the statement has been audited in accordance with:

(i) Auditing standards established by the U.S. Comptroller General in Standards of Audit of Governmental Organizations, Programs, Activities and Function, (available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402); and

(ii) The Audit Guide for Payments in Lieu of Taxes issued by the Department of the Interior.

(b) The Department's Office of the Inspector General will assist the Department, under the provisions of sections 4 and 6 of the Inspector General Act of 1978 (5 U.S.C. Appendix), to implement and administer the audit requirements in paragraph (a)(2) of this section.

(c) The Office of the Inspector General will:

(1) Develop appropriate audit guidelines that State auditors, independent Certified Public Accountants, or independent public accountants must use to audit the statements of the Governors or their designated officials and to certify the audits; and

(2) Furnish copies of the guides to the Governor or designated official each year. You should send questions on the use or application of this guide to the Office of Inspector General, U.S. Department of the Interior, Washington, DC 20240.

(d) The Department may waive the requirement to certify audits if the General Accounting Office or the Office of the Inspector General verifies the information in statements the Governor or designated official furnishes or if the Department determines it is not necessary. Payments to Local Governments for Acquisitions or Interest in Lands Acquired for Addition to the National Park System or National Forest Wilderness Areas (31 U.S.C. 6904).

§ 44.30 How does the Department make payments for acquired lands?

This section describes how the Department disburses payments for Acquisitions or Interest in Lands Acquired for Addition to the National Park System or National Forest Wilderness Areas (section 6904 payments).

(a) The Department disburses section 6904 payments to qualified local governments only if the administering agency supplies the following information for each qualified local government:

(1) Acreage or interests in land for which the payments are authorized; and

(2) Any other information the Department may require to certify payments to each qualified local government.

(b) The Department disburses payments under this section only for a period of 5 years from the date the land was conveyed to the United States.

§ 44.31 How does the Department calculate payments for acquired lands?

The Department calculates section 6904 payments by determining 1 percent of the fair market value of the purchased land and comparing the result to the amount of real estate taxes paid on the land in the year before Federal acquisition. The payment to qualified local governments will be the lesser of the two.

PAYMENTS TO LOCAL GOVERNMENTS FOR INTEREST IN LANDS IN THE REDWOOD NATIONAL PARK OR LAKE TAHOE BASIN

§ 44.40 How does the Department process payments for lands in the Redwood National Park or Lake Tahoe Basin?

This section describes how the Department disburses payments for lands in the Redwood National Park or Lake Tahoe Basin (section 6905 payments).

(a) The Department disburses payments to qualified local governments only if the administering agency supplies the following information for each qualified local government:

(1) Acreage or interests in land for which the payments are authorized; and

(2) Any other information the Department may require to certify payments to each qualified local government.

(b) The Department disburses payments until 5 percent of the fair market value is paid in full.

§ 44.41 How does the Department calculate payments for lands in the Redwood National Park or Lake Tahoe Basin?

(a) The Department calculates section 6905 payments by determining 1 percent of the fair market value of the purchased land and comparing the result to the amount of real estate taxes paid on the land in the year prior to Federal acquisition. The payment to qualified units of general local government will be the lesser of the two.

(b) The Department disburses payments annually for a period of 5 years beginning in the year immediately following the year of Federal acquisition of the land or interest.

(1) The difference, if any, between the amounts actually paid during each of the 5 years and 1 percent of the fair market value will be deferred to future years. However, a payment or any portion of a payment not paid because Congress appropriated insufficient monies will not be deferred.

(2) The Department will begin annual payment of the deferred amount (calculated the same as in paragraph (a) of this section) starting with the sixth fiscal year following Federal acquisition.

(3) The Department disburses payment of the deferred amount until the total amount deferred during the first 5 years is paid in full.

STATE AND LOCAL GOVERNMENTS' RESPONSIBILITIES AFTER THE DEPARTMENT DISTRIBUTES PAYMENTS

§ 44.50 What are the local governments' responsibilities after receiving payments under this part?

(a) The local government may use section 6902 payments for any governmental purpose.

(b) Within 90 days of receiving sections 6904 and 6905 payments, the local government must distribute the funds to the affected units of general local government and affected school districts. The affected units of general local government and school districts may use sections 6904 and 6905 payments for any governmental purpose.

(c) The local government must distribute section 6904 and 6905 payments in proportion to the tax revenues assessed and levied by the affected units of general local government and school districts in the Federal fiscal year before the Federal Government acquired the entitlement lands. The Redwoods

Community College District in California is an affected school district for this purpose.

(d) Within 120 days of receiving payments, the local government must certify to the Department that it has made an appropriate distribution of funds.

§ 44.51 Are there general procedures applicable to all PILT payments?

(a) The minimum payment that the Department will disburse to any local government is $100.00 (one hundred dollars).

(b) If Congress appropriates insufficient monies to provide full payment to each local government during any fiscal year, the Department will reduce proportionally all payments in that fiscal year.

§ 44.52 May a State enact legislation to reallocate or redistribute PILT payments?

A State may enact legislation to reallocate or redistribute PILT payments. If a State enacts legislation, it must:

(a) Notify the Department if the legislation requires reallocating or redistributing payments to smaller units of general local government (see 31 U.S.C. 6907);

(b) Provide the Department a copy of the legislation within 60 days of enactment;

(c) Provide the name and address of the State government office to which the Department should send the payment;

(d) Distribute funds to its smaller units of general local government within 30 days of receiving the payment; and

(e) Not reduce the payment made to smaller units of general local government to pay the cost of State legislation which reallocates or redistributes payments.

§ 44.53 What will the Department do if a State enacts distribution legislation?

If a State enacts distribution legislation, the Department will:

(a) Notify the State that a single payment will be disbursed to the designated State government office beginning with the Federal fiscal year following the fiscal year in which the State enacted legislation; and

(b) Provide the State with information that identifies the entitlement lands data on which the Department bases the payment.

§ 44.54 What happens if a State repeals or amends distribution legislation?

(a) If a State repeals or amends distribution legislation, the State must immediately notify the Department in writing of this fact and send the Department a copy of the new law.

(b) When the Department receives a notification under paragraph (a) of this section, it must:

(1) Determine if the State's process complies with 31 U.S.C. 6907. If the Department determines that it does not, we must notify the designated State government office that the Department will disburse payment directly to the eligible local governments; and

(2) Start the payments:

(i) In the current Federal fiscal year, if the Department receives a copy of the State's amendatory legislation before July 1; or

(ii) Start the payments in the next Federal fiscal year, if the Department receives a copy of the State's amendatory legislation after July 1.

§ 44.55 Can a unit of general local government protest the results of payment computations?

Any affected local government may file a protest with the Department.

§ 44.56 How does a unit of general local government file a protest?

The protesting local government must:

(a) Submit evidence to indicate the possibility of errors in the computations or the data on which the Department bases the computations; and

(b) File the protest by the first business day of the calendar year following the end of the fiscal year for which the Department made the payments.

§ 44.57 Can a unit of general local government appeal a rejection of a protest?

Any affected local government may appeal the Department's decision to reject a protest to the Interior Board of Land Appeals under 43 CFR part 4.

PART 45—CONDITIONS AND PRESCRIPTIONS IN FERC HYDROPOWER LICENSES

Subpart A—General Provisions

Sec.
45.1 What is the purpose of this part, and to what license proceedings does it apply?
45.2 What terms are used in this part?
45.3 How are time periods computed?
45.4 What deadlines apply to pending applications?

Subpart B—Hearing Process

REPRESENTATIVES

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

DOCUMENT FILING AND SERVICE

45.11 What are the form and content requirements for documents under this subpart?
45.12 Where and how must documents be filed?
45.13 What are the requirements for service of documents?

INITIATION OF HEARING PROCESS

45.20 What supporting information must a bureau provide with its preliminary conditions or prescriptions?
45.21 How do I request a hearing?
45.22 How do I file a notice of intervention and response?
45.23 When will hearing requests be consolidated?
45.24 How will the bureau respond to any hearing requests?
45.25 What will DOI do with any hearing requests?
45.26 What regulations apply to a case referred for a hearing?

GENERAL PROVISIONS RELATED TO HEARINGS

45.30 What will the Hearings Division do with a case referral?
45.31 What are the powers of the ALJ?
45.32 What happens if the ALJ becomes unavailable?
45.33 Under what circumstances may the ALJ be disqualified?
45.34 What is the law governing ex parte communications?
45.35 What are the requirements for motions?

PREHEARING CONFERENCES AND DISCOVERY

45.40 What are the requirements for prehearing conferences?
45.41 How may parties obtain discovery of information needed for the case?
45.42 When must a party supplement or amend information it has previously provided?
45.43 What are the requirements for written interrogatories?
45.44 What are the requirements for depositions?
45.45 What are the requirements for requests for documents or tangible things or entry on land?
45.46 What sanctions may the ALJ impose for failure to comply with discovery?
45.47 What are the requirements for subpoenas and witness fees?

HEARING, BRIEFING, AND DECISION

45.50 When and where will the hearing be held?
45.51 What are the parties' rights during the hearing?
45.52 What are the requirements for presenting testimony?
45.53 How may a party use a deposition in the hearing?
45.54 What are the requirements for exhibits, official notice, and stipulations?
45.55 What evidence is admissible at the hearing?
45.56 What are the requirements for transcription of the hearing?
45.57 What is the standard of proof?
45.58 When will the hearing record close?
45.59 What are the requirements for post-hearing briefs?
45.60 What are the requirements for the ALJ's decision?

Subpart C—Alternatives Process

45.70 How must documents be filed and served under this subpart?
45.71 How do I propose an alternative?
45.72 What will the bureau do with a proposed alternative?
45.73 How will the bureau analyze a proposed alternative and formulate its modified condition or prescription?
45.74 Has OMB approved the information collection provisions of this subpart?

AUTHORITY: 16 U.S.C. 797(e), 811, 823d.

SOURCE: 70 FR 69829, Nov. 17, 2005, unless otherwise noted.

Subpart A—General Provisions

§45.1 What is the purpose of this part, and to what license proceedings does it apply?

(a) *Hearing process.* (1) The regulations in subparts A and B of this part contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to

mandatory conditions and prescriptions that the Department of the Interior (DOI) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq*. The authority to develop these conditions and prescriptions is granted by FPA sections 4(e) and 18, 16 U.S.C. 797(e) and 811, which authorize the Secretary of the Interior to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC) and to prescribe fishways.

(2) The hearing process under this part does not apply to recommendations that DOI may submit to FERC under FPA section 10(a) or (j), 16 U.S.C. 803(a), (j).

(3) The FPA also grants the Department of Agriculture the authority to develop mandatory conditions, and the Department of Commerce the authority to develop mandatory prescriptions, for inclusion in a hydropower license. Where DOI and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 45.23:

(i) A hearing conducted under this part will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this part will be conducted by one of the other Departments, pursuant to 7 CFR 1.601 *et seq*. or 50 CFR 221.1 *et seq*., as applicable.

(4) The regulations in subparts A and B of this part will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 45.60(a).

(b) *Alternatives process*. The regulations in subparts A and C of this part contain rules of procedure applicable to the submission and consideration of alternative conditions and prescriptions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by DOI under section 4(e) or a fishway prescribed by DOI under section 18.

(c) *Reservation of authority*. Where DOI notifies FERC that it is reserving its authority to develop one or more conditions or prescriptions during the term of the license, the hearing and alternatives processes under this part for such conditions or prescriptions will be available if and when DOI exercises its reserved authority. DOI will consult with FERC and notify the license parties regarding how to initiate the hearing process and alternatives process at that time.

(d) *Applicability*. (1) This part applies to any hydropower license proceeding for which the license has not been issued as of November 17, 2005 and for which one or more preliminary conditions, conditions, preliminary prescriptions, or prescriptions have been or are filed with FERC.

(2) If DOI has already filed one or more preliminary conditions, conditions, preliminary prescriptions, or prescriptions as of November 17, 2005, the special applicability provisions of § 45.4 also apply.

§ 45.2 What terms are used in this part?

As used in this part:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under subpart B of this part.

Alternative means a condition or prescription that a license party other than a bureau or Department develops as an alternative to a preliminary condition or prescription from a bureau or Department, under FPA sec. 33, 16 U.S.C. 823d.

Bureau means any of the following organizations within DOI that develops a preliminary condition or prescription: the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, or National Park Service.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

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

DOI means the Department of the Interior, including any bureau, unit, or office of the Department, whether in Washington, DC, or in the field.

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.

FERC means the Federal Energy Regulatory Commission.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq*.

Hearings Division means the Departmental Cases Hearings Division, Office of Hearings and Appeals, Department of the Interior, 139 E. South Temple, Suite 600, Salt Lake City, Utah 84111, telephone 801–524–5344, facsimile number 801–524–5539.

Intervention means a process by which a person who did not request a hearing under § 45.21 can participate as a party to the hearing under § 45.22.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

License proceeding means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR parts 4 or 5.

Material fact means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

NEPA document means an environmental assessment or environmental impact statement issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*.

OEPC means the Office of Environmental Policy and Compliance, Department of the Interior, 1849 C Street, NW., Mail Stop 2342, Washington, DC 20240, telephone 202–208–3891, facsimile number 202–208–6970.

Party means, with respect to DOI's hearing process under subpart B of this part:

(1) A license party that has filed a timely request for a hearing under:

(i) Section 45.21; or

(ii) Either 7 CFR 1.621 or 50 CFR 221.21, with respect to a hearing process consolidated under § 45.23;

(2) A license party that has filed a timely notice of intervention and response under:

(i) Section 45.22; or

(ii) Either 7 CFR 1.622 or 50 CFR 221.22, with respect to a hearing process consolidated under § 45.23;

(3) Any bureau that has filed a preliminary condition or prescription; and

(4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under § 45.23.

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.

Preliminary condition or prescription means a preliminary condition or prescription filed by a Department with FERC under 18 CFR 4.34(b), 4.34(i), or 5.22(a) for potential inclusion in a hydropower license.

Prescription means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

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 § 45.10.

Reservation has the same meaning as the term ''reservations'' in FPA sec. 3(2), 16 U.S.C. 796(2).

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

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

You refers to a party other than a Department.

§ 45.3 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 federal holiday, 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 federal holiday that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a request for a hearing under § 45.21, a notice of intervention and response under § 45.22, an answer under § 45.24, or any document under subpart C of this part.

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

(i) To request an extension of time, a party must file a motion under § 45.35 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 decision under § 45.60.

§ 45.4 What deadlines apply to pending applications?

(a) *Applicability.* (1) This section applies to any case in which a bureau has filed a preliminary condition, condition, preliminary prescription, or prescription with FERC before November 17, 2005 and FERC has not issued a license as of that date.

(2) The deadlines in this section will apply in such a case, in lieu of any inconsistent deadline in other sections of this part.

(b) *Hearing process.* (1) Any request for a hearing under § 45.21 must be filed with OEPC by December 19, 2005.

(2) Any notice of intervention and response under § 45.22 must be filed by January 3, 2006.

(3) Upon receipt of a hearing request under paragraph (b)(1) of this section, the bureau must do the following by March 17, 2006:

(i) Comply with the requirements of § 45.23;

(ii) Determine jointly with any other bureau or Department that has received a hearing request, after consultation with FERC, a time frame for the hearing process and a corresponding deadline for the bureau to file an answer under § 45.24; and

(iii) Issue a notice to each party specifying the time frame for the hearing process, including the deadline for the bureau to file an answer.

(c) *Alternatives process.* (1) Any alternative under § 45.71 must be filed with OEPC by December 19, 2005.

(2) Upon receipt of an alternative under paragraph (c)(1) of this section, if no hearing request is filed under paragraph (b)(1) of this section, the bureau must do the following by February 15, 2006:

(i) Determine jointly with any other bureau or Department that has received a related alternative, after consultation with FERC, a time frame for the filing of a modified condition or prescription under § 45.72(b); and

(ii) Issue a notice to the license party that has submitted the alternative, specifying the time frame for the filing of a modified condition or prescription.

(3) Upon receipt of an alternative under paragraph (c)(1) of this section, if a hearing request is also filed under paragraph (b)(1) of this section, the bureau will follow the provisions of paragraph (b)(3) of this section.

Subpart B—Hearing Process

REPRESENTATIVES

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

(a) *Individuals.* A party who is an individual may either represent himself or herself in the hearing process under this subpart or authorize an attorney to represent him or her.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to represent it:

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

(1) Meet the form and content requirements for documents under §45.11;

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

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

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

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

DOCUMENT FILING AND SERVICE

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

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

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

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

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

(4) Use 10 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 filed under this subpart must begin with a caption that sets forth:

(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 license 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 filed under this subpart must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that he or she has read the document; that to the best of his or her knowledge, information, and belief, the statements made in the document are true; and that 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).

§45.12 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under this subpart must be filed with the appropriate office, as follows:

(1) Before OEPC refers a case for docketing under §45.25, any documents must be filed with OEPC. OEPC's address, telephone number, and facsimile number are set forth in §45.2.

(2) OEPC will notify the parties of the date on which it refers a case for docketing under §45.25. After that date, any documents must be filed with:

(i) The Hearings Division, if DOI will be conducting the hearing. The Hearings Division's address, telephone number, and facsimile number are set forth in §45.2; or

(ii) The hearings component of or used by another Department, if that Department will be conducting the hearing under §45.25. The name, address, telephone number, and facsimile number of the appropriate hearings

component will be provided in the referral notice from OEPC.

(b) *Method of filing.* (1) A document must be filed with the appropriate office under paragraph (a) of this section 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 diskette or compact disc.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due 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 party may be notified of the defect and given a chance to correct it.

§ 45.13 What are the requirements for service of documents?

(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 as follows:

(1) A complete copy of any request for a hearing under § 45.21 must be served on FERC and each license party, using one of the methods of service in paragraph (c) of this section.

(2) A complete copy of any notice of intervention and response under § 45.22 must be:

(i) Served on FERC, the license applicant, any person who has filed a request for hearing under § 45.21, and any bureau, using one of the methods of service in paragraph (c) of this section; and

(ii) Sent to any other license party using regular mail.

(3) A complete copy of any other filed document must be served on each party, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by the Hearings Division or ALJ.* A complete copy of any notice, order, decision, or other document issued by the Hearings Division 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.* 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 party's representative and include the following information:

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

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

(3) The date of service.

INITIATION OF HEARING PROCESS

§ 45.20 What supporting information must a bureau provide with its preliminary conditions or prescriptions?

(a) *Supporting information.* (1) When any bureau files a preliminary condition or prescription with FERC, it must include a rationale for the condition or prescription and an index to the

bureau's administrative record that identifies all documents relied upon.

(2) If any of the documents relied upon are not already in the license proceeding record, the bureau must:

(i) File them with FERC at the time it files the preliminary condition or prescription;

(ii) Provide copies to the license applicant; and

(iii) In the case of a condition developed by the Bureau of Indian Affairs, provide copies to the affected tribe.

(b) *Service.* In addition to serving a copy of its preliminary condition or prescription on each license party, the bureau must provide a copy to OEPC if and when a request for a hearing is filed with respect to the preliminary condition or prescription.

§ 45.21 How do I request a hearing?

(a) *General.* To request a hearing on disputed issues of material fact with respect to any condition or prescription filed by a bureau, you must:

(1) Be a license party; and

(2) File with OEPC a written request for a hearing within 30 days after the deadline for the Departments to file preliminary conditions or prescriptions with FERC.

(b) *Content.* Your hearing request must contain:

(1) A numbered list of the factual issues that you allege are in dispute, each stated in a single, concise sentence; and

(2) The following information with respect to each issue:

(i) The specific factual statements made or relied upon by the bureau under § 45.20(a) that you dispute;

(ii) The basis for your opinion that those factual statements are unfounded or erroneous;

(iii) The basis for your opinion that any factual dispute is material; and

(iv) With respect to any scientific studies, literature, and other documented information supporting your opinions under paragraphs (b)(2)(ii) and (b)(2)(iii) of this section, specific citations to the information relied upon. If any such document is not already in the license proceeding record, you must provide a copy with the request.

(c) *Witnesses and exhibits.* Your hearing request must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(2) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 45.22 How do I file a notice of intervention and response?

(a) *General.* (1) To intervene as a party to the hearing process, you must:

(i) Be a license party; and

(ii) File with OEPC a notice of intervention and a written response to any request for a hearing within 15 days after the date of service of the request for a hearing.

(2) A license party filing a notice of intervention and response may not raise issues of material fact beyond those raised in the hearing request.

(b) *Content.* In your notice of intervention and response you must explain your position with respect to the issues of material fact raised in the hearing request under § 45.21(b).

(1) If you agree with the information provided by the bureau under § 45.20(a) or by the requester under § 45.21(b), your response may refer to the bureau's explanation or the requester's hearing request for support.

(2) If you wish to rely on additional information or analysis, your response must provide the same level of detail with respect to the additional information or analysis as required under § 45.21(b).

(c) *Witnesses and exhibits.* Your response and notice must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony; and

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 45.23 When will hearing requests be consolidated?

(a) *Initial Department coordination.* Any bureau that has received a copy of a hearing request must contact the other bureaus and Departments within 10 days after the deadline for filing hearing requests under § 45.21 and determine:

(1) Whether any of the other bureaus or Departments has also filed a preliminary condition or prescription relating to the license with FERC; and

(2) If so, whether the other bureau or Department has also received a hearing request with respect to the preliminary condition or prescription.

(b) *Decision on consolidation.* Within 25 days after the deadline for filing hearing requests under § 45.21, any bureau or Department that has received a hearing request must:

(1) Consult with any other bureau or Department that has also received a hearing request; and

(2) Decide jointly with the other bureau or Department:

(i) Whether to consolidate the cases for hearing under paragraphs (c)(3)(ii) through (c)(3)(iv) of this section; and

(ii) If so, which Department will conduct the hearing on their behalf.

(c) *Criteria.* Cases will or may be consolidated as follows:

(1) All hearing requests with respect to any conditions from the same Department will be consolidated for hearing.

(2) All hearing requests with respect to any prescriptions from the same Department will be consolidated for hearing.

(3) Any or all of the following may be consolidated for hearing, if the bureaus and Departments involved determine that there are common issues of material fact or that consolidation is otherwise appropriate:

(i) Two or more hearing requests with respect to any condition and any prescription from the same Department;

(ii) Two or more hearing requests with respect to conditions from different Departments;

(iii) Two or more hearing requests with respect to prescriptions from different Departments; or

(iv) Two or more hearing requests with respect to any condition from one Department and any prescription from another Department.

§ 45.24 How will the bureau respond to any hearing requests?

(a) *General.* Within 45 days after the deadline in § 45.21(a)(2), the bureau may file with OEPC an answer to any hearing request under § 45.21.

(b) *Content.* If the bureau files an answer:

(1) For each of the numbered factual issues listed under § 45.21(b)(1), the answer must explain the bureau's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:

(i) That the bureau is willing to stipulate to the facts as alleged by the requester;

(ii) That the bureau believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;

(iii) That the bureau believes the issue listed by the requester is not material, explaining the basis for such belief; or

(iv) That the bureau agrees that the issue is factual, material, and in dispute.

(2) The answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests under § 45.23 and, if so:

(i) Identify any other hearing request that will be consolidated with this hearing request; and

(ii) State which Department will conduct the hearing and provide contact information for the appropriate Department hearings component.

(c) *Witnesses and exhibits.* The bureau's answer must also list the witnesses and exhibits that it intends to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, the bureau must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, the bureau must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(1) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

(e) *Notice in lieu of answer.* If the bureau elects not to file an answer to a hearing request:

(1) The bureau is deemed to agree that the issues listed by the requester are factual, material, and in dispute;

(2) The bureau may file a list of witnesses and exhibits with respect to the request only as provided in § 45.42(b); and

(3) The bureau must file a notice containing the information required by paragraph (b)(2) of this section, if the hearing request will be consolidated with one or more other hearing requests under § 45.23.

§ 45.25 What will DOI do with any hearing requests?

(a) *Case referral.* Within 5 days after receipt of the bureau's answer, OEPC will refer the case for a hearing as follows:

(1) If the hearing is to be conducted by DOI, OEPC will refer the case to the Hearings Division.

(2) If the hearing is to be conducted by another Department, OEPC will refer the case to the hearings component used by that Department.

(b) *Content.* The case referral will consist of the following:

(1) A copy of any preliminary condition or prescription under § 45.20;

(2) The original of any hearing request under § 45.21;

(3) The original of any notice of intervention and response under § 45.22;

(4) The original of any answer under § 45.24; and

(5) An original referral notice under paragraph (c) of this section.

(c) *Notice.* At the time OEPC refers the case for a hearing, it must provide a referral notice that contains the following information:

(1) The name, address, telephone number, and facsimile number of the Department hearings component that will conduct the hearing;

(2) The name, address, and other contact information for the representative of each party to the hearing process;

(3) An identification of any other hearing request that will be consolidated with this hearing request; and

(4) The date on which OEPC is referring the case for docketing.

(d) *Delivery and service.* (1) OEPC must refer the case to the appropriate Department hearings component by one of the methods identified in § 45.12(b)(1)(i) and (b)(1)(ii).

(2) OEPC must serve a copy of the referral notice on FERC and each party to the hearing by one of the methods identified in § 45.13(c)(1) and (c)(2).

§ 45.26 What regulations apply to a case referred for a hearing?

(a) If OEPC refers the case to the Hearings Division, the regulations in this subpart will continue to apply to the hearing process.

(b) If OEPC refers the case to the United States Department of Agriculture's Office of Administrative Law Judges, the regulations at 7 CFR 1.601 *et seq.* will apply from that point on.

(c) If OEPC refers the case to the Department of Commerce's designated ALJ office, the regulations at 50 CFR 221.1 *et seq.* will apply from that point on.

General Provisions Related to Hearings

§ 45.30 What will the Hearings Division do with a case referral?

Within 5 days after issuance of the referral notice under § 45.25(c), 7 CFR 1.625(c), or 50 CFR 221.25(c):

(a) The Hearings Division must:

(1) Docket the case;

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

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

(b) The ALJ must issue a notice setting the time, place, and method for conducting an initial prehearing conference under § 45.40. This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§ 45.31 What are the powers of the ALJ?

The ALJ will have all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process, consistent with the requirements of § 45.60(a), including the powers to:

(a) Administer oaths and affirmations;

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

(c) Rule on motions;

(d) Authorize discovery as provided for in this subpart;

(e) Hold hearings and conferences;

(f) Regulate the course of hearings;

(g) Call and question witnesses;

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

(i) Issue a decision consistent with § 45.60(b) regarding any disputed issues of material fact relating to any bureau's or other Department's condition or prescription that has been referred to the ALJ for hearing; and

(j) Take any other action authorized by law.

§ 45.32 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in § 45.31, the Hearings Division shall 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.

§ 45.33 Under what circumstances may the 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 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 decision.

§ 45.34 What is the law governing ex parte communications?

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

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

§ 45.35 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 the Hearings Division issues a docketing notice under § 45.30.

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

(2) Any other motion must:

(i) Be in writing;

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

(iii) Not exceed 10 pages.

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

(i) Its purpose and the relief sought;

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

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response*. Except as otherwise required by this part or by order of the ALJ, any other party may file a response to a written motion within 10 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 practicable, either orally on the record or in writing. He or she may summarily deny any dilatory, repetitive, or frivolous motion.

PREHEARING CONFERENCES AND DISCOVERY

§ 45.40 What are the requirements for prehearing conferences?

(a) *Initial prehearing conference*. The ALJ will conduct an initial prehearing conference with the parties at the time specified in the docketing notice under § 45.30, on or about the 20th day after issuance of the referral notice under § 45.25(c).

(1) The initial prehearing conference will be used:

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

(ii) To consider the parties' motions for discovery under § 45.41 and to set a deadline for the completion of discovery;

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

(iv) To set the deadline for submission of written testimony under § 45.52; and

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

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

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

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

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

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

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

(b) *Other conferences*. The ALJ may in his or her discretion direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 90 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. A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(d) *Preparation*. (1) Each party's representative must be fully prepared for a discussion of all issues properly before the conference, both procedural and substantive. The representative must be authorized to commit the party that he or she represents respecting those issues.

(2) Before the date set for the initial prehearing conference, the parties' representatives must make a good faith effort:

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

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

(e) *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.

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

(g) *Order*. Within 2 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.

§ 45.41 How may parties obtain discovery of information needed for the case?

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

(1) Written interrogatories;

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

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

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

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

(2) 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 already in the license proceeding record or otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

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

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

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

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

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

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

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

(2) By filing a motion that:

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

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

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

(d) *Timing of motions*. A party must file any discovery motion under paragraph (c)(2) of this section within 7 days after issuance of the referral notice under § 45.25(c).

(e) *Objections*. (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 7 days after service of the motion.

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

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

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

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

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

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

(g) *Experts*. Unless restricted by the ALJ, a party may discover any facts known or opinions held by an expert concerning any relevant matters that

are not privileged. Such discovery will be permitted only if:

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

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

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

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

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

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

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

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

(3) A party may depose a senior Department employee 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 government duties.

(i) *Completion of discovery*. All discovery must be completed within 25 days after the initial prehearing conference, unless the ALJ sets a different deadline.

§ 45.42 When must a party supplement or amend information it has previously provided?

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

(1) Was incomplete or incorrect when made; or

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

(b) *Witnesses and exhibits*. (1) Within 5 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under §§ 45.21(c), 45.22(c), or 45.24(c).

(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 §§ 45.21(c), 45.22(c), or 45.24(c).

(c) *Failure to disclose*. (1) A party that fails to disclose information required under §§ 45.21(c), 45.22(c), or 45.24(c), or paragraphs (a) or (b) of this section, will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclosed.

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

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

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

(i) The prejudice to the objecting party;

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

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

(iv) The importance of the evidence; and

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

§ 45.43 What are the requirements for written interrogatories?

(a) *Motion*. Except upon agreement of the parties, a party wishing to propound interrogatories must file a motion under § 45.41(c).

(b) *ALJ order*. During or promptly after the initial prehearing conference, the ALJ will issue an order under § 45.41(b) with respect to any discovery motion requesting the use of written interrogatories. The order will:

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

(2) Deny the motion.

(c) *Answers to interrogatories*. Except upon agreement of the parties, the

party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the ALJ within 15 days after issuance of the order under paragraph (b) of this section.

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

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

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

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

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

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

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

§ 45.44 What are the requirements for depositions?

(a) *Motion and notice.* Except upon agreement of the parties, a party wishing to take a deposition must file a motion under § 45.41(c). Any notice of deposition filed with the motion must state:

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

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

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

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

(b) *ALJ order.* During or promptly after the initial prehearing conference, the ALJ will issue an order under § 45.41(b) with respect to any discovery motion requesting the taking of a deposition. The order will:

(1) Grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the ALJ may impose; or

(2) Deny the motion.

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

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

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

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

(i) Before the deposition begins; or

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) *Use of deposition*. A deposition may be used at the hearing as provided in § 45.53.

§ 45.45 What are the requirements for requests for documents or tangible things or entry on land?

(a) *Motion*. Except upon agreement of the parties, a party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 45.41(c). A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying, other than documents that are already in the license proceeding record;

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

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

(b) *ALJ order*. During or promptly after the initial prehearing conference, the ALJ will issue an order under § 45.41(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

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

(2) Deny the motion.

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

§ 45.46 What sanctions may the ALJ impose for failure to comply with discovery?

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

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

(2) Fails to supplement or amend a response to discovery under § 45.42(a).

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

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

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

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

(i) That the party improperly withheld; or

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

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

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

§ 45.47 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 a senior Department employee only if the party shows:

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

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

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

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

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth:

(A) The date, time, and manner of service; or

(B) 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 a bureau or other Department.

(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 during discovery that is not discoverable; or

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

(e) *Enforcement*. For good cause shown, the 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 DECISION

§ 45.50 When and where will the hearing be held?

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 45.40, generally within 15 days after the date set for completion of discovery.

(b) 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.

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

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

(a) To present direct and rebuttal evidence;

(b) To make objections, motions, and arguments; and

(c) To cross-examine witnesses and to conduct re-direct and re-cross examination as permitted by the ALJ.

§ 45.52 What are the requirements for presenting testimony?

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

(1) Prepared written testimony must:

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

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

(iii) Be filed within 5 days after the date set for completion of discovery, unless the ALJ sets a different deadline; and

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

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

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

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

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

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

(3) The ALJ may issue a subpoena under §45.47 directing a witness to testify by telephonic conference call.

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

(a) *In general*. Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under §45.44 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 ALJ.

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

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

(ii) Would have been sustained if the witness had been personally present and testifying at 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) *Videotaped deposition*. If the deposition was recorded on videotape and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

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

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

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

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

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

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

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

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

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

(c) *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 any Department party.

(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.

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

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

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

§ 45.55 What evidence is admissible at the hearing?

(a) *General.* (1) Subject to the provisions of § 45.42(b), 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.

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

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

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

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

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

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

(1) The Hearings Division will secure the services of a reporter and pay the reporter's fees to provide an original transcript to the Hearings Division 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 practicable 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.

§ 45.57 What is the standard of proof?

The standard of proof is a preponderance of the evidence.

§ 45.58 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) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under § 45.56(b).

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

(a) *General.* (1) Each party may file a post-hearing brief within 10 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 in evidence or marked for identification in the record may not be reproduced in the brief.

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

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

(2) If a brief exceeds 20 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.

§45.60 What are the requirements for the ALJ's decision?

(a) *Timing*. The ALJ must issue a decision within the shorter of the following time periods:

(1) 30 days after the close of the hearing under §45.58; or

(2) 90 days after issuance of the referral notice under §45.25(c), 7 CFR 1.625(c), or 50 CFR 221.25(c).

(b) *Content*. (1) The decision must contain:

(i) Findings of fact on all disputed issues of material fact;

(ii) Conclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); 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.

(3) The decision will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be adopted or rejected.

(c) *Service*. Promptly after issuing his or her decision, the ALJ must:

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

(2) Forward a copy of the decision to FERC, along with the complete hearing record, for inclusion in the license proceeding record.

(d) *Finality*. The ALJ's decision under this section will be final, with respect to the disputed issues of material fact, for any Department involved in the hearing. To the extent the ALJ's decision forms the basis for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825l(b).

Subpart C—Alternatives Process

§45.70 How must documents be filed and served under this subpart?

(a) *Filing*. (1) A document under this subpart must be filed using one of the methods set forth in §45.12(b).

(2) A document is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(b) *Service*. (1) Any document filed under this subpart must be served at the same time the document is delivered or sent for filing. A complete copy of the document must be served on each license party and FERC, using:

(i) One of the methods of service in §45.13(c); or

(ii) Regular mail.

(2) The provisions of §45.13(d) and (e) regarding acknowledgment and certificate of service apply to service under this subpart.

§45.71 How do I propose an alternative?

(a) *General*. To propose an alternative, you must:

(1) Be a license party; and

(2) File a written proposal with OEPC within 30 days after the deadline for the bureau to file preliminary conditions or prescriptions with FERC.

(b) *Content*. Your proposal must include:

(1) A description of the alternative, in an equivalent level of detail to the bureau's preliminary condition or prescription;

(2) An explanation of how the alternative:

(i) If a condition, will provide for the adequate protection and utilization of the reservation; or

(ii) If a prescription, will be no less protective than the fishway prescribed by the bureau;

(3) An explanation of how the alternative, as compared to the preliminary condition or prescription, will:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production;

(4) An explanation of how the alternative will affect:

(i) Energy supply, distribution, cost, and use;

(ii) Flood control;

(iii) Navigation;

(iv) Water supply;

(v) Air quality; and

(vi) Other aspects of environmental quality; and

(5) Specific citations to any scientific studies, literature, and other documented information relied on to support your proposal, including any assumptions you are making (e.g., regarding the cost of energy or the rate of inflation). If any such document is not already in the license proceeding record, you must provide a copy with the proposal.

§ 45.72 What will the bureau do with a proposed alternative?

If any license party proposes an alternative to a preliminary condition or prescription under § 45.71(a)(1), the bureau must do the following within 60 days after the deadline for filing comments to FERC's NEPA document under 18 CFR 5.25(c):

(a) Analyze the alternative under § 45.73; and

(b) File with FERC:

(1) Any condition or prescription that the bureau adopts as its modified condition or prescription; and

(2) Its analysis of the modified condition or prescription and any proposed alternatives under § 45.73(c).

§ 45.73 How will the bureau analyze a proposed alternative and formulate its modified condition or prescription?

(a) In deciding whether to adopt a proposed alternative, the bureau must consider evidence and supporting material provided by any license party or otherwise available to the bureau, including:

(1) Any evidence on the implementation costs or operational impacts for electricity production of the proposed alternative;

(2) Any comments received on the bureau's preliminary condition or prescription;

(3) Any ALJ decision on disputed issues of material fact issued under § 45.60 with respect to the preliminary condition or prescription;

(4) Comments received on any draft or final NEPA documents; and

(5) The license party's proposal under § 45.71.

(b) The bureau must adopt a proposed alternative if the bureau determines, based on substantial evidence provided by any license party or otherwise available to the bureau, that the alternative:

(1) Will, as compared to the bureau's preliminary condition or prescription:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production; and

(2) Will:

(i) If a condition, provide for the adequate protection and utilization of the reservation; or

(ii) If a prescription, be no less protective than the bureau's preliminary prescription.

(c) When the bureau files with FERC the condition or prescription that the bureau adopts as its modified condition or prescription under §§ 45.72(b), it must also file:

(1) A written statement explaining:

(i) The basis for the adopted condition or prescription; and

(ii) If the bureau is not adopting any alternative, its reasons for not doing so; and

(2) Any study, data, and other factual information relied on that is not already part of the licensing proceeding record.

(d) The written statement under paragraph (c)(1) of this section must demonstrate that the bureau gave equal consideration to the effects of the condition or prescription adopted and any alternative not adopted on:

(1) Energy supply, distribution, cost, and use;

(2) Flood control;

(3) Navigation;

(4) Water supply;

(5) Air quality; and

(6) Preservation of other aspects of environmental quality.

§ 45.74 Has OMB approved the information collection provisions of this subpart?

Yes. This rule contains provisions that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.

PART 46—IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Subpart A—General Information

Sec.
46.10 Purpose of this part.
46.20 How to use this part.
46.30 Definitions.

Subpart B—Protection and Enhancement of Environmental Quality

46.100 Federal action subject to the procedural requirements of NEPA.
46.105 Using a contractor to prepare environmental documents.
46.110 Incorporating consensus-based management.
46.115 Consideration of past actions in analysis of cumulative effects.
46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations.
46.125 Incomplete or unavailable information.
46.130 Mitigation measures in analyses.
46.135 Incorporation of referenced documents into NEPA analysis.
46.140 Using tiered documents.
46.145 Using adaptive management.
46.150 Emergency responses.
46.155 Consultation, coordination, and cooperation with other agencies.
46.160 Limitations on actions during the NEPA analysis process.
46.170 Environmental effects abroad of major Federal actions.

Subpart C—Initiating the NEPA Process

46.200 Applying NEPA early.
46.205 Actions categorically excluded from further NEPA review.
46.210 Listing of Departmental categorical exclusions.
46.215 Categorical exclusions: Extraordinary circumstances.
46.220 How to designate lead agencies.
46.225 How to select cooperating agencies.
46.230 Role of cooperating agencies in the NEPA process.
46.235 NEPA scoping process.
46.240 Establishing time limits for the NEPA process.

Subpart D—Environmental Assessments

46.300 Purpose of an environmental assessment and when it must be prepared.
46.305 Public involvement in the environmental assessment process.
46.310 Contents of an environmental assessment.
46.315 How to format an environmental assessment.
46.320 Adopting environmental assessments prepared by another agency, entity, or person.
46.325 Conclusion of the environmental assessment process.

Subpart E—Environmental Impact Statements

46.400 Timing of environmental impact statement development.
46.405 Remaining within page limits.
46.415 Environmental impact statement content, alternatives, circulation and filing requirements.
46.420 Terms used in an environmental impact statement.
46.425 Identification of the preferred alternative in an environmental impact statement.
46.430 Environmental review and consultation requirements.
46.435 Inviting comments.
46.440 Eliminating duplication with State and local procedures.
46.445 Preparing a legislative environmental impact statement.
46.450 Identifying the environmentally preferable alternatives.

AUTHORITY: 42 U.S.C. 4321 *et seq.* (The National Environmental Policy Act of 1969, as amended); Executive Order 11514, (Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977)); 40 CFR parts 1500–1508 (43 FR 55978) (National Environmental Policy Act, Implementation of Procedural Provisions).

SOURCE: 73 FR 61314, Oct. 15, 2008, unless otherwise noted.

Subpart A—General Information

§ 46.10 Purpose of this part.

(a) This part establishes procedures for the Department, and its constituent bureaus, to use for compliance with:

(1) The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*); and

(2) The Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508).

(b) Consistent with 40 CFR 1500.3, it is the Department's intention that any trivial violation of these regulations will not give rise to any independent cause of action.

§ 46.20 How to use this part.

(a) This part supplements, and is to be used in conjunction with, the CEQ regulations except where it is inconsistent with other statutory requirements. The following table shows the corresponding CEQ regulations for the sections in subparts A—E of this part. Some sections in those subparts do not have a corresponding CEQ regulation.

SUBPART A	40 CFR
46.10	Parts 1500–1508
46.20	No corresponding CEQ regulation
46.30	No corresponding CEQ regulation
SUBPART B	
46.100	1508.14, 1508.18, 1508.23
46.105	1506.5
46.110	No corresponding CEQ regulation
46.115	1508.7
46.120	1502.9, 1502.20, 1502.21, 1506.3
46.125	1502.22
46.130	1502.14
46.135	1502.21
46.140	1502.20
46.145	No corresponding CEQ regulation
46.150	1506.11
46.155	1502.25, 1506.2
46.160	1506.1
46.170	No corresponding CEQ regulation
SUBPART C	
46.200	1501.2
46.205	1508.4
46.210	1508.4
46.215	1508.4
46.220	1501.5
46.225	1501.6
46.230	1501.6
46.235	1501.7
46.240	1501.8
SUBPART D	
46.300	1501.3
46.305	1501.7, 1506.6
46.310	1508.9
46.315	No corresponding CEQ regulation
46.320	1506.3
46.325	1501.4
SUBPART E	
46.400	1502.5
46.405	1502.7
46.415	1502.10
46.420	1502.14
46.425	1502.14
46.430	1502.25
46.435	1503
46.440	1506.2
46.445	1506.8
46.450	1505.2

(b) The Responsible Official will ensure that the decision making process for proposals subject to this part includes appropriate NEPA review.

(c) During the decision making process for each proposal subject to this part, the Responsible Official shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and responses to those comments, as part of consideration of the proposal and, except as specified in paragraphs 46.210(a) through (j), shall include such documents, including supplements, comments, and responses as part of the administrative file.

(d) The Responsible Official's decision on a proposed action shall be within the range of alternatives discussed in the relevant environmental document. The Responsible Official's decision may combine elements of alternatives discussed in the relevant environmental document if the effects of such combined elements of alternatives are reasonably apparent from the analysis in the relevant environmental document.

(e) For situations involving an applicant, the Responsible Official should initiate the NEPA process upon acceptance of an application for a proposed Federal action. The Responsible Official must publish or otherwise provide policy information and make staff available to advise potential applicants of studies or other information, such as costs, foreseeably required for later Federal action.

§ 46.30 Definitions.

For purposes of this part, the following definitions supplement terms defined at 40 CFR parts 1500–1508.

Adaptive management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain.

Bureau means bureau, office, service, or survey within the Department of the Interior.

Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).

Controversial refers to circumstances where a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the existence of opposition to a proposed action, the effect of which is relatively undisputed.

Environmental Statement Memoranda (ESM) are a series of instructions issued by the Department's Office of Environmental Policy and Compliance to provide information and explanatory guidance in the preparation, completion, and circulation of NEPA documents.

Environmentally preferable alternative is the alternative required by 40 CFR 1505.2(b) to be identified in a record of decision (ROD), that causes the least damage to the biological and physical environment and best protects, preserves, and enhances historical, cultural, and natural resources. The environmentally preferable alternative is identified upon consideration and weighing by the Responsible Official of long-term environmental impacts against short-term impacts in evaluating what is the best protection of these resources. In some situations, such as when different alternatives impact different resources to different degrees, there may be more than one environmentally preferable alternative.

No action alternative.

(1) This term has two interpretations. First ''no action'' may mean ''no change'' from a current management direction or level of management intensity (*e.g.*, if no ground-disturbance is currently underway, no action means no ground-disturbance). Second ''no action'' may mean ''no project'' in cases where a new project is proposed for implementation.

(2) The Responsible Official must determine the ''no action'' alternative consistent with one of the definitions in paragraph (1) of this definition and appropriate to the proposed action to be analyzed in an environmental impact statement. The no action alternative looks at effects of not approving the action under consideration.

Proposed action. This term refers to the bureau activity under consideration. It includes the bureau's exercise of discretion over a non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments. The proposed action:

(1) Is not necessarily, but may become, during the NEPA process, the bureau preferred alternative or (in a record of decision for an environmental impact statement, in accordance with 40 CFR 1505.2) an environmentally preferable alternative; and

(2) Must be clearly described in order to proceed with NEPA analysis.

Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite.

Responsible Official is the bureau employee who is delegated the authority to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA.

Subpart B—Protection and Enhancement of Environmental Quality

§ 46.100 Federal action subject to the procedural requirements of NEPA.

(a) A bureau proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR 1508.14), and is subject to bureau control and responsibility (40 CFR 1508.18). The determination of whether a proposed action is subject to the procedural requirements of NEPA depends on the extent to which bureaus exercise control and responsibility over the proposed action and whether Federal funding or approval are necessary to implement it. If Federal funding is provided with no Federal agency control as to the expenditure of such funds by the recipient, NEPA compliance is not necessary. The proposed action is not subject to the procedural requirements of NEPA if it is exempt from the requirements of section 102(2) of NEPA.

(b) A bureau shall apply the procedural requirements of NEPA when the proposal is developed to the point that:

(1) The bureau has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal; and

(2) The effects of the proposed action can be meaningfully evaluated (40 CFR 1508.23).

§ 46.105 Using a contractor to prepare environmental documents.

A Responsible Official may use a contractor to prepare any environmental document in accordance with the standards of 40 CFR 1506.5(b) and (c). If a Responsible Official uses a contractor, the Responsible Official remains responsible for:

(a) Preparation and adequacy of the environmental documents; and

(b) Independent evaluation of the environmental documents after their completion.

§ 46.110 Incorporating consensus-based management.

(a) Consensus-based management incorporates direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. For the purposes of this Part, consensus-based management involves outreach to persons, organizations or communities who may be interested in or affected by a proposed action with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.

(b) In incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action. While there is no guarantee that any particular consensus-based alternative will be considered to be a reasonable alternative or be identified as the bureau's preferred alternative, bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision. To be selected for implementation, a consensus-based alternative must be fully consistent with NEPA, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance.

(c) The Responsible Official must, whenever practicable, use a consensus-based management approach to the NEPA process.

(d) If the Responsible Official determines that the consensus-based alternative, if any, is not the preferred alternative, he or she must state the reasons for this determination in the environmental document.

(e) When practicing consensus-based management in the NEPA process, bureaus must comply with all applicable laws, including any applicable provisions of the Federal Advisory Committee Act (FACA).

§ 46.115 Consideration of past actions in the analysis of cumulative effects.

When considering the effects of past actions as part of a cumulative effects analysis, the Responsible Official must analyze the effects in accordance with 40 CFR 1508.7 and in accordance with relevant guidance issued by the Council on Environmental Quality, such as ''The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis'' dated June 24, 2005, or any superseding Council on Environmental Quality guidance.

§ 46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations.

(a) When available, the Responsible Official should use existing NEPA analyses for assessing the impacts of a proposed action and any alternatives. Procedures for adoption or incorporation by reference of such analyses must be followed where applicable.

(b) If existing NEPA analyses include data and assumptions appropriate for the analysis at hand, the Responsible Official should use these existing NEPA analyses and/or their underlying data and assumptions where feasible.

(c) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.

(d) Responsible Officials should make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork.

§ 46.125 Incomplete or unavailable information.

In circumstances where the provisions of 40 CFR 1502.22 apply, bureaus must consider all costs to obtain information. These costs include monetary costs as well as other non-monetized costs when appropriate, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates.

§ 46.130 Mitigation measures in analyses.

(a) Bureau proposed action. The analysis of the proposed action and any alternatives must include an analysis of the effects of the proposed action or alternative as well as analysis of the effects of any appropriate mitigation measures or best management practices that are considered. The mitigation measures can be analyzed either as elements of alternatives or in a separate discussion of mitigation.

(b) Applicant proposals (*i.e.*, bureau decision-making on such proposals is the proposed action). An applicant's proposal presented to the bureau for analysis must include any ameliorative design elements (including stipulations, conditions, or best management practices), required to make the proposal conform to applicable legal requirements, as well as any voluntary ameliorative design element(s). The effects of any mitigation measures other than the ameliorative design elements included in the applicant's proposal must also be analyzed. The analysis of these mitigation measures can be structured as a matter of consideration of alternatives to approving the applicant's proposal or as separate mitigation measures to be imposed on any alternative selected for implementation.

§ 46.135 Incorporation of referenced documents into NEPA analysis.

(a) The Responsible Official must determine that the analysis and assumptions used in the referenced document are appropriate for the analysis at hand.

(b) Citations of specific information or analysis from other source documents should include the pertinent page numbers or other relevant identifying information.

(c) Publications incorporated into NEPA analysis by reference must be listed in the bibliography. Such publications must be readily available for review and, when not readily available, they must be made available for review as part of the record supporting the proposed action.

§ 46.140 Using tiered documents.

A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.

(a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

(b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.

(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a ''finding of no *new* significant impact.''

§ 46.145 Using adaptive management.

Bureaus should use adaptive management, as appropriate, particularly in circumstances where long-term impacts may be uncertain and future monitoring will be needed to make adjustments in subsequent implementation decisions. The NEPA analysis conducted in the context of an adaptive management approach should identify the range of management options that may be taken in response to the results of monitoring and should analyze the effects of such options. The environmental effects of any adaptive management strategy must be evaluated in this or subsequent NEPA analysis.

§ 46.150 Emergency responses.

This section applies only if the Responsible Official determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation in accordance with the provisions in subparts D and E of this part.

(a) The Responsible Official may take those actions necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources. When taking such actions, the Responsible Official shall take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical.

(b) The Responsible Official shall document in writing the determination that an emergency exists and describe the responsive action(s) taken at the time the emergency exists. The form of that documentation is within the discretion of the Responsible Official.

(c) If the Responsible Official determines that proposed actions taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are not likely to have significant environmental impacts, the Responsible Official shall document that determination in an environmental assessment and a finding of no significant impact prepared in accordance with this part, unless categorically excluded (see subpart C of this part). If the Responsible Official finds that the

nature and scope of the subsequent actions related to the emergency require taking such proposed actions prior to completing an environmental assessment and a finding of no significant impact, the Responsible Official shall consult with the Office of Environmental Policy and Compliance about alternative arrangements for NEPA compliance. The Assistant Secretary, Policy Management and Budget or his/her designee may grant an alternative arrangement. Any alternative arrangement must be documented. Consultation with the Department must be coordinated through the appropriate bureau headquarters.

(d) The Department shall consult with CEQ about alternative arrangements as soon as possible if the Responsible Official determines that proposed actions, taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are likely to have significant environmental impacts. The Responsible Official shall consult with appropriate bureau headquarters and the Department, about alternative arrangements as soon as the Responsible Official determines that the proposed action is likely to have a significant environmental effect. Such alternative arrangements will apply only to the proposed actions necessary to control the immediate impacts of the emergency. Other proposed actions remain subject to NEPA analysis and documentation in accordance with this part.

§ 46.155 Consultation, coordination, and cooperation with other agencies.

The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.

§ 46.160 Limitations on actions during the NEPA analysis process.

During the preparation of a program or plan NEPA document, the Responsible Official may undertake any major Federal action in accordance with 40 CFR 1506.1 when that action is within the scope of, and analyzed in, an existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action.

§ 46.170 Environmental effects abroad of major Federal actions.

(a) In order to facilitate informed decision-making, the Responsible Official having ultimate responsibility for authorizing and approving proposed actions encompassed by the provisions of Executive Order (EO) 12114 shall follow the provisions and procedures of that EO. EO 12114 ''represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.''

(b) When implementing EO 12114, bureaus shall coordinate with the Department. The Department shall then consult with the Department of State, which shall coordinate all communications by the Department with foreign governments concerning environmental agreements and other arrangements in implementing EO 12114.

Subpart C—Initiating the NEPA Process

§ 46.200 Applying NEPA early.

(a) For any potentially major proposed Federal action (40 CFR 1508.23 and 1508.18) that may have potentially significant environmental impacts, bureaus must coordinate, as early as feasible, with:

(1) Any other bureaus or Federal agencies, State, local, and tribal governments having jurisdiction by law or special expertise; and

(2) Appropriate Federal, State, local, and tribal governments authorized to develop and enforce environmental standards or to manage and protect natural resources or other aspects of the human environment.

(b) Bureaus must solicit the participation of all those persons or organizations that may be interested or affected as early as possible, such as at

the time an application is received or when the bureau initiates the NEPA process for a proposed action.

(c) Bureaus should provide, where practicable, any appropriate community-based training to reduce costs, prevent delays, and facilitate and promote efficiency in the NEPA process.

(d) Bureaus should inform private or non-Federal applicants, to the extent feasible, of:

(1) Any appropriate environmental information that the applicants must include in their applications; and

(2) Any consultation with other Federal agencies, or State, local, or tribal governments that the applicant must accomplish before or during the application process.

(e) Bureaus must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposals.

§ 46.205 Actions categorically excluded from further NEPA review.

Categorical Exclusion means a category or kind of action that has no significant individual or cumulative effect on the quality of the human environment. See 40 CFR 1508.4.

(a) Except as provided in paragraph (c) of this section, if an action is covered by a Departmental categorical exclusion, the bureau is not required to prepare an environmental assessment (see subpart D of this part) or an environmental impact statement (see subpart E of this part). If a proposed action does not meet the criteria for any of the listed Departmental categorical exclusions or any of the individual bureau categorical exclusions, then the proposed action must be analyzed in an environmental assessment or environmental impact statement.

(b) The actions listed in section 46.210 are categorically excluded, Department-wide, from preparation of environmental assessments or environmental impact statements.

(c) The CEQ Regulations at 40 CFR 1508.4 require agency procedures to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect and require additional analysis and action. Section 46.215 lists the extraordinary circumstances under which actions otherwise covered by a categorical exclusion require analyses under NEPA.

(1) Any action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in section 46.215; if it does, further analysis and environmental documents must be prepared for the action.

(2) Bureaus must work within existing administrative frameworks, including any existing programmatic agreements, when deciding how to apply any of the section 46.215 extraordinary circumstances.

(d) Congress may establish categorical exclusions by legislation, in which case the terms of the legislation determine how to apply those categorical exclusions.

§ 46.210 Listing of Departmental categorical exclusions.

The following actions are categorically excluded under paragraph 46.205(b), unless any of the extraordinary circumstances in section 46.215 apply:

(a) Personnel actions and investigations and personnel services contracts.

(b) Internal organizational changes and facility and bureau reductions and closings.

(c) Routine financial transactions including such things as salaries and expenses, procurement contracts (*e.g.*, in accordance with applicable procedures and Executive Orders for sustainable or green procurement), guarantees, financial assistance, income transfers, audits, fees, bonds, and royalties.

(d) Departmental legal activities including, but not limited to, such things as arrests, investigations, patents, claims, and legal opinions. This does not include bringing judicial or administrative civil or criminal enforcement actions which are outside the scope of NEPA in accordance with 40 CFR 1508.18(a).

(e) Nondestructive data collection, inventory (including field, aerial, and satellite surveying and mapping), study, research, and monitoring activities.

(f) Routine and continuing government business, including such things as

supervision, administration, operations, maintenance, renovations, and replacement activities having limited context and intensity (*e.g.*, limited size and magnitude or short-term effects).

(g) Management, formulation, allocation, transfer, and reprogramming of the Department's budget at all levels. (This does not exclude the preparation of environmental documents for proposals included in the budget when otherwise required.)

(h) Legislative proposals of an administrative or technical nature (including such things as changes in authorizations for appropriations and minor boundary changes and land title transactions) or having primarily economic, social, individual, or institutional effects; and comments and reports on referrals of legislative proposals.

(i) Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

(j) Activities which are educational, informational, advisory, or consultative to other agencies, public and private entities, visitors, individuals, or the general public.

(k) Hazardous fuels reduction activities using prescribed fire not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:

(1) Shall be limited to areas—

(i) In wildland-urban interface; and

(ii) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface;

(2) Shall be identified through a collaborative framework as described in ''A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan;''

(3) Shall be conducted consistent with bureau and Departmental procedures and applicable land and resource management plans;

(4) Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness; and

(5) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction. (Refer to the ESM Series for additional, required guidance.)

(l) Post-fire rehabilitation activities not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire. Such activities must comply with the following (Refer to the ESM Series for additional, required guidance.):

(1) Shall be conducted consistent with bureau and Departmental procedures and applicable land and resource management plans;

(2) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and

(3) Shall be completed within three years following a wildland fire.

§ 46.215 Categorical exclusions: Extraordinary circumstances.

Extraordinary circumstances (see paragraph 46.205(c)) exist for individual actions within categorical exclusions that may meet any of the criteria listed in paragraphs (a) through (l) of this section. Applicability of extraordinary circumstances to categorical exclusions is determined by the Responsible Official.

(a) Have significant impacts on public health or safety.

(b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands

(EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.

(c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].

(d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

(f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau.

(h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.

(i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

(j) Have a disproportionately high and adverse effect on low income or minority populations (EO 12898).

(k) Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (EO 13007).

(l) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112).

§ 46.220 How to designate lead agencies.

(a) In most cases, the Responsible Official should designate one Federal agency as the lead with the remaining Federal, State, tribal governments, and local agencies assuming the role of cooperating agency. In this manner, the other Federal, State, and local agencies can work to ensure that the NEPA document will meet their needs for adoption and application to their related decision(s).

(b) In some cases, a non-Federal agency (including a tribal government) must comply with State or local requirements that are comparable to the NEPA requirements. In these cases, the Responsible Official may designate the non-Federal agency as a joint lead agency. (See 40 CFR 1501.5 and 1506.2 for a description of the selection of lead agencies, the settlement of lead agency disputes, and the use of joint lead agencies.)

(c) In some cases, the Responsible Official may establish a joint lead relationship among several Federal agencies. If there is a joint lead, then one Federal agency must be identified as the agency responsible for filing the environmental impact statement with EPA.

§ 46.225 How to select cooperating agencies.

(a) An ''eligible governmental entity'' is:

(1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15;

(2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or

(3) Any non-Federal agency (State, tribal, or local) with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section.

(b) Except as described in paragraph (c) of this section, the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies when the bureau is developing an environmental impact statement.

(c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to

participate in a particular environmental impact statement as a cooperating agency. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the environmental impact statement. Denial of a request or not extending an invitation for cooperating agency status is not subject to any internal administrative appeals process, nor is it a final agency action subject to review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

(d) Bureaus should work with cooperating agencies to develop and adopt a memorandum of understanding that includes their respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule. Memoranda of understanding must be used in the case of non-Federal agencies and must include a commitment to maintain the confidentiality of documents and deliberations during the period prior to the public release by the bureau of any NEPA document, including drafts.

(e) The procedures of this section may be used for an environmental assessment.

§ 46.230 Role of cooperating agencies in the NEPA process.

In accordance with 40 CFR 1501.6, throughout the development of an environmental document, the lead bureau will collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise. Cooperating agencies may, by agreement with the lead bureau, help to do the following:

(a) Identify issues to be addressed;

(b) Arrange for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data;

(c) Analyze data;

(d) Develop alternatives;

(e) Evaluate alternatives and estimate the effects of implementing each alternative; and

(f) Carry out any other task necessary for the development of the environmental analysis and documentation.

§ 46.235 NEPA scoping process.

(a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a) Public involvement in the environmental assessment process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI).

(b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

§ 46.240 Establishing time limits for the NEPA process.

(a) For each proposed action, on a case-by-case basis, bureaus shall:

(1) Set time limits from the start to the finish of the NEPA analysis and documentation, consistent with the requirements of 40 CFR 1501.8 and other legal obligations, including statutory and regulatory timeframes;

(2) Consult with cooperating agencies in setting time limits; and

(3) Encourage cooperating agencies to meet established time frames.

(b) Time limits should reflect the availability of Department and bureau personnel and funds. Efficiency of the NEPA process is dependent on the management capabilities of the lead bureau, which must assemble an interdisciplinary team and/or qualified staff appropriate to the type of project to be analyzed to ensure timely completion of NEPA documents.

Subpart D—Environmental Assessments

§ 46.300 Purpose of an environmental assessment and when it must be prepared.

The purpose of an environmental assessment is to allow the Responsible Official to determine whether to prepare an environmental impact statement or a finding of no significant impact.

(a) A bureau must ensure that an environmental assessment is prepared for all proposed Federal actions, except those:

(1) That are covered by a categorical exclusion;

(2) That are covered sufficiently by an earlier environmental document as determined and documented by the Responsible Official; or

(3) For which the bureau has already decided to prepare an environmental impact statement.

(b) A bureau may prepare an environmental assessment for any proposed action at any time to:

(1) Assist in planning and decision-making;

(2) Further the purposes of NEPA when no environmental impact statement is necessary; or

(3) Facilitate environmental impact statement preparation.

§ 46.305 Public involvement in the environmental assessment process.

(a) The bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.

(1) The bureau must consider comments that are timely received, whether specifically solicited or not.

(2) Although scoping is not required, the bureau may apply a scoping process to an environmental assessment.

(b) Publication of a ''draft'' environmental assessment is not required. Bureaus may seek comments on an environmental assessment if they determine it to be appropriate, such as when the level of public interest or the uncertainty of effects warrants, and may revise environmental assessments based on comments received without need of initiating another comment period.

(c) The bureau must notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed. Comments on a finding of no significant impact do not need to be solicited, except as required by 40 CFR 1501.4(e)(2).

(d) Bureaus may allow cooperating agencies (as defined in § 46.225) to participate in developing environmental assessments.

§ 46.310 Contents of an environmental assessment.

(a) At a minimum, an environmental assessment must include brief discussions of:

(1) The proposal;

(2) The need for the proposal;

(3) The environmental impacts of the proposed action;

(4) The environmental impacts of the alternatives considered; and

(5) A list of agencies and persons consulted.

(b) When the Responsible Official determines that there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources, the environmental assessment need only consider the proposed action and does not need to consider additional alternatives, including the no action alternative. (See section 102(2)(E) of NEPA).

(c) In addition, an environmental assessment may describe a broader range of alternatives to facilitate planning and decision-making.

(d) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

(e) The level of detail and depth of impact analysis should normally be limited to the minimum needed to determine whether there would be significant environmental effects.

(f) Bureaus may choose to provide additional detail and depth of analysis as appropriate in those environmental assessments prepared under paragraph 46.300(b).

(g) An environmental assessment must contain objective analyses that support conclusions concerning environmental impacts.

§ 46.315 How to format an environmental assessment.

(a) An environmental assessment may be prepared in any format useful to facilitate planning, decision-making, and appropriate public participation.

(b) An environmental assessment may be accompanied by any other planning or decision-making document. The portion of the document that analyzes the environmental impacts of the proposal and alternatives must be clearly and separately identified and not spread throughout or interwoven into other sections of the document.

§ 46.320 Adopting environmental assessments prepared by another agency, entity, or person.

(a) A Responsible Official may adopt an environmental assessment prepared by another agency, entity, or person, including an applicant, if the Responsible Official:

(1) Independently reviews the environmental assessment; and

(2) Finds that the environmental assessment complies with this subpart and relevant provisions of the CEQ Regulations and with other program requirements.

(b) When appropriate, the Responsible Official may augment the environmental assessment to be consistent with the bureau's proposed action.

(c) In adopting or augmenting the environmental assessment, the Responsible Official will cite the original environmental assessment.

(d) The Responsible Official must ensure that its bureau's public involvement requirements have been met before it adopts another agency's environmental assessment.

§ 46.325 Conclusion of the environmental assessment process.

Upon review of the environmental assessment by the Responsible Official, the environmental assessment process concludes with one of the following:

(1) A notice of intent to prepare an environmental impact statement;

(2) A finding of no significant impact; or

(3) A result that no further action is taken on the proposal.

Subpart E—Environmental Impact Statements

§ 46.400 Timing of environmental impact statement development.

The bureau must prepare an environmental impact statement for each proposed major Federal action significantly affecting the quality of the human environment before making a decision on whether to proceed with the proposed action.

§ 46.405 Remaining within page limits.

To the extent possible, bureaus should use techniques such as incorporation of referenced documents into NEPA analysis (46.135) and tiering (46.140) in an effort to remain within the normal page limits stated in 40 CFR 1502.7.

§ 46.415 Environmental impact statement content, alternatives, circulation and filing requirements.

The Responsible Official may use any environmental impact statement format and design as long as the statement is in accordance with 40 CFR 1502.10.

(a) *Contents.* The environmental impact statement shall disclose:

(1) A statement of the purpose and need for the action;

(2) A description of the proposed action;

(3) The environmental impact of the proposed action;

(4) A brief description of the affected environment;

(5) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(6) Alternatives to the proposed action;

(7) The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(8) Any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and

(9) The process used to coordinate with other Federal agencies, State, tribal and local governments, and persons or organizations who may be interested or affected, and the results thereof.

(b) *Alternatives.* The environmental impact statement shall document the examination of the range of alternatives (paragraph 46.420(c)). The range of alternatives includes those reasonable alternatives (paragraph 46.420(b)) that meet the purpose and need of the proposed action, and address one or more significant issues (40 CFR 1501.7(a)(2–3)) related to the proposed action. Since an alternative may be developed to address more than one significant issue, no specific number of alternatives is required or prescribed. In addition to the requirements in 40 CFR 1502.14, the Responsible Official has an option to use the following procedures to develop and analyze alternatives.

(1) The analysis of the effects of the no-action alternative may be documented by contrasting the current condition and expected future condition should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives.

(2) The Responsible Official may collaborate with those persons or organization that may be interested or affected to modify a proposed action and alternative(s) under consideration prior to issuing a draft environmental impact statement. In such cases the Responsible Official may consider these modifications as alternatives considered. Before engaging in any collaborative processes, the Responsible Official must consider the Federal Advisory Committee Act (FACA) implications of such processes.

(3) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

(c) *Circulating and filing draft and final environmental impact statements.* (1) The draft and final environmental impact statements shall be filed with the Environmental Protection Agency's Office of Federal Activities in Washington, DC (40 CFR 1506.9).

(2) Requirements at 40 CFR 1506.9 ''Filing requirements,'' 40 CFR 1506.10 ''Timing of agency action,'' 40 CFR 1502.9 ''Draft, final, and supplemental statements,'' and 40 CFR 1502.19 ''Circulation of the environmental impact statement'' shall only apply to draft, final, and supplemental environmental impact statements that are filed with EPA.

§ 46.420 Terms used in an environmental impact statement.

The following terms are commonly used to describe concepts or activities in an environmental impact statement:

(a) *Statement of purpose and need.* In accordance with 40 CFR 1502.13, the statement of purpose and need briefly

indicates the underlying purpose and need to which the bureau is responding.

(1) In some instances it may be appropriate for the bureau to describe its ''purpose'' and its ''need'' as distinct aspects. The ''need'' for the action may be described as the underlying problem or opportunity to which the agency is responding with the action. The ''purpose'' may refer to the goal or objective that the bureau is trying to achieve, and should be stated to the extent possible, in terms of desired outcomes.

(2) When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information. However, this description must not be confused with the bureau's purpose and need for action. It is the bureau's purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision.

(b) *Reasonable alternatives*. In addition to the requirements of 40 CFR 1502.14, this term includes alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action.

(c) *Range of alternatives*. This term includes all reasonable alternatives, or when there are potentially a very large number of alternatives then a reasonable number of examples covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated, as well as those other alternatives that are eliminated from detailed study with a brief discussion of the reasons for eliminating them. 40 CFR 1502.14. The Responsible Official must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents, but may select elements from several alternatives discussed. Moreover, the Responsible Official must, in fact, consider all the alternatives discussed in an environmental impact statement. 40 CFR 1505.1 (e).

(d) *Preferred alternative*. This term refers to the alternative which the bureau believes would best accomplish the purpose and need of the proposed action while fulfilling its statutory mission and responsibilities, giving consideration to economic, environmental, technical, and other factors. It may or may not be the same as the bureau's proposed action, the non-Federal entity's proposal or the environmentally preferable alternative.

§ 46.425 Identification of the preferred alternative in an environmental impact statement.

(a) Unless another law prohibits the expression of a preference, the draft environmental impact statement should identify the bureau's preferred alternative or alternatives, if one or more exists.

(b) Unless another law prohibits the expression of a preference, the final environmental impact statement must identify the bureau's preferred alternative.

§ 46.430 Environmental review and consultation requirements.

(a) Any environmental impact statement that also addresses other environmental review and consultation requirements must clearly identify and discuss all the associated analyses, studies, or surveys relied upon by the bureau as a part of that review and consultation. The environmental impact statement must include these associated analyses, studies, or surveys, either in the text or in an appendix or indicate where such analysis, studies or surveys may be readily accessed by the public.

(b) The draft environmental impact statement must list all Federal permits, licenses, or approvals that must be obtained to implement the proposal. The environmental analyses for these related permits, licenses, and approvals should be integrated and performed concurrently. The bureau, however, need not unreasonably delay its NEPA analysis in order to integrate another agency's analyses. The bureau may complete the NEPA analysis before all approvals by other agencies are in place.

§ 46.435 Inviting comments.

(a) A bureau must seek comment from the public as part of the Notice of Intent to prepare an environmental impact statement and notice of availability for a draft environmental impact statement;

(b) In addition to paragraph (a) of this section, a bureau must request comments from:

(1) Federal agencies;

(2) State agencies through procedures established by the Governor of such state under EO 12372;

(3) Local governments and agencies, to the extent that the proposed action affects their jurisdictions; and

(4) The applicant, if any, and persons or organizations who may be interested or affected.

(c) The bureau must request comments from the tribal governments, unless the tribal governments have designated an alternate review process, when the proposed action may affect the environment of either:

(1) Indian trust or restricted land; or

(2) Other Indian trust resources, trust assets, or tribal health and safety.

(d) A bureau does not need to delay preparation and issuance of a final environmental impact statement when any Federal, State, and local agencies, or tribal governments from which comments must be obtained or requested do not comment within the prescribed time period.

§ 46.440 Eliminating duplication with State and local procedures.

A bureau must incorporate in its directives provisions allowing a State agency to jointly prepare an environmental impact statement, to the extent provided in 40 CFR 1506.2.

§ 46.445 Preparing a legislative environmental impact statement.

When required under 40 CFR 1506.8, the Department must ensure that a legislative environmental impact statement is included as a part of the formal transmittal of a legislative proposal to the Congress.

§ 46.450 Identifying the environmentally preferable alternative(s).

In accordance with the requirements of 40 CFR 1505.2, a bureau must identify the environmentally preferable alternative(s) in the record of decision. It is not necessary that the environmentally preferable alternative(s) be selected in the record of decision.

PARTS 47–199 [RESERVED]

Subtitle B—Regulations Relating to Public Lands

CHAPTER I—BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR

Part		*Page*
400–401	[Reserved]	
402	Sale of lands in Federal reclamation projects	593
404	Reclamation Rural Water Supply Program	596
413	Assessment by irrigation districts of lands owned by the United States, Columbia Basin Project, Washington	611
414	Offstream storage of Colorado River water and development and release of intentionally created unused apportionment in the Lower Division States	613
417	Procedural methods for implementing Colorado River water conservation measures with lower basin contractors and others	619
418	Operating criteria and procedures for the Newlands Reclamation Project, Nevada	621
419	Truckee River Operating Agreement	645
420	Off-road vehicle use	647
422	Law enforcement authority at Bureau of Reclamation projects	650
423	Public conduct on Bureau of Reclamation facilities, lands, and waterbodies	654
424	Regulations pertaining to standards for the prevention, control, and abatement of environmental pollution of Conconully Lake and Conconully Reservoir, Okanogan County, Wash.	668
426	Acreage limitation rules and regulations	668
427	Water conservation rules and regulations	704
428	Information requirements for certain farm operations in excess of 960 acres and the eligibility of certain formerly excess land	705
429	Use of Bureau of Reclamation land, facilities, and waterbodies	707
430	Rules for management of Lake Berryessa	719

Part		Page
431	General regulations for power generation, operation, maintenance, and replacement at the Boulder Canyon Project, Arizona/Nevada	720
432–999	[Reserved]	

PARTS 400–401 [RESERVED]

PART 402—SALE OF LANDS IN FEDERAL RECLAMATION PROJECTS

Subpart A—Public Lands

Sec.
402.1 Purpose of this subpart.
402.2 What lands may be sold; method of sale; limit of acreage.
402.3 Power to sell.
402.4 Citizenship requirement.
402.5 Procedures within the Department.
402.6 Price.
402.7 Notice of sale.
402.8 Terms of sale.
402.9 Contracts.
402.10 Patent.
402.11 Termination or cancellation

Subpart B—Small Tracts; Public and Acquired Lands; Gila Project, Arizona

402.21 Purpose of this subpart.
402.22 Provisions of subpart A applicable.
402.23 Special provisions.

Subpart A—Public Lands

AUTHORITY: Sec. 10, 32 Stat. 390, as amended, sec. 6, 46 Stat. 368, sec. 5, 64 Stat. 40; 43 U.S.C. 373, 424e, 375f. Interpret or apply 41 Stat. 605, 46 Stat. 367, sec. 11, 53 Stat. 1197, 64 Stat. 39; 43 U.S.C. 375, 424 through 424d, 375a, 375b through 375f.

SOURCE: 18 FR 316, Jan. 15, 1953, unless otherwise noted.

§ 402.1 Purpose of this subpart.

The regulations in this subpart apply to the sale of certain classes of lands that are subject to the reclamation laws and that may be sold under one of the following statutes:

(a) The Act of May 20, 1920 (41 Stat. 605; 43 U.S.C. 375);

(b) The Act of May 16, 1930 (46 Stat. 367; 43 U.S.C. 424 through 424e); or

(c) The Act of March 31, 1950 (64 Stat. 39; 43 U.S.C. Sup. 375b through 375f).

§ 402.2 What lands may be sold; method of sale; limit of acreage.

(a) Lands which may be sold under the Act of May 20, 1920 (41 Stat. 605; 43 U.S.C. 375) are lands, not otherwise reserved, which have been withdrawn in connection with a Federal irrigation project and improved at the expense of the reclamation fund for administration or other like purposes and which are no longer needed for project purposes. Not more than 160 acres of such lands may be sold to any one person. With one exception, such lands must be sold at public auction. If, however, a tract is appraised at not more than $300, it may be sold at private sale or at public auction and without regard to the provisions of the Act of May 20, 1920 respecting notice of publication and mode of sale.

(b) Lands which may be sold under the Act of May 16, 1930 (46 Stat. 367; 43 U.S.C. 424 through 424e) are tracts of temporarily or permanently unproductive land of insufficient size to support a family. A purchaser must be a resident farm owner or entryman on the Federal irrigation project where such lands are located and is permitted to purchase not more than 160 acres or an area which together with lands already owned or entered on such project, does not exceed 320 acres. A resident farm owner means a farm owner who is actually residing on the farm he owns, and a resident entryman means a homestead entryman who is actually residing on the land in his homestead entry. These lands may be sold either at public auction or at private sale.

(c) Lands which may be sold under the Act of March 31, 1950 (64 Stat. 39; 43 U.S.C. Sup., 375b through 375f) are tracts of land too small to be classed as farm units under the Federal reclamation laws. A purchaser must be a resident farm owner or entryman (as defined in paragraph (b) of this section) on the Federal irrigation project where such lands are located and is permitted to purchase not more than 160 acres or an area which, together with land already owned or entered on such project, does not exceed 160 irrigable acres. These lands may be sold either at public auction or at private sale.

§ 402.3 Power to sell.

The Commissioner of Reclamation may, in accordance with the regulations in this subpart, sell lands under each of the three statutes listed in § 402.1. An Assistant Commissioner or an official in charge of an office, region, division, district, or project of the Bureau of Reclamation, if authorized in writing by the Commissioner of

Reclamation, may also sell lands under the statutes mentioned in accordance with this subpart, and whenever the term ''Commissioner'' is used in this subpart, it includes any official so authorized.

§ 402.4 Citizenship requirement.

Before patent may be issued to a purchaser under the regulations in this subpart, he must furnish satisfactory evidence that he is a citizen of the United States.

§ 402.5 Procedures within the Department.

(a) Before offering any land for sale under any of the statutes listed in § 402.1, the Commissioner should determine that the sale will be in the best interest of the project in which the lands are located and, if the lands sold are to be irrigated, that there is a sufficient water supply for such irrigation.

(b) When a decision is made to offer lands for sale under any of the statutes listed in § 402.1: (1) The Commissioner should notify the State Supervisor of the Bureau of Land Management in whose State the lands are located, (2) a report showing the status of the lands should be obtained from the Manager of the appropriate office of the Bureau of Land Management, and (3) a report should be obtained from the Geological Survey with respect to the mineral resources of the lands. A copy of the report of the Geological Survey should be furnished to the Manager of the appropriate land office of the Bureau of Land Management for his use in preparing the final certificate.

§ 402.6 Price.

The price of land sold under this subpart shall be not less than that fixed by independent appraisal approved by the Commissioner.

§ 402.7 Notice of sale.

The sale of lands at public auction under this part shall be administered by the Commissioner. Notice of such sales shall be given by publication in a newspaper of general circulation in the vicinity of the lands to be sold for either not less than 30 days or once a week for five consecutive weeks prior to the date fixed for any such sale. Under the Act of May 20, 1920 (41 Stat. 605; 43 U.S.C. 375) notice of sales of lands appraised at more than $300 shall also be given by posting upon the land. In the case of all sales under this subpart notice may be given by such other means as the Commissioner may deem appropriate. Where lands are to be sold at private sale, no public notice shall be required.

§ 402.8 Terms of sale.

(a) Under the Acts of May 16, 1930 (46 Stat. 367; 43 U.S.C. 424 through 424e) and March 31, 1950 (64 Stat. 39; 43 U.S.C. Sup., 375b through 375f) lands may be sold either for cash or upon deferred payments. A sale providing for deferred payments shall be upon terms to be established by the Commissioner, except that the Commissioner shall require the annual payment of interest at six percent per annum on the unpaid balance.

(b) Under the Act of May 20, 1920 (41 Stat. 605; 43 U.S.C. 375) lands may be sold either for cash or upon deferred payments. In connection with a sale providing for deferred payments the Commissioner shall require that not less than one-fifth the purchase price in cash be paid at the time of sale and that the remainder be payable in not more than four annual payments with interest at six percent per annum on the unpaid balance.

(c) All payments shall be made to the official of the Bureau of Reclamation specified in the contract of sale.

§ 402.9 Contracts.

A contract in form approved by the Commissioner shall be signed by the purchaser at the time of sale and executed on behalf of the United States by the Commissioner. A copy of the contract shall be furnished to the appropriate land office of the Bureau of Land Management for entering in the tract books. The contract shall contain a description of the land to be sold, the price and terms of sale, a full statement by the purchaser respecting his qualifications, including citizenship, a description by the purchaser of his present holdings, and a statement by him of the irrigable acreage of those holdings. The contract shall also contain a statement by the purchaser with

respect to his knowledge as to whether the land is mineral or non-mineral in character, as well as all appropriate reservations, mineral and otherwise, required by law to be made on entries and patents. Assignments of contracts may be made only with the consent of the Commissioner and to persons legally qualified to be purchasers.

§ 402.10 Patent.

When a purchaser has complied fully with the provisions of his contract and with the applicable provisions of law, including the regulations in this subpart, the Commissioner shall issue to the purchaser a final receipt so stating. The receipt shall show any liens that, under the reclamation laws, must be indicated in the final certificate and patent and shall state the statutory authority for such liens. The receipt shall be submitted to the Manager of the appropriate land office of the Bureau of Land Management and the Manager shall prepare a final certificate for the issuance of patent to the purchaser. The Manager shall show in the final certificate the above-mentioned reclamation liens and any reservations that are required by law to be made on the patent.

§ 402.11 Termination or cancellation.

Immediately upon the termination or cancellation of any contract for nonpayment or other appropriate reason the Commissioner shall notify the proper office of the Bureau of Land Management in order that the tract books located there may reflect the termination or cancellation of the contract.

Subpart B—Small Tracts; Public and Acquired Lands; Gila Project, Arizona

AUTHORITY: Sec. 15, 53 Stat. 1198, sec. 7, 61 Stat. 630; 43 U.S.C. 485i, 613e. Interpret or apply secs. 3–4, 61 Stat. 629; 43 U.S.C. 613b through 613c.

§ 402.21 Purpose of this subpart.

The regulations in this subpart apply to the sale of small tracts of public and acquired lands on the Gila Project, Arizona, that are subject to the reclamation laws and that may be sold to actual settlers or farmers under the Act of July 30, 1947 (61 Stat. 628; 43 U. S. C. 613–613e).

[19 FR 431, Jan. 26, 1954]

§ 402.22 Provisions of subpart A applicable.

The regulations in subpart A of this part relative to the sale of public lands under the Act of March 31, 1950 (64 Stat. 39; 43 U. S. C., Sup. 375b through 375f) shall be applicable to all sales proposed to be made under this subpart, except that the provisions of § 402.23(b) relative to deeds shall apply in lieu of the provisions of § 402.10 relative to patents; and excepting further that the residence requirements of § 402.2(b) shall not apply.

[18 FR 316, Jan. 15, 1953, as amended at 34 FR 5066, Mar. 11, 1969]

§ 402.23 Special provisions.

(a) After disposition of any lands under this subpart by contract of sale and during the time such contract shall remain in effect, said lands shall be (1) subject to the provisions of the laws of the State of Arizona relating to the organization, government, and regulation of irrigation, electrical power, and other similar districts, and (2) subject to legal assessment or taxation by any such district and by said State or political subdivisions thereof, and to liens for such assessments and taxes and to all proceedings for the enforcement thereof, in the same manner and to the same extent as privately-owned lands; *Provided*, however, That the United States shall not assume any obligation for amounts so assessed or taxed: *And provided further*, That any proceedings to enforce said assessments or taxes shall be subject to any title then remaining in the United States, to any prior lien reserved to the United States for unpaid installments under contracts of sale made under this subpart, and to any obligation for any other charges, accrued or unaccrued, for special improvements, construction, or operation and maintenance costs of the Gila Project. Any such lands situate within the Wellton-Mohawk Division of said project shall also be subject to the provisions of the Contract Between the United States

and Wellton-Mohawk Irrigation and Drainage District for Construction of Works and for Delivery of Water, dated March 4, 1952, including but not limited to the provisions of subdivisions (b) and (c) of Article 22.

(b) When a purchaser has complied fully with the provisions of his contract and with the applicable provisions of law, including the regulations in this subpart, the Commissioner shall issue a deed to the purchaser. The deed shall recite the reservations described in the contract of sale.

[19 FR 431, Jan. 26, 1954]

PART 404—RECLAMATION RURAL WATER SUPPLY PROGRAM

Subpart A—Overview

Sec.

404.1 What is the purpose of this part?
404.2 What terms are used in this part?
404.3 What is the Reclamation Rural Water Supply Program?
404.4 What are the goals of the program?
404.5 Who is responsible for implementing this rule?
404.6 Who is eligible to participate in the program?
404.7 What types of projects are eligible for consideration under the program?
404.8 Are there any exceptions that would allow a community with greater than 50,000 inhabitants to be part of an eligible rural water supply project?
404.9 What types of infrastructure and facilities may be included in an eligible rural water supply project?
404.10 Are there certain types of infrastructure and facilities that may not be included in a rural water supply project?
404.11 What type of assistance is available under the program?
404.12 Can Reclamation provide assistance with the construction of a rural water supply project under this program?
404.13 What criteria will Reclamation use to prioritize requests for assistance under the program?
404.14 How will Reclamation provide notice of opportunities for assistance under the program?
404.15 How can I request assistance under the program?
404.16 What information must I include in my statement of interest?
404.17 How will Reclamation evaluate my statement of interest?
404.18 How can I request assistance to conduct a feasibility study?
404.19 What requirements must be met before I can request assistance to conduct a feasibility study?
404.20 What information must I include in my full proposal to conduct an appraisal or a feasibility study?
404.21 What is Reclamation's role in preparing the full proposal?
404.22 How will Reclamation evaluate my full proposal?
404.23 How will Reclamation determine whether you or your contractor is qualified to conduct an appraisal investigation or a feasibility study?
404.24 How will Reclamation determine whether it is cost-effective for me or my contractor to conduct the appraisal investigation or feasibility study?
404.25 How can I request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program?
404.26 Must an appraisal investigation be completed before I can request Reclamation to review a feasibility study that was not completed under this program?
404.27 How will Reclamation evaluate my request to review an appraisal investigation or feasibility study completed without the support of Reclamation?
404.28 Is it possible to expedite the completion of an appraisal investigation or feasibility study?
404.29 Can the level of effort needed to complete an appraisal investigation or feasibility study be scaled to be proportional to the size and cost of the proposed project?

Subpart B—Cost-Sharing

404.30 How much Federal funding can Reclamation provide for the completion of an appraisal investigation?
404.31 What forms of non-Federal cost-share payment are acceptable?
404.32 Can Reclamation reduce the non-Federal cost-share required for an appraisal investigation?
404.33 How much Federal funding can Reclamation provide for the completion of a feasibility study?
404.34 Can Reclamation reduce the amount of non-Federal cost-share required for a feasibility study?
404.35 Is there a different non-Federal cost-share requirement for feasibility studies that involve a community greater than 50,000 inhabitants?
404.36 Will Reclamation reimburse me for the cost of an appraisal investigation or a feasibility study that was not completed under § 404.11(a) or (b)?
404.37 How will Reclamation determine the appropriate non-Federal share of construction costs?

404.38 Are there different requirements for determining the appropriate non-Federal share of construction costs to be paid by Indian tribes?
404.39 What factors will Reclamation consider in evaluating my capability to pay 25 percent or more of the construction costs?
404.40 What is the non-Federal share of operation, maintenance, and replacement costs?

Subpart C—Appraisal Investigations

404.41 How will an appraisal investigation be conducted under this program?
404.42 How much time is provided to complete an appraisal investigation?
404.43 What process will Reclamation follow to determine if an appraisal investigation is ready for review?
404.44 What criteria will Reclamation apply to determine whether it is appropriate to recommend that a feasibility study be conducted?
404.45 What will be included in the appraisal report prepared by Reclamation?
404.46 Who will the appraisal report be provided to?

Subpart D—Feasibility Studies

404.47 How will a feasibility study be conducted under this program?
404.48 What process will Reclamation follow to determine if a feasibility study is ready for review?
404.49 What criteria will Reclamation use to determine whether to recommend that a proposed rural water supply project be authorized for construction?
404.50 What information will be included in the feasibility report prepared by Reclamation?
404.51 Are proposed projects under the Rural Water Supply Program reviewed by the Administration?
404.52 Who will the feasibility report be provided to?

Subpart E—Miscellaneous

404.53 Does this rule provide authority for the transfer of pre-existing facilities from Federal to private ownership, or from private to Federal ownership?
404.54 Who will hold title to a rural water project that is constructed following the completion of an appraisal investigation or feasibility study under this program?
404.55 Who is responsible for the operation, maintenance, and replacement costs?
404.56 If a financial assistance agreement is entered into for a rural water supply project that benefits more than one Indian tribe, is the approval of each Indian tribe required?
404.57 Does this rule have any effect on state water law?
404.58 Do rural water projects authorized before the enactment of the Rural Water Supply Act of 2006 have to comply with the requirements in this rule?
404.59 If the Secretary recommends a project for construction, is that a promise of Federal funding?
404.60 Does this rule contain an information collection that requires approval by the Office of Management and Budget (OMB)?

AUTHORITY: Public Law 109–451 (43 U.S.C. 2401 *et seq.*)

SOURCE: 73 FR 67782, Nov. 17, 2008, unless otherwise noted.

Subpart A—Overview

§ 404.1 What is the purpose of this part?

The purpose of this part is to explain how the Reclamation Rural Water Supply Program is implemented. This part describes:

(a) The purpose and priorities of the program;

(b) How to apply for assistance under the program;

(c) How Reclamation will evaluate requests for assistance;

(d) How Reclamation will evaluate an appraisal investigation; and

(e) How Reclamation will evaluate a feasibility study.

§ 404.2 What terms are used in this part?

The following terms are used in this part:

Appraisal investigation means an analysis of domestic, municipal, and industrial water supply problems, needs, and opportunities in the planning area, primarily using existing data. An appraisal investigation includes a preliminary assessment of alternatives to address the identified water supply problems and needs. The purpose of an appraisal investigation is to determine if there is at least one viable alternative that warrants a more detailed investigation through a feasibility study.

Appraisal report means the document, prepared by Reclamation, setting forth the findings and conclusions reached by Reclamation in its evaluation of a completed appraisal investigation. The

purpose of the appraisal report is for Reclamation to provide a recommendation on whether a feasibility study should be initiated.

Assistance means the transfer of a thing of value to a non-Federal project sponsor to carry out a public purpose of support or stimulation authorized by law. For purposes of this rule, assistance consists of funds provided by Reclamation through an assistance agreement (grant or cooperative agreement) and technical assistance performed by Reclamation, for the purpose of conducting an appraisal investigation or a feasibility study.

Commissioner means the Commissioner of the Bureau of Reclamation.

Feasibility report means the document, prepared by Reclamation, setting forth the findings and conclusions of a completed feasibility study. The purpose of the feasibility report is to provide an Administration recommendation to Congress regarding whether the proposed rural water supply project should be authorized for construction.

Feasibility study means a detailed investigation requiring the acquisition of primary data, and an analysis of a reasonable range of alternatives, including a preferred alternative, to meet identified water supply problems, needs, and opportunities in the planning area. A feasibility study also includes an analysis of the technical and economic feasibility of the proposed project, the impact of the proposed project on the environment in compliance with the National Environmental Policy Act and other applicable environmental laws, and the financial capability of the non-Federal project sponsor to pay the non-Federal costs associated with constructing, operating, and maintaining the rural water supply project. The completed feasibility study will form the basis for the recommendation to Congress in the feasibility report regarding whether the proposed rural water supply project should be authorized for construction.

Incidental noncommercial livestock watering means the supply of water to pasture taps for the purpose of watering livestock, and other livestock watering uses that are incidental to the purpose of the project.

Indian means a person who is a member of an Indian tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Noncommercial irrigation of vegetation means the supply of water to irrigate lawns, trees, small gardens, and similar vegetation of less than 1 acre.

Non-Federal project sponsor means a non-Federal project entity or entities meeting the eligibility criteria in § 404.6. A non-Federal project sponsor is also referred to as project sponsor, project sponsors, I, me, my, you, or your in this part.

Program means the Reclamation Rural Water Supply Program that is described in § 404.3.

Reclamation means the Bureau of Reclamation, U.S. Department of the Interior.

Reclamation states means the states and areas referred to in 43 U.S.C. 391, as amended.

Regional or watershed perspective means an approach to rural water supply planning directed at meeting the needs of geographically dispersed localities across a region or a watershed that will take advantage of economies of scale and foster opportunities for partnerships. This approach also takes into account the interconnectedness of water and land resources, encourages the active participation of all interested groups, and uses the full spectrum of technical disciplines in activities and decision-making.

Rural Water Supply Project, or project, means:

(a) A project that is designed to serve a community or groups of communities, each of which has a current population of not more than 50,000 inhabitants, which may include Indian tribes and tribal organizations, dispersed home sites, or rural areas with domestic, municipal, and industrial water, including incidental noncommercial

livestock watering and noncommercial irrigation of vegetation.

(b) A rural water supply project may include the following, or any combination of the following:

(1) The construction or installation of new rural water supply infrastructure and facilities;

(2) The improvement or upgrade of existing rural water supply infrastructure and facilities;

(3) The extension of existing rural water supply infrastructure and facilities to reach an increased service area; and

(4) The inter-connection of existing rural water supply infrastructure and facilities currently serving individual communities, dispersed homesites, rural areas, or tribes.

Secretary means the Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation.

Tribal organization means:

(a) The recognized governing body of an Indian tribe; and

(b) Any legally established organization of Indians that is controlled, sanctioned, or chartered by the governing body, or democratically elected by the adult members of the Indian community to be served by the organization.

§ 404.3 What is the Reclamation Rural Water Supply Program?

This program addresses domestic, municipal, and industrial water supply needs in rural areas of the Reclamation States. Reclamation's experience, technical expertise, and financial resources assist rural communities to identify their water supply problems and needs, and evaluate options for addressing those needs. Using a regional or watershed perspective, Reclamation assists in planning projects that maximize regional and national benefits. Through this program, Reclamation works in cooperation with non-Federal project sponsors in Reclamation States on a cost-share basis to:

(a) Investigate and identify opportunities to ensure safe and adequate rural water supplies for domestic, municipal, and industrial use in rural areas and small communities, including Indian tribes;

(b) Plan the design and construction of rural water supply projects through the conduct of appraisal investigations and feasibility studies; and

(c) Oversee, as appropriate, the construction of rural water supply projects that the Secretary recommends to Congress, which are subsequently authorized and funded for construction by Congress.

§ 404.4 What are the goals of the program?

The goals of the program are to:

(a) Assess and address urgent and compelling rural water supply needs that are not currently met by other programs;

(b) Promote and apply a regional or watershed perspective to water resources management in planning rural water supply projects;

(c) Develop solutions to address rural water supply needs that are cost-effective, and that generate national net economic benefits as required under the ''Economic Principles and Guidelines for Water and Related Land Resources'' (Principles and Guidelines). The Principles and Guidelines, published in 1983 by the Water Resources Council pursuant to the Water Resources Planning Act of 1965 (Pub. L. 89–80) as amended, is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. The Principles and Guidelines are intended to ensure proper and consistent planning by Federal agencies in the formulation and evaluation of water and related land resources implementation studies. To enforce any edition other than that specified in this section, the material must be available to the public and approved by the Director of the Federal Register. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. Also, a copy of this publication may be obtained and inspected at: Bureau of Reclamation, Denver Federal Center, Building 67, Denver, CO 80225, Policy and Program Services, 303–445–2906 where copies are

on file, or at the following website: *http://intra.gp.usbr.gov/resource_services/planning_process/principles_guidelines.pdf*.

(d) Encourage partnerships among rural communities, Indian tribes or tribal organizations, states or political subdivisions of a state, water districts and associations, and other eligible entities, to address rural water supply issues; and

(e) Complement other existing programs and authorities that address rural water supply issues, and encourage collaboration between programs where appropriate.

§ 404.5 Who is responsible for implementing this rule?

Authority to implement and make determinations under this rule has been delegated from the Secretary to the Commissioner. The Commissioner is authorized to implement this program and may re-delegate that authority as needed. Questions regarding the program should be directed to your local Reclamation office.

§ 404.6 Who is eligible to participate in the program?

Those eligible to participate in the program include:

(a) A state or political subdivision of a state, including a department, agency, municipality, county, or other regional or local authority;

(b) An Indian tribe or tribal organization; or

(c) An entity created under state law that has water management or water delivery authority, including for example, an irrigation or water district, canal company, water users association, rural water association or district, a joint powers authority, or other qualifying entity; and

(d) Any combination of the entities listed above, which collectively are referred to as the non-Federal project sponsor, as defined in § 404.2.

§ 404.7 What types of projects are eligible for consideration under the program?

To be eligible for consideration under the program, a rural water supply project must:

(a) Meet the definition of a rural water supply project in § 404.2; and

(b) Be located in a Reclamation State, as defined in § 404.2.

§ 404.8 Are there any exceptions that would allow a community with greater than 50,000 inhabitants to be part of an eligible rural water supply project?

Yes. A town or community with a population in excess of 50,000 inhabitants may participate in or be served by an eligible rural water supply project under this program if Reclamation determines that the town or community is a critical partner whose involvement substantially contributes to the financial viability of the proposed project. Such a community could be expected to bear a greater proportionate share of the planning, design, and construction costs than other project sponsors, consistent with their capability to pay and the benefits they derive from the project.

§ 404.9 What types of infrastructure and facilities may be included in an eligible rural water supply project?

A rural water supply project may include, but is not limited to, the following types of infrastructure and facilities:

(a) Pumps, pipes, wells, surface water intakes and other diversion, transmission, or distribution systems;

(b) Storage tanks and small impoundments;

(c) Water treatment facilities for potable water supplies, including desalination facilities;

(d) Buildings necessary to house equipment and serve as a center for operations;

(e) Power transmission and related facilities required for the rural water supply project;

(f) Equipment and management tools for water conservation, groundwater recovery, and water reuse and recycling;

(g) Associated features to mitigate adverse environmental consequences of a project; and

(h) Appurtenances.

§ 404.10 Are there certain types of infrastructure and facilities that may not be included in a rural water supply project?

Yes. A rural water supply project may not include:

(a) Any infrastructure or facilities that would deliver water for commercial irrigation; and

(b) The construction of major impoundment structures.

§ 404.11 What type of assistance is available under the program?

Under the Reclamation Rural Water Supply Program, you may:

(a) Request Reclamation to conduct an appraisal investigation or feasibility study for a rural water supply project for you, with your cooperation;

(b) Request funding through a grant or cooperative agreement to enable you to conduct an appraisal investigation or feasibility study for a rural water supply project yourself, or through a contractor; or

(c) Request Reclamation to review and approve an appraisal investigation or feasibility study completed without assistance from Reclamation.

§ 404.12 Can Reclamation provide assistance with the construction of a rural water supply project under this program?

Reclamation may provide assistance with the construction of a rural water supply project developed under this program if Congress specifically authorizes the project and appropriates funds for construction.

§ 404.13 What criteria will Reclamation use to prioritize requests for assistance under the program?

All requests for assistance that meet the eligibility requirements in §§ 404.6 and 404.7 will be evaluated by applying the following prioritization criteria:

(a) Whether there is an urgent and compelling need for a rural water supply project that would:

(1) Address present or future water supply needs; or

(2) Promote public health and safety by addressing present and preventing future violations of drinking water standards;

(b) The extent to which a rural water supply project promotes and applies a regional or watershed perspective to water resources management as defined in § 404.2;

(c) The financial need of the project sponsors for assistance with the planning, design, and construction of a rural water supply project, as demonstrated by readily available local and regional economic indicators;

(d) The extent to which Reclamation is uniquely qualified to plan, design, and build the project;

(e) Whether a rural water supply project helps meet applicable requirements established by law;

(f) The extent to which a rural water supply project serves Indian tribes that have nonexistent or inadequate water systems;

(g) The extent to which a rural water supply project is ineligible for comprehensive funding (sufficient to fully fund planning and construction of the entire project) through other assistance programs;

(h) The extent to which a rural water supply project is identified as a priority by state, tribal or local governments;

(i) Whether a rural water supply project incorporates an innovative approach that effectively addresses water supply problems and needs, either by applying new technology or by employing a creative administrative or cooperative solution; and

(j) Other criteria that Reclamation deems appropriate.

§ 404.14 How will Reclamation provide notice of opportunities for assistance under the program?

Notice of opportunities for assistance to conduct an appraisal investigation or a feasibility study under § 404.11(a) or (b) will be posted as a program announcement on the required government-wide Web site for announcement of Federal assistance opportunities. Opportunities for assistance will also be advertised locally by Reclamation regional and area offices. You are encouraged to contact your local Reclamation office to find out about upcoming program announcements and to discuss your interest in the program.

§ 404.15 How can I request assistance under the program?

This table summarizes the requirements for requesting assistance under the program. The requirements are described in more detail in the sections that follow.

Type of assistance requested	How to request assistance
1. Request Reclamation to conduct an appraisal investigation.	Submit a statement of interest as described in § 404.16. Reclamation will then advise you whether you are eligible to submit a full proposal.
2. Request funding to conduct an appraisal investigation yourself or through a contractor.	Submit a statement of interest as described in § 404.16. Reclamation will then advise you whether you are eligible to submit a full proposal.
3. Request Reclamation to conduct a feasibility study.	Submit a full proposal as described in § 404.20.
4. Request funding to conduct a feasibility study yourself or through a contractor.	Submit a full proposal as described in § 404.20.
5. Request Reclamation to review and approve an appraisal investigation or a feasibility study completed without Reclamation assistance.	Submit the investigation or study and a cover letter to your local Reclamation office, as described in § 404.25.

§ 404.16 What information must I include in my statement of interest?

A statement of interest is a preliminary scope of work that must include sufficient information to address all of the eligibility criteria described in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, as well as any information required by the program announcement. In general, this may include, but is not limited to:

(a) Name, organization, and contact information, including the identification of any partners that may be involved in the appraisal investigation;

(b) Location map and description of the areas to be served by the proposed rural water supply project, including:

(1) Geographical scope;

(2) Demographics; and

(3) Existing rural water supply infrastructure, if any;

(c) Type of assistance being requested through this program as described in § 404.11;

(d) A general description of the problems, needs, and opportunities that the appraisal investigation is being formulated to address, supported by data or documentation where appropriate. The information provided must also address each of the prioritization criteria in § 404.13;

(e) A general description of project alternatives that may be considered in the investigation, including:

(1) Water supply management alternatives (e.g., types of infrastructure or facilities to deliver new water supplies), if known;

(2) Water demand management alternatives (e.g., water conservation and other approaches to reduce water consumption), if known; and

(3) Potential sources of water supply.

(f) A general description of any prior studies on the problems, needs, and water management alternatives at issue; and,

(g) A general description of existing sources of water supply.

§ 404.17 How will Reclamation evaluate my statement of interest?

(a) Reclamation will apply the eligibility requirements in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, to determine whether the proposed rural water supply project is eligible for further consideration through a full proposal;

(b) If the proposed project is not eligible for further consideration, Reclamation will notify you in writing of that outcome; and,

(c) If the proposed project is eligible for further consideration, Reclamation will notify you in writing that you are eligible to develop a full proposal to conduct an appraisal investigation, as described in § 404.20.

§ 404.18 How can I request assistance to conduct a feasibility study?

To request assistance to conduct a feasibility study under § 404.11(a) or (b), consistent with Reclamation's recommendation in an appraisal report, you must submit a full proposal to conduct a feasibility study in response to the program announcement, pursuant to § 404.20. You are not required to submit a statement of interest.

§ 404.19 What requirements must be met before I can request assistance to conduct a feasibility study?

All of the following requirements must be met before you can request assistance to conduct a feasibility study:

(a) An appraisal investigation must be completed, with or without assistance from Reclamation;

(b) Reclamation must have reviewed any appraisal investigation prepared without its assistance;

(c) Reclamation must have prepared an appraisal report evaluating the appraisal investigation; and,

(d) The appraisal report must include a recommendation by Reclamation, if appropriate, that a feasibility study should be conducted, as described in § 404.45.

§ 404.20 What information must I include in my full proposal to conduct an appraisal or a feasibility study?

A full proposal to conduct an appraisal investigation or a feasibility study is a detailed scope of work that must include sufficient information to address the eligibility criteria described in §§ 404.6 and 404.7, and the prioritization criteria in § 404.13. In general this may include, but is not limited to:

(a) The issues to be addressed in the appraisal investigation or feasibility study and a plan for addressing those issues. The information provided must also address each of the prioritization criteria in § 404.13;

(b) A description of who will conduct the appraisal investigation or feasibility study, which could include you, your contractor, or Reclamation;

(c) If you propose that either you or your contractor will conduct the appraisal investigation or feasibility study, you must include the information necessary for Reclamation to determine whether you or your contractor are qualified to conduct the investigation or study, and whether having you or your contractor conduct it is a cost-effective alternative, in accordance with the criteria in §§ 404.23 and 404.24;

(d) A schedule for conducting the work, identifying specific tasks and the duration of each task, and major milestones with dates for each milestone;

(e) A complete budget for conducting the appraisal investigation or feasibility study, including an itemized tabular summary of known or expected costs and a narrative description of those costs;

(f) A funding plan that details how the appraisal investigation or feasibility study will be paid for, taking into consideration applicable assistance and non-Federal cost-share requirements; and

(g) Any other information requested by Reclamation in the program announcement.

§ 404.21 What is Reclamation's role in preparing the full proposal?

(a) If you are requesting Reclamation to prepare an appraisal investigation or feasibility study on your behalf under § 404.11(a), Reclamation will work with you on a collaborative basis to provide the information requested in § 404.20(a), (b), (d), (e) and (f).

(b) If you are requesting funding through a grant or cooperative agreement under § 404.11(b), Reclamation will be available to provide you with guidance and assistance in preparing your full proposal, upon request.

§ 404.22 How will Reclamation evaluate my full proposal?

(a) Reclamation will evaluate the full proposal to conduct an appraisal or a feasibility study in order to ensure that it meets the requirements in § 404.20 and is, therefore, complete. Reclamation will notify you in writing of the outcome of this determination.

(b) If it is complete, Reclamation will evaluate your proposal against all other proposals received, using a competitive review process based on an application of the prioritization criteria in § 404.13.

(c) Full proposals will be selected for award of assistance based on:

(1) The evaluation process, as described in § 404.22(b); and

(2) The availability of appropriations; and

(3) Other criteria that Reclamation deems appropriate.

(d) Once the proposal evaluation and selection process is complete, you will be notified in writing of the outcome of your request for assistance.

§ 404.23 How will Reclamation determine whether you or your contractor is qualified to conduct an appraisal investigation or a feasibility study?

If you are requesting funding under § 404.11(b) to conduct an appraisal investigation or a feasibility study yourself or though a contractor, Reclamation will evaluate whether you, your technical staff, or contractor are qualified to perform the appraisal investigation or feasibility study based on their demonstrated qualifications and experience in performing or managing similar activities. Areas of expertise needed may include, but are not limited to, water management planning, engineering, hydrology, biology, demography, finance, and economics.

§ 404.24 How will Reclamation determine whether it is cost-effective for me or my contractor to conduct the appraisal investigation or feasibility study?

Reclamation will take the following steps to determine whether it is cost-effective for you or your contractor to conduct the appraisal investigation or feasibility study:

(a) Reclamation will review and evaluate the reasonableness of your full proposal, including the scope of work, the estimated costs, anticipated work schedule, and products to be delivered;

(b) At its discretion, Reclamation may also choose to prepare an independent government cost estimate to analyze whether it would be more cost-effective for Reclamation to complete the appraisal investigation or feasibility study;

(c) Reclamation will notify you in writing of its determination regarding the cost-effectiveness of your proposal and the basis for its decision.

§ 404.25 How can I request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program?

(a) To request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program as provided under § 404.11(c), you must submit the appraisal investigation or feasibility study to your local Reclamation office with a cover letter requesting Reclamation to review it.

(b) Your cover letter must address the eligibility criteria set forth in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13.

(c) You may make your submittal at any time and are not required to submit a statement of interest in response to the program announcement, as required for requests to conduct an appraisal investigation or feasibility study under § 404.11(a) or (b).

§ 404.26 Must an appraisal investigation be completed before I can request Reclamation to review a feasibility study that was not completed under this program?

In general, Reclamation must review an appraisal investigation and prepare an appraisal report recommending that a feasibility study be conducted before Reclamation can review a feasibility study completed without Reclamation assistance under § 404.11(c). However, Reclamation may review a feasibility study without first reviewing and approving an appraisal investigation, if Reclamation determines that:

(a) No appraisal investigation was prepared for the project;

(b) The feasibility study satisfies the appraisal criteria set forth in § 404.44; and

(c) Reclamation documents these findings in the feasibility report.

§ 404.27 How will Reclamation evaluate my request to review an appraisal investigation or feasibility study completed without the support of Reclamation?

(a) Upon receipt of your submittal, Reclamation will apply the eligibility criteria in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, to determine whether the appraisal investigation or feasibility study is eligible to be reviewed under the program. Reclamation will notify you in writing of the outcome of this determination.

(b) If the proposed appraisal investigation or feasibility study is eligible for review, Reclamation will evaluate the investigation or study in accordance with the process set forth in § 404.43, for an appraisal investigation, or § 404.48, for a feasibility study.

§ 404.28 Is it possible to expedite the completion of an appraisal investigation or feasibility study?

Yes. If Reclamation determines that a community or groups of communities to be served by a proposed rural water supply project has urgent and compelling water needs, Reclamation will, to the maximum extent practicable, expedite appraisal investigations and reports and feasibility studies and reports conducted under this program.

§ 404.29 Can the level of effort needed to complete an appraisal investigation or feasibility study be scaled to be proportional to the size and cost of the proposed project?

Yes. In general, the level of effort for an appraisal investigation or feasibility study should be scaled to take into consideration the total size, cost, and complexity of the proposed rural water supply project in order to reduce the total cost of the investigation or study. However, the effort to scale the appraisal investigation or feasibility study must not diminish the quality of the data, the analysis, or the overall completeness of the investigation or study.

Subpart B—Cost-Sharing

§ 404.30 How much Federal funding can Reclamation provide for the completion of an appraisal investigation?

In general, Reclamation will be responsible for 100 percent of the cost of an appraisal investigation conducted under § 404.11(a) or (b), up to $200,000. If the cost of the appraisal investigation exceeds $200,000, your cost-share will be 50 percent of the amount exceeding $200,000.

§ 404.31 What forms of non-Federal cost-share payment are acceptable?

The non-Federal cost-share for an appraisal investigation or a feasibility study may be provided in the form of money or in-kind services that Reclamation determines are necessary and reasonable for the conduct and completion of the investigation or study. The determination of allowability, allocability, and reasonableness is governed by the Cost Principles of the Office of Management and Budget, codified at 2 CFR 220, 225, and 230, and in the Federal Acquisitions Regulations, Part 312.

§ 404.32 Can Reclamation reduce the non-Federal cost-share required for an appraisal investigation?

Yes. Reclamation may reduce the non-Federal cost-share for appraisal investigations below 50 percent of the costs exceeding $200,000, if:

(a) Reclamation determines that there is an overwhelming Federal interest in conducting the appraisal investigation, and you demonstrate financial hardship. Financial hardship will be determined in accordance with Reclamation's official policies, guidance and standards, which are available at your local Reclamation office; and

(b) Reclamation consults with other Federal agencies that are partners in the project and determines that a reduction in the non-Federal cost-share is appropriate.

§ 404.33 How much Federal funding can Reclamation provide for the completion of a feasibility study?

In general, Reclamation will be responsible for 50 percent of the cost of a feasibility study conducted under § 404.11(a) or (b). You will be responsible to pay for the remaining 50 percent of the cost of the study using non-Federal funding.

§ 404.34 Can Reclamation reduce the amount of non-Federal cost-share required for a feasibility study?

Yes. Reclamation may reduce the non-Federal cost-share required for a feasibility study to an amount less than 50 percent of the study costs if:

(a) Reclamation determines that there is an overwhelming Federal interest in conducting the feasibility study, and you demonstrate financial hardship. Financial hardship will be determined in accordance with Reclamation's standards, which are available at your local Reclamation office; and

(b) Reclamation consults with other Federal agencies that are partners in the project and determines that a reduction in the non-Federal cost-share is appropriate.

§ 404.35 Is there a different non-Federal cost-share requirement for feasibility studies that involve a community greater than 50,000 inhabitants?

Yes. If the feasibility study involves a rural water supply system that will serve a community with a population in excess of 50,000 inhabitants, pursuant to the exception provided in § 404.8, you may be required to pay more than 50 percent of the costs of the study. Determination of the appropriate amount of the non-Federal cost-share will be based on the same criteria used to evaluate your capability to pay the non-Federal share of construction costs, set forth in § 404.39.

§ 404.36 Will Reclamation reimburse me for the cost of an appraisal investigation or a feasibility study that was not completed under § 404.11(a) or (b)?

No. The cost-share provisions described in this rule only apply to appraisal investigations and feasibility studies that are completed under the program pursuant to § 404.11(a) or (b). Reclamation will not reimburse you or provide program funding for any expenses related to an appraisal investigation or a feasibility study that is completed without assistance from Reclamation.

§ 404.37 How will Reclamation determine the appropriate non-Federal share of construction costs?

Reclamation will determine the appropriate non-Federal share of construction costs in the process of developing the feasibility report. The non-Federal cost-share will be:

(a) At least 25 percent of the total construction costs; and

(b) An additional amount based on your capability to pay, as appropriate, to be determined by Reclamation based on the factors in § 404.39.

§ 404.38 Are there different requirements for determining the appropriate non-Federal share of construction costs to be paid by Indian tribes?

Yes. The appropriate non-Federal share of construction costs to be paid by Indian tribes will be based on:

(a) Consideration of an Indian tribe's capability to pay at least 25 percent of the construction costs, to be determined in accordance with the factors in § 404.39; and

(b) If Reclamation determines, based on the analysis in § 404.38(a), that an Indian tribe is not capable of paying at least 25 percent of the construction costs, Reclamation may recommend in its feasibility report that the collection of all or part of the non-Federal construction costs apportioned to an Indian tribe be deferred, unless or until Reclamation determines that the Indian tribe should pay all or a portion of those costs.

§ 404.39 What factors will Reclamation consider in evaluating my capability to pay 25 percent or more of the construction costs?

Reclamation will consider the following factors:

(a) Economic factors for the project area, relative to the state average, including:

(1) Per capita income;

(2) Median household income; and

(3) The poverty rate;

(b) The ability of the project sponsor to raise tax revenues or assess fees such as user fees and ad valorum taxes or issue bonds;

(c) The strength of the project sponsor financial statements in comparison to other similar entities over the previous 4 years, including a review of:

(1) Current (includes cash and inventory) and non-current assets (property, plants etc.);

(2) Net Assets (total assets minus total liabilities);

(3) Changes to net assets;

(4) Operating revenues (water and power sales);

(5) Operating expenses (variable costs and depreciation, maintenance and repair);

(6) Cash flow from operating activities (positive value from water sales minus payments to supplies and employees);

(7) Current (current bonds payable and accounts payable) and non-current liabilities (long term debt payable);

(8) Outstanding debts and all other financial obligations;

(9) Collateral/equity as appropriate;

(10) Cash flows from capital and related financing activities (negative value from principle paid on bonds and interest payments);

(11) Net cash flow; and

(12) Any non-operating revenues and expenses;

(d) Funding commitments from non-Federal sources, other than the non-Federal project sponsor, including resources committed by state, county, or local governments;

(e) The existing cost of water and the cost to develop new water supplies in the region; and

(f) The impact of the proposed project on water rates;

(g) The projected impact of the proposed project on the non-Federal project sponsor's ability to raise or generate revenues;

(h) The non-Federal project sponsor's financial history including their past performance on repaying loans and other debts; and

(i) Any other financial means of the non-Federal project sponsor that is not captured in this subsection.

§ 404.40 What is the non-Federal share of operation, maintenance, and replacement costs?

You are required to pay 100 percent of the operation, maintenance, and replacement costs of any rural water supply project planned under this program.

Subpart C—Appraisal Investigations

§ 404.41 How will an appraisal investigation be conducted under this program?

Appraisal investigations will be conducted in accordance with Reclamation-approved standards governing the approach, process and content of the appraisal investigation. You can obtain information about Reclamation's standards and requirements for conducting an appraisal investigation by contacting your local Reclamation office.

§ 404.42 How much time is provided to complete an appraisal investigation?

An appraisal investigation must be scheduled for completion not later than 2 years after the date on which the appraisal investigation is initiated, unless otherwise agreed to in writing by Reclamation.

§ 404.43 What process will Reclamation follow to determine if an appraisal investigation is ready for review?

(a) Reclamation will evaluate whether the appraisal investigation adequately addresses all of the items required in Reclamation's standards for conducting appraisal investigations, and is, therefore ready for review. Reclamation standards and requirements for the content of an appraisal investigation are available at your local Reclamation office. Reclamation will notify you in writing of the outcome of this determination within 90 business days from the date of Reclamation's receipt of the appraisal investigation;

(b) If the appraisal investigation does not include the required information, you will be notified in writing of the reasons why, and you will have an opportunity to make changes and re-submit the corrected appraisal investigation to Reclamation for additional review. As appropriate, Reclamation will work with you to suggest approaches to correct the appraisal investigation;

(c) Once Reclamation determines that the appraisal investigation includes all of the required information, Reclamation will review the investigation to determine, based on an application of the criteria set forth in § 404.44, whether or not it is appropriate to proceed to a feasibility study. Reclamation will document its findings in an appraisal report, as described in § 404.45;

(d) Reclamation's review of an appraisal investigation will take no longer than 180 business days from its receipt of the appraisal investigation to its completion of the appraisal report, excluding time when Reclamation is waiting for additional information from the project sponsor.

§ 404.44 What criteria will Reclamation apply to determine whether it is appropriate to recommend that a feasibility study be conducted?

In reviewing an appraisal investigation, Reclamation will apply the following criteria to determine whether at least one of the alternatives identified is appropriate for further analysis through a feasibility study, or whether the investigation should be terminated without conducting a feasibility study, including:

(a) Whether a reasonable range of alternatives (structural or non-structural) have been formulated and evaluated;

(b) Whether the recommendation for further study of one or more alternatives is clearly supported by the analysis in the appraisal investigation; and

(c) For each alternative considered in the investigation, whether the alternative:

(1) Identifies viable water supplies and water rights sufficient to supply the proposed service area, including all practicable water sources such as lower quality waters, non-potable waters, and water-reuse-based water supplies;

(2) Has a positive effect on public and health and safety;

(3) Will meet water demand, including projected future needs;

(4) Provides environmental benefits, including source water protection;

(5) Applies a regional or watershed perspective and promotes benefits in the region in which the project is carried out;

(6) Implements an integrated water resources management approach;

(7) Enhances water management flexibility, including providing for local control of water supplies and, where applicable, encouraging participation in water banking and markets;

(8) Promotes long-term protection of water supplies;

(9) Includes preliminary cost estimates that are reasonable and supported;

(10) Is cost-effective and generates national net economic benefits as required under the Principles and Guidelines (incorporated by reference at § 404.4);

(11) For each alternative proposed for further evaluation in a feasibility study, whether the project sponsor has the capability to pay 100 percent of the costs associated with the operation, maintenance, and replacement of the facilities constructed or developed; and

(12) Other factors that Reclamation deems appropriate.

§ 404.45 What will be included in the appraisal report prepared by Reclamation?

The appraisal report prepared by Reclamation will include Reclamation's finding as to whether or not it is appropriate to proceed to a feasibility study, based on Reclamation's review of the appraisal investigation and application of the criteria set forth in § 404.44, and the reasons supporting that finding.

§ 404.46 Who will the appraisal report be provided to?

A copy of the appraisal report will be provided to you. Reclamation will also publish a notice of availability of the appraisal report in the FEDERAL REGISTER and will make a copy of the report available to the public upon request.

Subpart D—Feasibility Studies

§ 404.47 How will a feasibility study be conducted under this program?

Feasibility studies will be conducted in accordance with Reclamation's standards governing the approach, process and content of the feasibility study, including the Principles and Guidelines (incorporated by reference at § 404.4). You can obtain information about Reclamation's standards and requirements for conducting feasibility studies by contacting your local Reclamation office.

§ 404.48 What process will Reclamation follow to determine if a feasibility study is ready for review?

(a) Reclamation will evaluate whether the feasibility study adequately addresses all of the items required in Reclamation's standards for conducting a feasibility study, and is, therefore, ready for review. Reclamation standards and requirements for the content

of a feasibility study are available at your local Reclamation office. Reclamation will notify you in writing of the outcome of this determination within 90 business days from the date of Reclamation's receipt of the feasibility study;

(b) If the feasibility study does not include the required information, you will be notified in writing of the reasons why, and you will have an opportunity to make changes and re-submit the corrected feasibility study to Reclamation for additional review. Where appropriate, Reclamation will work with you to suggest approaches to correct the feasibility study;

(c) Once Reclamation determines that the feasibility study includes all of the required information, Reclamation will review the study to determine, based on application of the criteria set forth in § 404.49, whether or not it is appropriate to recommend to Congress that it authorize construction of the project;

(d) Reclamation's review of the feasibility study will take no longer than 180 business days from the date that Reclamation determines that the study includes all of the required information and is ready for review; and

(e) Reclamation will document its findings in a feasibility report, as more fully described in section § 404.50.

§ 404.49 What criteria will Reclamation use to determine whether to recommend that a proposed rural water supply project be authorized for construction?

In reviewing a feasibility study, Reclamation will assure that the proposed project is consistent with the policies and programs of the President and will apply the following criteria to evaluate and determine whether it is appropriate to recommend authorization for construction:

(a) The degree to which the project meets the prioritization criteria in § 404.13;

(b) The outcome of the environmental analysis;

(c) Whether there is a Federal interest in the project, including;

(1) A clearly defined Federal nexus to a proposed project;

(2) The Federal cost of the project in relation to the amount of Federal resources likely to be available; and

(d) Whether the recommended project alternative is clearly supported by the feasibility study, based on application of the following factors, including the extent to which the alternative:

(1) Addresses near and long-term water demand;

(2) Advances public health and safety and consideration of other benefits of the proposed rural water supply project;

(3) Addresses environmental quality and source water protection issues;

(4) Addresses opportunities to treat and use low-quality or non-potable water, water-reuse based supplies, and brackish and saline waters, through innovative and economically viable treatment technologies;

(5) Addresses opportunities for water conservation through structural or non-structural approaches and demonstration technologies to reduce water use and water system costs;

(6) Addresses opportunities to take advantage of economic incentives and the use of market-based mechanisms;

(7) Includes a reasonable and supported estimate of construction costs and operation, maintenance, and replacement costs;

(8) Is consistent with the Principles and Guidelines (incorporated by reference at § 404.4).

(9) Includes a reasonable and supported operation, maintenance, and replacement plan to assist the project sponsor in establishing rates and fees and a schedule identifying how those costs should be allocated to each non-Federal project sponsor;

(10) Demonstrates your financial capability to pay at least 25 percent of the design and construction costs and 100 percent of the operation, maintenance, and replacement costs;

(11) Is eligible for guaranteed loans;

(12) Includes adequate administrative and financial controls to manage construction and operation, maintenance, and replacement of the project;

(13) Is eligible for assistance under other Federal authorities to pay for discrete features or portions of the project;

(14) Is technically feasible and can be constructed within industry standards;

(15) Involves partnerships with other state, local, or tribal governments or Federal entities; and

(16) In the case of Indian tribes and tribal organizations, the extent to which the alternative addresses the goal of economic self-sufficiency;

(17) The degree to which the proposed project demonstrates that it has clear deliverables, will be accomplished within a reasonable schedule, within budget, and is well managed; and

(18) Other factors and criteria that Reclamation deems appropriate.

§ 404.50 What information will be included in the feasibility report prepared by Reclamation.

The feasibility report prepared by Reclamation will include:

(a) Reclamation's finding as to whether the proposed rural water supply project is feasible and the reasons supporting that determination;

(b) A recommendation to Congress regarding whether or not the proposed rural water supply project should be authorized for construction, and the reasons supporting the recommendation. This recommendation will be based on Reclamation's review of the feasibility study and its application of the criteria set forth in § 404.49; and

(c) If the rural water supply project is recommended for construction, the feasibility report will also include:

(1) The appropriate Federal and non-Federal share of the capital construction costs for the project and for projects involving multiple project sponsors, the portion of those costs allocated to each project sponsor;

(2) What amount of grants, loan guarantees, or combination of grants and loan guarantees should constitute the Federal share of the project;

(3) The annual operation, maintenance, and replacement costs, and the portion of those costs allocated to each project sponsor participating in the rural water supply project; and

(4) An assessment of the financial capability of each project sponsor participating in the rural water supply project to pay the portion of the construction and operation, maintenance, and replacement costs allocated to it.

§ 404.51 Are proposed projects under the Rural Water Supply Program reviewed by the Administration?

Yes. The Administration will review all projects proposed for funding under the Reclamation's Rural Water Supply Program. This includes review under Executive Order 12322 to determine whether the project is consistent with the policies and programs of the President. This review will occur before the feasibility report is finalized.

§ 404.52 Who will the feasibility report be provided to?

Upon its completion, Reclamation will:

(a) Provide the feasibility report to you;

(b) Submit the feasibility report to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives;

(c) Make the report publicly available, along with associated study documents; and

(d) Publish in the FEDERAL REGISTER a notice of the availability of the results.

Subpart E—Miscellaneous

§ 404.53 Does this rule provide authority for the transfer of pre-existing facilities from Federal to private ownership, or from private to Federal ownership?

No. This rule does not authorize the transfer of pre-existing facilities or pre-existing components of any water system from Federal to private ownership, or from private to Federal ownership.

§ 404.54 Who will hold title to a rural water project that is constructed following the completion of an appraisal investigation or feasibility study under this program?

Title to any rural water project planned, designed and recommended for construction under this program will be held by the non-Federal project sponsor.

§404.55 Who is responsible for the operation, maintenance, and replacement costs?

You will be responsible for 100 percent of the operation, maintenance, and replacement costs for any rural water facility that is planned, designed, and recommended for construction under this program.

§404.56 If a financial assistance agreement is entered into for a rural water supply project that benefits more than one Indian tribe, is the approval of each Indian tribe required?

Yes. When a financial assistance agreement is entered into with an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe is a prerequisite to entering into the financial assistance agreement.

§404.57 Does this rule have any affect on state water law?

No. Neither the Act nor this rule preempts or affects state water law or any interstate compact governing water. Reclamation will comply with state water laws in carrying out this rule.

§404.58 Do rural water projects authorized before the enactment of the Rural Water Supply Act of 2006 have to comply with the requirements in this rule?

No. Neither the Act nor this rule imposes any additional requirements on rural water supply projects that were authorized for construction before the date of enactment of the Act.

§404.59 If the Secretary recommends a project for construction, is that a promise of Federal funding?

No. Congress must first authorize the project for construction and Federal funding is subject to the availability of appropriations.

§404.60 Does this rule contain an information collection that requires approval by the Office of Management and Budget (OMB)?

Yes. This rule does contain an information collection that is approved by OMB, under Control Number 1006–0029. The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

PART 413—ASSESSMENT BY IRRIGATION DISTRICTS OF LANDS OWNED BY THE UNITED STATES, COLUMBIA BASIN PROJECT, WASHINGTON

Sec.

413.1 Purpose.
413.2 Definitions.
413.3 Assessment of settlement lands.
413.4 Assessment of other project act lands and rights of way.
413.5 Reports on status of settlement lands.

AUTHORITY: Sec. 8, 57 Stat. 20; 16 U.S.C. 835c–4.

SOURCE: 23 FR 10360, Dec. 25, 1958, unless otherwise noted.

§413.1 Purpose.

The provisions of this part shall govern the levy and enforcement of assessments by or on behalf of irrigation districts against lands owned by the United States within the Columbia Basin Project, pursuant to the provisions of subsection 5 (b) and section 8 of the Columbia Basin Project Act (57 Stat. 14; 16 U. S. C. 835c–1 and 835c–4) and in keeping with the provisions of section 14, Chapter 275, Laws of Washington, 1943. (Section 89.12.120, Revised Code of Washington).

§413.2 Definitions.

As used in this part:

(a) *Project Manager* means the Project Manager of the Columbia Basin Project, a Federal reclamation project.

(b) *District* means any one of the irrigation districts organized under the laws of Washington which has contracted with the United States under the Columbia Basin Project Act to repay a portion of the construction cost of the project.

(c) *Settlement lands* means those public lands of the United States within the project or those lands acquired by the United States under the authority of the Columbia Basin Project Act, title to which is vested in the United States and which are being held pending their conveyance in accordance

with the project settlement and development program.

(d) *Other project act lands* means those public lands within the project and those lands or interests acquired and being held by the United States under the Columbia Basin Project Act, which are being held other than for conveyance in accordance with the project settlement and development program.

(e) *Rights of way* means lands or interests in lands acquired by the United States under the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, 43 U. S. C. 391, and acts amendatory thereof or supplementary thereto) for the construction and operation of project works, rights of way, including improvements thereon, reserved to the United States, under the Act of August 30, 1890 (26 Stat. 391; 43 U. S. C. 945) or section 90.40.050 of the Revised Code of Washington and being asserted for project purposes.

§ 413.3 Assessment of settlement lands.

(a) Settlement lands, which the United States is not under contract to sell or exchange at the time a district makes its annual levy of assessments shall not be assessed, except as provided in paragraph (c) of this section. If the United States thereafter contracts to sell or exchange such lands before the end of the irrigation season following the date of the annual levy, the purchaser will be required to make appropriate payment to the district for the water service which will be available to the purchaser during that irrigation season or the remaining portion thereof.

(b) From the date the United States contracts to sell or exchange settlement lands until title thereto passes to the purchaser under such contract, or until the rights of the purchaser are terminated or reacquired by the United States settlement lands shall be subject to assessment by a district on the same basis as other lands of like character within the operation of the district.

(c) Settlement lands, which the United States is not under contract to sell or exchange at the time a district makes its levy may be assessed by a district to the extent of the construction charge obligation installment required to be levied for the following year on such lands on account of the district's construction cost obligation to the United States. No other levies shall be made by a district against settlement lands in this status.

(d) While settlement lands which the United States has leased for use as irrigated lands and which the United States has not contracted to sell or exchange may not be assessed by a district except as provided in paragraph (c) of this section, lessees shall pay the district the same amounts annually that would be required to be paid for water service if the lands were subject to assessment therefor, in addition to any assessment levied under paragraph (c) of this section.

(e) Assessments made by a district against settlement lands while the United States is under contract to sell or exchange such lands shall be subject to all interest and penalties for delinquency as provided by the laws of Washington, but interest and penalties shall cease to accumulate on the date such contract is terminated or the purchaser's interest therein reacquired by the United States.

(f) No action shall be taken by or for a district to enforce any lien created as permitted under the regulations in this part by assessment foreclosure or other means that would purport to transfer any right in or title to any land or interests therein while title thereto is vested in the United States. Although the United States does not assume any obligation for the payment of such liens, it will in any conveyance of settlement lands covered thereby convey subject to those liens.

§ 413.4 Assessment of other project act lands and rights of way.

(a) A district shall, as to other project act lands and rights of way the title to which passes to the United States on or after January 1 of any year and before the district has levied its assessments for that year, immediately remove the lands from its assessment rolls and shall not thereafter take any proceedings to complete or enforce the assessments. Any such removal from the rolls shall be effective as of January 1 of the year in which

title passes to the United States Action so to remove shall be taken promptly after the giving of written notice by the Project Manager to the district as to the lands involved, and the district shall provide the United States with a certificate stating that the lands have not been and will not be assessed so long as title thereto remains in the United States.

(b) There is no authority in law for the assessment of rights of way owned by the United States. Accordingly, a district shall make no assessment thereof while title thereto remains in the United States.

(c) Other project act lands while title thereto remains in the United States shall not be assessed for any district charge so long as they are in the ''other project act lands'' category.

§413.5 Reports on status of settlement lands.

The Project Manager will furnish each district prior to its annual levy every year a list of all the settlement lands owned by the United States for which water is available and which are not under contract of sale or exchange and therefore are not to be assessed by the district, except for construction charge obligation installments under §413.3(c) when such charges are required to be levied.

PART 414—OFFSTREAM STORAGE OF COLORADO RIVER WATER AND DEVELOPMENT AND RELEASE OF INTENTIONALLY CREATED UNUSED APPORTIONMENT IN THE LOWER DIVISION STATES

Subpart A—Purposes and Definitions

Sec.
414.1 Purpose.
414.2 Definitions of terms used in this part.

SUBPART B—STORAGE AND INTERSTATE RELEASE AGREEMENTS

414.3 Storage and Interstate Release Agreements.
414.4 Reporting Requirements and accounting under storage and interstate release agreements.

Subpart C—Water Quality and Environmental compliance

414.5 Water Quality.
414.6 Environmental Compliance and funding of Federal costs.

AUTHORITY: 5 U.S.C. 553; 43 U.S.C. 391, 485 and 617; 373 U.S. 546; 376 U.S. 340.

SOURCE: 64 FR 59006, Nov. 1, 1999, unless otherwise noted.

Subpart A—Purposes and Definitions

§414.1 Purpose.

(a) *What this part does.* This part establishes a procedural framework for the Secretary of the Interior (Secretary) to follow in considering, participating in, and administering Storage and Interstate Release Agreements in the Lower Division States (Arizona, California, and Nevada) that would:

(1) Permit State-authorized entities to store Colorado River water offstream;

(2) Permit State-authorized entities to develop intentionally created unused apportionment (ICUA);

(3) Permit State-authorized entities to make ICUA available to the Secretary for release for use in another Lower Division State. This release may only take place in accordance with the Secretary's obligations under Federal law and may occur in either the year of storage or in years subsequent to storage; and

(4) Allow only voluntary interstate water transactions. These water transactions can help to satisfy regional water demands by increasing the efficiency, flexibility, and certainty in Colorado River management in accordance with the Secretary's authority under Article II (B) (6) of the Decree entered March 9, 1964 (376 U.S. 340) in the case of *Arizona* v. *California*, (373 U.S. 546) (1963), as supplemented and amended.

(b) *What this part does not do.* This part does not:

(1) Affect any Colorado River water entitlement holder's right to use its full water entitlement;

(2) Address or preclude independent actions by the Secretary regarding Tribal storage and water transfer activities;

(3) Change or expand existing authorities under the body of law known as the ''Law of the River'';

(4) Change the apportionments made for use within individual States;

(5) Address intrastate storage or intrastate distribution of water;

(6) Preclude a Storing State from storing some of its unused apportionment in another Lower Division State if consistent with applicable State law; or

(7) Authorize any specific activities; the rule provides a framework only.

§ 414.2 Definitions of terms used in this part.

Authorized entity means:

(1) An entity in a Storing State which is expressly authorized pursuant to the laws of that State to enter into Storage and Interstate Release Agreements and develop ICUA (''storing entity''); or

(2) An entity in a Consuming State which has authority under the laws of that State to enter into Storage and Interstate Release Agreements and acquire the right to use ICUA (''consuming entity'').

Basic apportionment means the Colorado River water apportioned for use within each Lower Division State when sufficient water is available for release, as determined by the Secretary of the Interior, to satisfy 7.5 million acre-feet (maf) of annual consumptive use in the Lower Division States. The United States Supreme Court, in *Arizona* v. *California*, confirmed that the annual basic apportionment for the Lower Division States is 2.8 maf of consumptive use in the State of Arizona, 4.4 maf of consumptive use in the State of California, and 0.3 maf of consumptive use in the State of Nevada.

BCPA means the Boulder Canyon Project Act, authorized by the Act of Congress of December 21, 1928 (45 Stat. 1057).

Colorado River Basin means all of the drainage area of the Colorado River System and all other territory within the United States to which the waters of the Colorado River System shall be beneficially applied.

Colorado River System means that portion of the Colorado River and its tributaries within the United States.

Colorado River water means water in or withdrawn from the mainstream.

Consuming entity means an authorized entity in a Consuming State.

Consuming State means a Lower Division State where ICUA will be used.

Consumptive use means diversions from the Colorado River less any return flow to the river that is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation.

(1) Consumptive use from the mainstream within the Lower Division States includes water drawn from the mainstream by underground pumping.

(2) The Mexican treaty obligation is set forth in the February 3, 1944, Water Treaty between Mexico and the United States, including supplements and associated Minutes of the International Boundary and Water Commission.

Decree means the decree entered March 9, 1964, by the Supreme Court in *Arizona* v. *California*, 373 U.S. 546 (1963), as supplemented or amended.

Entitlement means an authorization to beneficially use Colorado River water pursuant to:

(1) The Decree;

(2) A water delivery contract with the United States through the Secretary; or

(3) A reservation of water from the Secretary.

Intentionally created unused apportionment or ICUA means unused apportionment that is developed:

(1) Consistent with the laws of the Storing State;

(2) Solely as a result of, and would not exist except for, implementing a Storage and Interstate Release Agreement.

Lower Division States means the States of Arizona, California, and Nevada.

Mainstream means the main channel of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs behind dams on the main channel, and Senator Wash Reservoir off the main channel.

Offstream storage means storage in a surface reservoir off of the mainstream or in a ground water aquifer. Offstream storage includes indirect recharge

when Colorado River water is exchanged for ground water that otherwise would have been pumped and consumed.

Secretary means the Secretary of the Interior or an authorized representative.

Storage and Interstate Release Agreement means an agreement, consistent with this part, between the Secretary and authorized entities in two or more Lower Division States that addresses the details of:

(1) Offstream storage of Colorado River water by a storing entity for future use within the Storing State;

(2) Subsequent development of ICUA by the storing entity, consistent with the laws of the Storing State;

(3) A request by the storing entity to the Secretary to release ICUA to the consuming entity;

(4) Release of ICUA by the Secretary to the consuming entity; and

(5) The inclusion of other entities that are determined by the Secretary and the storing entity and the consuming entity to be appropriate to the performance and enforcement of the agreement.

Storing entity means an authorized entity in a Storing State.

Storing State means a Lower Division State in which water is stored off the mainstream in accordance with a Storage and Interstate Release Agreement for future use in that State.

Surplus apportionment means the Colorado River water apportioned for use within each Lower Division State when sufficient water is available for release, as determined by the Secretary, to satisfy in excess of 7.5 maf of annual consumptive use in the Lower Division States.

Unused apportionment means Colorado River water within a Lower Division State's basic or surplus apportionment, or both, which is not otherwise put to beneficial consumptive use during that year within that State.

Upper Division States means the States of Colorado, New Mexico, Utah, and Wyoming.

Water delivery contract means a contract between the Secretary and an entity for the delivery of Colorado River water in accordance with section 5 of the BCPA.

Subpart B—Storage and Interstate Release Agreements

§414.3 Storage and Interstate Release Agreements.

(a) *Basic requirements for Storage and Interstate Release Agreements*. Two or more authorized entities may enter into Storage and Interstate Release Agreements with the Secretary in accordance with paragraph (c) of this section. Each agreement must meet all of the requirements of this section.

(1) The agreement must specify the quantity of Colorado River water to be stored, the Lower Division State in which it is to be stored, the entity(ies) that will store the water, and the facility(ies) in which it will be stored.

(2) The agreement must specify whether the water to be stored will be within the unused basic apportionment or unused surplus apportionment of the Storing State. For water from the Storing State's apportionment to qualify as unused apportionment available for storage under this part, the water must first be offered to all entitlement holders within the Storing State for purposes other than interstate transactions under proposed Storage and Interstate Release Agreements.

(3) The agreement must specify whether the water to be stored will be within the unused basic apportionment or unused surplus apportionment of the Consuming State. If the water to be stored will be unused apportionment of the Consuming State, the agreement must acknowledge that any unused apportionment of the Consuming State may be made available from the Consuming State by the Secretary to the Storing State only in accordance with Article II(B)(6) of the Decree. If unused apportionment from the Consuming State is to be stored under a Storage and Interstate Release Agreement, the Secretary will make the unused apportionment of the Consuming State available to the storing entity in accordance with the terms of a Storage and Interstate Release Agreement and will not make that water available to other entitlement holders.

(4) The agreement must specify the maximum quantity of ICUA that will be developed and made available for release to the consuming entity.

(5) The agreement must specify that ICUA may not be requested by the consuming entity in a quantity that exceeds the quantity of water that had been stored under a Storage and Interstate Release Agreement in the Storing State.

(6) The agreement must specify a procedure to verify and account for the quantity of water stored in the Storing State under a Storage and Interstate Release Agreement.

(7) The agreement must specify that, by a date certain, the consuming entity will:

(i) Notify the storing entity to develop a specific quantity of ICUA in the following calendar year;

(ii) Ask the Secretary to release that ICUA; and

(iii) Provide a copy of the notice or request to each Lower Division State.

(8) The agreement must specify that when the storing entity receives a request to develop a specific quantity of ICUA:

(i) It will ensure that the Storing State's consumptive use of Colorado River water will be decreased by a quantity sufficient to develop the requested quantity of ICUA; and

(ii) Any actions that the storing entity takes will be consistent with its State's laws.

(9) The agreement must include a description of:

(i) The actions the authorized entity will take to develop ICUA;

(ii) Potential actions to decrease the authorized entity's consumptive use of Colorado River water;

(iii) The means by which the development of the ICUA will be enforceable by the storing entity; and

(iv) The notice given to entitlement holders, including Indian tribes, of opportunities to participate in development of this ICUA.

(10) The agreement must specify that the storing entity will certify to the Secretary that ICUA has been or will be developed that otherwise would not have existed. The certification must:

(i) Identify the quantity, the means, and the entity by which ICUA has been or will be developed; and

(ii) Ask the Secretary to make the ICUA available to the consuming entity under Article II(B)(6) of the Decree and the Storage and Interstate Release Agreement.

(11) The agreement must specify a procedure for verifying development of the ICUA appropriate to the manner in which it is developed.

(12) The agreement must specify that the Secretary will release ICUA developed by the storing entity:

(i) In accordance with a request of the consuming entity;

(ii) In accordance with the terms of the Storage and Interstate Release Agreement;

(iii) Only for use by the consuming entity and not for use by other entitlement holders; and

(iv) In accordance with the terms of the Storage and Interstate Release Agreement, the BCPA, Article II(B)(6) of the Decree and all other applicable laws and executive orders.

(13) The agreement must specify that ICUA shall be released to the consuming entity only in the year and to the extent that ICUA is developed by the storing entity by reducing Colorado River water use within the Storing State.

(14) The agreement must specify that the Secretary will release ICUA only after the Secretary has determined that all necessary actions have been taken under this part.

(15) The agreement must specify that before releasing ICUA the Secretary must first determine that the storing entity:

(i) Stored water in accordance with the Storage and Interstate Release Agreement in quantities sufficient to support the development of the ICUA requested by the consuming entity; and

(ii) Certified to the satisfaction of the Secretary that the quantity of ICUA requested by the consuming entity has been developed in that year or will be developed in that year under § 414.3(f).

(16) The agreement must specify that the non-Federal parties to the Storage and Interstate Release Agreement will indemnify the United States, its employees, agents, subcontractors, successors, or assigns from loss or claim for damages and from liability to persons or property, direct or indirect, and loss or claim of any nature whatsoever arising by reason of the actions taken

by the non-federal parties to the Storage and Interstate Release Agreement under this part.

(17) The agreement must specify the extent to which facilities constructed or financed by the United States will be used to store, convey, or distribute water associated with a Storage and Interstate Release Agreement.

(18) The agreement must include any other provisions that the parties deem appropriate.

(b) *How to address financial considerations.* The Secretary will not execute an agreement that has adverse impacts on the financial interests of the United States. Financial details between and among the non-Federal parties need not be included in the Storage and Interstate Release Agreement but instead can be the subject of separate agreements. The Secretary need not be a party to the separate agreements.

(c) *How the Secretary will execute storage and interstate release agreements.* The Regional Director for the Bureau of Reclamation's Lower Colorado Region (Regional Director) may execute and administer a Storage and Interstate Release Agreement on behalf of the Secretary. The Secretary will notify the public of his/her intent to participate in negotiations to develop a Storage and Interstate Release Agreement and provide a means for public input. In considering whether to execute a Storage and Interstate Release Agreement, the Secretary may request, and the non-Federal parties must provide, any additional supporting data necessary to clearly set forth both the details of the proposed transaction and the eligibility of the parties to participate as State-authorized entities in the proposed transaction. The Secretary will also consider: applicable law and executive orders; applicable contracts; potential effects on trust resources; potential effects on entitlement holders, including Indian tribes; potential impacts on the Upper Division States; potential effects on third parties; potential environmental impacts and potential effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; comments from the State agencies responsible for consulting with the Secretary on matters related to the Colorado River; and other relevant factors, including the direct or indirect consequences of the proposed Storage and Interstate Release Agreement on the financial interests of the United States. Based on the consideration of the factors in this section, the Secretary may execute or decide not to execute a Storage and Interstate Release Agreement.

(d) *Assigning interests to an authorized entity.* Non-Federal parties to a Storage and Interstate Release Agreement may assign their interests in the Agreement to authorized entities. The assignment can be in whole or in part. The assignment can only be made if all parties to the agreement approve.

(e) *Requirement for contracts under the Boulder Canyon Project Act.* Release or diversion of Colorado River water for storage under this part must be supported by a water delivery contract with the Secretary in accordance with Section 5 of the BCPA. The only exception to this requirement is storage of Article II(D) (of the Decree) water by Federal or tribal entitlement holders. The release or diversion of Colorado River water that has been developed or will be developed as ICUA under this part also must be supported by a Section 5 water delivery contract.

(1) An authorized entity may satisfy the requirement of this section through a direct contract with the Secretary. An authorized entity also may satisfy the Section 5 requirement of the BCPA, for purposes of this part, through a valid subcontract with an entitlement holder that is authorized by the Secretary to subcontract for the delivery of all or a portion of its entitlement.

(2) For storing entities that do not otherwise hold a contract or valid subcontract for the delivery of the water to be stored, the Storage and Interstate Release Agreement will serve as the vehicle for satisfying the Section 5 requirement for the release or diversion of that water.

(3) For consuming entities that do not otherwise hold a contract or valid subcontract for the delivery of the water to be released by the Secretary as ICUA, the Storage and Interstate

Release Agreement will serve as the vehicle for satisfying the Section 5 requirement for the release or diversion of that water.

(f) *Anticipatory release of ICUA.* The Secretary may release ICUA to a consuming entity before the actual development of ICUA by the storing entity if the storing entity certifies to the Secretary that ICUA will be developed during that same year that otherwise would not have existed.

(1) These anticipatory releases will only be made in the same year that the ICUA is developed.

(2) Before an anticipatory release, the Secretary must be satisfied that the storing entity will develop the necessary ICUA in the same year that the ICUA is to be released.

(g) *Treaty obligations.* Prior to executing any specific Storage and Interstate Release Agreements, the United States will consult with Mexico through the International Boundary and Water Commission under the boundary water treaties and other applicable international agreements in force between the two countries.

§ 414.4 Reporting requirements and accounting under Storage and Interstate Release Agreements.

(a) *Annual report to the Secretary.* Each storing entity will submit an annual report to the Secretary containing the material required by this section. The report will be due on a date to be agreed upon by the parties to the Storage and Interstate Release Agreement. The report must include:

(1) The quantity of water diverted and stored during the prior year under all Storage and Interstate Release Agreements; and

(2) The total quantity of stored water available to support the development of ICUA under each Storage and Interstate Release Agreement to which the storing entity is a party as of December 31 of the prior calendar year.

(b) *How the Secretary accounts for diverted and stored water.* The Secretary will account for water diverted and stored under Storage and Interstate Release Agreements in the records maintained under Article V of the Decree.

(1) The Secretary will account for the water that is diverted and stored by a storing entity as a consumptive use in the Storing State for the year in which it is stored.

(2) The Secretary will account for the diversion and consumptive use of ICUA by a consuming entity as a consumptive use in the Consuming State of unused apportionment under Article II(B)(6) of the Decree in the year the water is released in the same manner as any other unused apportionment taken by that State.

(3) The Secretary will maintain individual balances of the quantities of water stored under a Storage and Interstate Release Agreement and available to support the development of ICUA. The appropriate balances will be reduced when ICUA is developed by the storing entity and released by the Secretary for use by a consuming entity.

Subpart C—Water Quality and Environmental Compliance

§ 414.5 Water quality.

(a) *Water Quality is not guaranteed.* The Secretary does not warrant the quality of water released or delivered under Storage and Interstate Release Agreements, and the United States will not be liable for damages of any kind resulting from water quality problems. The United States is not under any obligation to construct or furnish water treatment facilities to maintain or improve water quality except as may otherwise be provided in relevant Federal law.

(b) *Required water quality standards.* All entities, in diverting, using, and returning Colorado River water, must:

(1) Comply with all applicable water pollution laws and regulations of the United States, the Storing State, and the Consuming State; and

(2) Obtain all applicable permits or licenses from the appropriate Federal, State, or local authorities regarding water quality and water pollution matters.

§414.6 Environmental compliance and funding of Federal costs.

(a) *Ensuring environmental compliance.* The Secretary will complete environmental compliance documentation, compliance with the National Environmental Policy Act of 1969, as amended, and the Endangered Species Act of 1973, as amended; and will integrate the requirements of other statutes, laws, and executive orders as required for Federal actions to be taken under this part.

(b) *Responsibility for environmental compliance work.* Authorized entities seeking to enter into a Storage and Interstate Release Agreement under this part may prepare the appropriate documentation and compliance document for a proposed Federal action, such as execution of a proposed Storage and Interstate Release Agreement. The compliance documents must meet the standards set forth in Reclamation's national environmental policy guidance before they can be adopted.

(c) *Responsibility for funding of Federal costs.* All costs incurred by the United States in evaluating, processing, and/or executing a Storage and Interstate Release Agreement under this part must be funded in advance by the authorized entities that are party to that agreement.

PART 417—PROCEDURAL METHODS FOR IMPLEMENTING COLORADO RIVER WATER CONSERVATION MEASURES WITH LOWER BASIN CONTRACTORS AND OTHERS

Sec.

417.1 Scope of part.
417.2 Consultation with contractors.
417.3 Notice of recommendations and determinations.
417.4 Changed conditions, emergency, or hardship modifications.
417.5 Duties of the Commissioner of Indian Affairs with respect to Indian reservations.
417.6 General regulations.

AUTHORITY: 45 Stat. 1057, 1060; 43 U.S.C. 617; and Supreme Court Decree in ''Arizona v. California,'' 376 U.S. 340.

SOURCE: 37 FR 18076, Sept. 7, 1972, unless otherwise noted.

§417.1 Scope of part.

The procedures established in this part shall apply to every public or private organization (herein termed ''Contractor'') in Arizona, California, or Nevada which, pursuant to the Boulder Canyon Project Act or to provisions of other Reclamation Laws, has a valid contract for the delivery of Colorado River water, and to Federal establishments other than Indian Reservations enumerated in Article II(D) of the March 9, 1964, Decree of the Supreme Court of the United States in the case of ''Arizona v. California et al.'', 376 U.S. 340 (for purposes of this part each such Federal establishment is considered as a ''Contractor''), except that (a) neither this part nor the term ''Contractor'' as used herein shall apply to any person or entity which has a contract for the delivery or use of Colorado River water made pursuant to the Warren Act of February 21, 1911 (36 Stat. 925) or the Miscellaneous Purposes Act of February 25, 1920 (41 Stat. 451), (b) Contractors and permittees for small quantities of water, as determined by the Regional Director, Bureau of Reclamation, Boulder City, Nev. (herein termed ''Regional Director''), and Contractors for municipal and industrial water may be excluded from the application of these procedures at the discretion of the Regional Director, and (c) procedural methods for implementing Colorado River water conservation measures on Indian Reservations will be in accordance with §417.5 of this part.

§417.2 Consultation with contractors.

The Regional Director or his representative will, prior to the beginning of each calendar year, arrange for and conduct such consultations with each Contractor as the Regional Director may deem appropriate as to the making by the Regional Director of annual recommendations relating to water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, and to the making by the Regional Director of annual determinations of each Contractor's estimated water requirements for the ensuing calendar year to the end that deliveries of

Colorado River water to each Contractor will not exceed those reasonably required for beneficial use under the respective Boulder Canyon Project Act contract or other authorization for use of Colorado River water.

§ 417.3 Notice of recommendations and determinations.

Following consultation with each Contractor and after consideration of all relevant comments and suggestions advanced by the Contractors in such consultations, the Regional Director will formulate his recommendations and determinations relating to the matters specified in § 417.2. The recommendations and determinations shall, with respect to each Contractor, be based upon but not necessarily limited to such factors as the area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of the water users, amount and rate of return flows to the river, municipal water requirements and the pertinent provisions of the Contractor's Boulder Canyon Project Act water delivery contract. The Regional Director shall give each Contractor written notice by registered or certified mail, return receipt requested, of his recommendations and determinations. If the recommendations and determinations include a reduction in the amount of water to be delivered, as compared to the calendar year immediately preceding, the notice shall be delivered to the Contractor or timely sent by registered or certified mail, return receipt requested, so that it may reasonably be delivered at least 30 days prior to the first date water delivery would be affected thereby, and shall specify the basis for such reduction including any pertinent factual determinations. The recommendations and determinations of the Regional Director shall be final and conclusive unless, within 30 days of the date of receipt of the notice, the Contractor submits his written comments and objections to the Regional Director and requests further consultation. If, after such further consultation, timely taken, the Regional Director does not modify his recommendations and determinations and so advises the Contractor in writing, or if modifications are made but the Contractor still feels aggrieved thereby after notification in writing of such modified recommendations and determinations, the Contractor may, before 30 days after receipt of said notice, appeal to the Secretary of the Interior. During the pendency of such appeal, and until disposition thereof by the Secretary, the recommendations and determinations formulated by the Regional Director shall be of no force or effect. In the event delivery of water is scheduled prior to the new recommendations and determinations becoming final, said delivery shall be made according to the Contractor's currently proposed schedule or to the schedules approved for the previous calendar year, whichever is less.

§ 417.4 Changed conditions, emergency, or hardship modifications.

A Contractor may at any time apply in writing to the Regional Director for modification of recommendations or determinations deemed necessary because of changed conditions, emergency, or hardship. Upon receipt of such written application identifying the reason for such requested modification, the Regional Director shall arrange for consultation with the Contractor with the objective of making such modifications as he may deem appropriate under the then existing conditions. The Regional Director may initiate efforts for further consultation with any Contractor on his own motion with the objective of modifying previous recommendations and determinations, but in the event such modifications are made, the Contractor shall have the same opportunity to object and appeal as provided in § 417.3 of this part for the initial recommendations and determinations. The Regional Director shall afford the fullest practicable opportunity for consultation with a Contractor when acting under this section. Each modification under this section shall be transmitted to the Contractor by letter.

§ 417.5 Duties of the Commissioner of Indian Affairs with respect to Indian reservations.

(a) The Commissioner of Indian Affairs (herein termed ''Commissioner'') will engage in consultations with various tribes and other water users on the Indian Reservations listed in Article II (D) of said Supreme Court Decree, similar to those engaged in by the Regional Director with regard to Contractors as provided in § 417.2 of this part. After consideration of all comments and suggestions advanced by said tribes and other water users on said Indian Reservations concerning water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, the Commissioner shall, within the limits prescribed in said decree, make a determination as to the estimated amount of water to be diverted for use on each Indian Reservation covered by the above decree. Said determination shall be made prior to the beginning of each calendar year. That determination shall be based upon, but not necessarily limited to, such factors as: The area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of the tribes and water users on each reservation, the amount and rate of return flows to the river, municipal water requirements, and other uses on the reservation. The Commissioner of Indian Affairs shall deliver to the Regional Director written notice of the amount of water to be diverted for use upon each Indian Reservation for each year 60 days prior to the beginning of each calendar year and the basis for said determination. The determination of the Commissioner shall be final and conclusive unless within 30 days of the date of receipt of such notice the Regional Director submits his written comments and objections to the Commissioner of Indian Affairs and requests further consultation. If after such further consultation, timely taken, the Commissioner does not modify his determination and so advises the Regional Director in writing or if modifications are made by the Commissioner but the Regional Director still does not agree therewith, the Regional Director may, within 30 days after receipt of the Commissioner's response, appeal to the Secretary of the Interior for a decision on the matter. During the pendency of such appeal and until disposition thereof by the Secretary, water deliveries will be made to the extent legally and physically available according to the Commissioner's determination or according to the Commissioner's determination for the preceding calendar year, whichever is less.

(b) Modifications of said determinations due to changed conditions, emergency or hardship may be made by the Commissioner, subject, however, to the right of the Regional Director to appeal to the Secretary, as provided in the case of an initial determination by the Commissioner. During the pendency of such an appeal, water deliveries will be made on the basis of the initial determination.

§ 417.6 General regulations.

In addition to the recommendations and determinations formulated according to the procedures set out above, the right is reserved to issue regulations of general applicability to the topics dealt with herein.

PART 418—OPERATING CRITERIA AND PROCEDURES FOR THE NEWLANDS RECLAMATION PROJECT, NEVADA

GENERAL PROVISIONS

Sec.
418.1 Definitions.
418.2 How Project water may be used.
418.3 Effect of these regulations on water rights.
418.4 Prohibited deliveries.
418.5 Responsibility for violations.
418.6 Fallon Paiute-Shoshone Indian Reservation.

CONDITIONS OF WATER DELIVERY

418.7 Who may receive irrigation deliveries.
418.8 Types of eligible land.
418.9 Reporting changes in eligible land.

418.10 Determining the amount of water duty to be paid.
418.11 Valid headgate deliveries.
418.12 Project efficiency.
418.13 Maximum allowable limits.

MONITORING DIVERSIONS

418.14 Recordkeeping requirements.
418.15 Operations monitoring.

OPERATIONS AND MANAGEMENT

418.16 Using water for power generation.
418.17 Truckee and Carson River water use.
418.18 Diversions at Derby Dam.
418.19 Diversions from the Truckee River to the Truckee Division.
418.20 Diversions from the Truckee River to Lahontan Reservoir, January through June.
418.21 Diversion of Truckee River water to Lahontan Reservoir, July through December.
418.22 Future adjustments to Lahontan Reservoir storage targets.
418.23 Diversion of Rock Dam Ditch water.
418.24 Precautionary drawdown and spills from Lahontan Reservoir.
418.25 Water use for other than Newlands Project.
418.26 Charges for water use.
418.27 Distribution system operation.

ENFORCEMENT

418.28 Conditions of delivery.
418.29 Project management.
418.30 Provisions required in future contracts.

WATER MANAGEMENT AND CONSERVATION

418.31 Conservation measures.
418.32 Cooperative programs.

IMPLEMENTATION

418.33 Purpose of the implementation strategy.
418.34 Valid headgate deliveries.
418.35 Efficiencies.
418.36 Incentives for additional long term conservation.
418.37 Disincentives for lower efficiency.
418.38 Maximum allowable diversion.

APPENDIX A TO PART 418—CALCULATION OF EFFICIENCY EQUATION

AUTHORITY: 43 U.S.C. 391, *et seq.;* 43 U.S.C. 373; 43 U.S.C. 614, *et seq.;* 104 Stat. 3289, Pub. L. 101–618.

SOURCE: 62 FR 66467, Dec. 18, 1997, unless otherwise noted.

GENERAL PROVISIONS

§ 418.1 Definitions.

Bureau means the Bureau of Reclamation.

Decrees means the *Alpine* decree (*United States* v. *Alpine Land and Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980)) and the *Orr Ditch* decree (*United States* v. *Orr Water Ditch Co.*, Equity No. A–3 (D. Nev.))

District means the Truckee-Carson Irrigation District or any other approved Newlands Project operator.

Eligible land means Project land which at the time of delivery has a valid water right and either:

(1) Is classified as irrigable under Bureau land classification standards (Reclamation Instruction Series 510); or

(2) Has a paid out Project water right.

Full reservoir means 295,500 acre-feet in Lahontan Reservoir using Truckee River diversions. The Reservoir can fill above 295,500 acre-feet to 316,500 acre-feet with Carson River inflow and the use of flash boards. Intentional storage on the flash boards will occur only after the peak runoff.

Project means the Newlands Irrigation Project in western Nevada.

§ 418.2 How Project water may be used.

Project water may be delivered only to serve valid water rights used for:

(a) Maintenance of wetlands and fish and wildlife including endangered and threatened species;

(b) Recreation;

(c) Irrigation of eligible land; and

(d) Domestic and other uses of Project water as defined by the decrees.

§ 418.3 Effect of these regulations on water rights.

This part governs water uses within existing rights. This part does not in any way change, amend, modify, abandon, diminish, or extend existing rights. Water rights transfers will be determined by the Nevada State Engineer under the provisions of the *Alpine* decree.

§ 418.4 Prohibited deliveries.

The District must not deliver Project water or permit its use except as provided in this part. No Project water will be released in excess of the maximum allowable diversion or delivered to ineligible lands. Delivery of water to

land in excess of established water duties is prohibited.

§418.5 Responsibility for violations.

Violations of the terms and provisions of this part must be reported immediately to the Bureau. The District or individual water users will be responsible for any shortages to water users occasioned by waste or excess delivery or delivery of water to ineligible land as provided in this part.

§418.6 Fallon Paiute-Shoshone Indian Reservation.

Nothing in this part affects:

(a) The authority of the Fallon Paiute-Shoshone Tribe to use water on the Tribe's reservation which was delivered to the Reservation in accordance with this part; or

(b) The Secretary's trust responsibility with respect to the Fallon Paiute-Shoshone Tribe.

CONDITIONS OF WATER DELIVERY

§418.7 Who may receive irrigation deliveries.

Project irrigation water deliveries may be made only to eligible land to be irrigated. The District must maintain records for each individual water right holder indicating the number of eligible acres irrigated and the amount of water ordered and delivered.

§418.8 Types of eligible land.

(a) *Eligible land actually irrigated.* During each year, the District, in cooperation with the Bureau, must identify and report to the Bureau the location and number of acres of eligible land irrigated in the Project. Possible irrigation of ineligible land will also be identified. The Bureau will review data to ensure compliance with this part. The District, in cooperation with the Bureau, will be responsible for field checking potential violations and immediately stopping delivery of Project water to any ineligible land. The Bureau may also audit as appropriate.

(b) *Eligible land with transferred water rights.* The District water rights maps dated August 1981 through January 1983 will be used as the basis for determining which lands have a valid water right. The original maps will be maintained by the District. The District must provide copies of the maps to the Bureau. The District will alter the maps and the copies to account for water right transfers as the transfers are approved by the Nevada State Engineer.

(c) *Other eligible land.* The Bureau will also identify eligible land that was not irrigated during the prior irrigation season.

§418.9 Reporting changes in eligible land.

(a) *Eligible land anticipated to be irrigated.* (1) Anticipated changes in irrigated eligible land from the prior year will be reported to the Bureau's Lahontan Area Office by the District by March 1 of each year. The District will adjust the acreage of the eligible land anticipated to be irrigated to correct for inaccuracies, water right transfers that have been finally approved by the Nevada State Engineer, and any other action that affects the number of eligible acres, acres anticipated to be irrigated, or water deliveries.

(2) As the adjustments are made, the District will provide updated information to the Bureau for review and approval. The District must adjust anticipated water allocations to individual water users accordingly. The allocations will at all times be based on a maximum annual entitlement of 3.5 acre-feet (AF) per acre of bottom land, 4.5 AF per acre of bench land, and 1.5 AF per acre of pasture land that is anticipated to be irrigated and not on the number of water-righted acres.

(3) The District will provide the individual water users with the approved data regarding the anticipated acreage to be irrigated and water allocations for each water user that year.

(i) Any adjustments based on changes in lands anticipated to be irrigated during the irrigation season must be reported by the individual water user to the District.

(ii) The District will, in turn, notify the Bureau of any changes in irrigated acreage which must be accounted for.

(iii) Each landowner's anticipated acreage must be less than or equal to the landowner's eligible acreage.

(4) Should a landowner believe that the number of acres of eligible land he or she is entitled to irrigate is different from the number of acres as approved by the Bureau, the landowner must notify the District and present appropriate documentation regarding the subject acreage. The District must record the information and present the claim to the Bureau for further consideration.

(i) If the Bureau determines there is sufficient support for the landowner's claim, then adjustments will be made to accommodate the changes requested by the landowner.

(ii) If the Bureau disallows the landowner's claim, the Bureau must notify the District in writing. The District will, in turn, inform the landowner of the disposition of the claim and the reasons therefore, and will further instruct the landowner that he or she may seek judicial review of the Bureau's determination under the decrees. If the dispute affects the current year, then the Bureau and the District will seek to expedite any court proceeding.

(b) *Changes in domestic and other uses.* By March 1 of each year, the District must report to the Bureau all anticipated domestic and other water uses. This notification must include a detailed explanation of the criteria used in allowing the use and sufficient documentation on the type and amount of use by each water user to demonstrate to the satisfaction of the Bureau that each water user is in compliance with the criteria. With adequate documentation, the District may notify the Bureau of any changes in domestic water requirements at any time during the year.

§ 418.10 Determining the amount of water duty to be delivered.

(a) Eligible land may receive no more than the amount of water in acre-feet per year established as maximum farm headgate delivery allowances by the decrees. All water use is limited to that amount reasonably necessary for economical and beneficial use under the decrees.

(b) The annual water duty as assigned by the decrees is a maximum of 4.5 AF per acre for bench lands and a maximum of 3.5 AF per acre for bottom lands. The water duty for fields with a mixture of bench and bottom lands must be the water duty of the majority acreage. Bench and bottom land designations as finally approved by the United States District Court for the District of Nevada will be used in determining the maximum water duty for any parcel of eligible land. The annual water duty for pasture land established by contract is 1.5 AF per acre.

§ 418.11 Valid headgate deliveries.

The valid water deliveries at the headgate are set by the product of eligible land actually irrigated multiplied by the appropriate water duty in accordance with §§ 418.8 and 418.10. The District will regularly monitor all water deliveries and report in accordance with § 418.9. No amount of water will be delivered in excess of the individual water user's headgate entitlement. In the event excess deliveries should occur, such amount will be automatically reflected in the efficiency deficit adjustment to the Lahontan storage. Water delivered in excess of entitlements must not be considered valid for purposes of computing project efficiency.

§ 418.12 Project efficiency.

(a) The principal feature of this part is to obtain a reasonable level of efficiency in supplying water to the headgate by the District. The efficiency targets established by this part are the cornerstone of the enforcement and the incentive provisions and when implemented will aid other competing uses.

(b) The efficiency is readily calculable at the year's end, readily applicable to water appropriate to that year, able to be compared to other irrigation systems even though there may be many dissimilarities, appropriate for long term averaging, adjustable to any headgate delivery level including droughts or allocations, automatically adjusts to changes during the year and accurately accounts for misappropriated water. Efficiency also can be achieved through any number of measures from operations to changes in the facilities and can be measured as an

end product without regard to the approach. Thus it is flexible enough to allow local decision making and yet is fact based to minimize disputes.

(c) Assuming the headgate deliveries are valid and enforceable, conveyance efficiency is the only remaining variable in determining the quantity of water needed to be supplied to the District. Conveyance efficiency is a measure of how much water is released into the irrigation system relative to actual headgate deliveries. Differences in efficiency, therefore, are directly convertible to acre-feet. The differences in efficiency, expressed as a quantity in acre-feet, may be added to or subtracted from the actual Lahontan Reservoir storage level before it is compared to the monthly storage objective. Thus, the diversions from the Truckee River, operation of other facilities (e.g., Stampede Reservoir) and decisions related to Lahontan Reservoir are made after the efficiency storage adjustments have been made. Operating decisions are made as if the adjusted storage reflected actual conditions.

(1) *Efficiency incentive credits.* In any year that the District's actual efficiency exceeds the target efficiency for the actual headgate delivery, two-thirds of the resultant savings, in water, will be credited to the District as storage in Lahontan. This storage amount will remain in Lahontan Reservoir as water available to the District to use at its discretion consistent with Nevada and Federal law. Such uses may include wetlands (directly or incidentally), power production, recreation, a hedge against future shortages or whatever else the District determines. The storage is credited at the end of the irrigation season from which it was earned. This storage ''floats'' on top of the reservoir so that if it is unused it will be spilled first if the reservoir spills. The District may use all capacity of Lahontan Reservoir not needed for project purposes to store credits.

(2) *Efficiency disincentive debits.* In any year that the District's actual efficiency falls short of the target appropriate to the actual headgate deliveries, then the resultant excess water that was used is considered borrowed from the future. Thus it becomes a storage debit adjustment to the actual Lahontan Reservoir storage level for determining all operational decisions. The debit may accumulate but may not exceed a maximum as defined in § 418.13(b). The debit must be offset by an existing incentive credit or, if none is available, by a subsequent incentive at a full credit (not a ⅔ credit), or finally by a restriction of actual headgate deliveries by the District. This would only be done prospectively (a subsequent year) so the District and the water users can prepare accordingly. Since the debit does not immediately affect other competing uses or the District (except in a real drought), it allows for future planning and averaging over time.

(3) *Efficiency targets.* To determine the efficiency target, the system delivery losses were divided into categories such as seepage, evaporation and operational losses. The ''reasonable'' level of savings for each category was then determined by starting with current operating experience and applying the added knowledge from several measures. Means of achieving the efficiency targets, including the specific conservation measures and amounts, are identified in the table Possible Water Conservation Measures for the Newlands Project. Applicable target efficiencies will be determined each year as described in § 418.13 (a)(4).

(4) *Available conservation measures.* The water conservation measures referred to in paragraph (c)(3) of this section and others currently available to the District are listed in the following table. The table has been revised based upon the Bureau of Reclamation's Final Report to Congress of the Newlands Project Efficiency Study, 1994.

POSSIBLE WATER CONSERVATION MEASURES FOR THE NEWLANDS PROJECT

Conservation measures[1]	Expected savings in acre-feet (AF) per year[2]	Notes
1. Water ordering	1,000	Require 48-hour advance notice.
2. Adjust Lahontan Dam releases frequently	++[3]	Match releases to demand with daily adjustments.
3. Increase accuracy of delivery records and measurement devices	12,000	Account for deliveries to nearest cfs and to nearest minute.
4. Change operation of regulating reservoirs	??[4]	Eliminate use of all or parts of regulating reservoirs; drain at end of season.
5. Shorten irrigation season	4,000	Reduce by 2 weeks.
6. Control delivery system	++	Eliminate spills, better scheduling, grouping deliveries.
7. System improvements	??	O&M activity: repair leaky gates, reshape canals, improve measuring devices.
8. Dike off 2/3 S-Line Reservoir	2,720	500 ft. dike; (5′ evaporation, 0.75′ seepage).
9. Dike off south half of Harmon Reservoir	2,130	5,000 ft. dike; large savings considering canal losses (5′ evap., 1.8′ seepage).
10. Dike off west half of Sheckler Reservoir	2,400	6,000 ft. dike.
11. Eliminate use of Sheckler Reservoir	4,000	Use for Lahontan spill capture only; restore 200 ft. of E-Canal; A-Canal is OK.
12. Line 20 miles of Truckee Canal[5]	20,000	Reduces O&M.
13. Line large canals	26,100–31,000	Line large net losers first.
14. Line regulatory reservoirs	2.3 AF/acre	
15. Reuse drain water for irrigation	7,100	Assuming blended water quality would be adequate
16. Ditch rider training each year	??	
17. Canal automation	??	Reduced canal fluctuations.
18. Community rotation system	??	Grouping deliveries by area.
19. Reclamation Reform Act water conservation plan:	??	District implementation of water conservation plan.
a. Weed and phreatophyte control		
b. Fix gate leaks		
c. Water measurement		
d. Automation		
e. Communication		
20. Pumps and wells for small diverters	400	
21. Water pricing by amount used	++	Incurs administrative costs to implement.
22. Incentive programs	??	For District personnel and/or water users.
23. Drain canals	1,065	At the end of each irrigation season.
24. Acquire parcels with inefficient delivery[6]	22,280	Acquire and retire water rights from irrigated acreage with particularly inefficient delivery. Lesser savings from transferring water rights to lands with more efficient delivery.

[1]The first seven measures were considered in developing the water budget in Table 1 for the 1988 OCAP. Additional measures could be implemented by the District to help achieve efficiency requirements.
[2]Water savings have been updated in accordance with Bureau of Reclamation's Report to Congress on Newlands Project Efficiency, April 1994.
[3]++ indicates a positive number for savings but not quantifiable at this time.
[4]?? indicates uncertainty as to savings.
[5]This measure was included in the 1988 OCAP and effects overall Project efficiency; it is recognized that savings from this measure are not accounted for in the OCAP.
[6]Identified in the 1994 BOR Efficiency Study: 31 Corporation, below Sagouspe Dam, and N Canal.

(5) The measures in paragraph (c)(4) of this section are discretionary choices for the District. The range of measures available to the District provides a level of assurance that the target efficiency is reasonably achievable. The resultant efficiency targets were also compared to the range of efficiencies actually experienced by other irrigation systems that were considered comparable in order to provide a further check on ''reasonable.'' Most of the delivery losses are relatively constant regardless of the amount of deliveries. The efficiency will necessarily vary with the amount of headgate deliveries.

(6) The target efficiency for any annual valid headgate delivery can be derived from the table in Appendix A to this part.

§ 418.13 Maximum allowable limits.

(a) *Maximum allowable diversions.* (1) A provisional water budget in the Newlands Project Water Budget table must be recalculated for each irrigation season to reflect anticipated water-righted acres to be irrigated. At the start of the irrigation season, the maximum allowable diversion (MAD)

for each year must be determined by revising the first 10 lines of the Newlands Project Water Budget table based on acres of eligible land anticipated to actually be irrigated in that year (§418.9(a)) and the water duties for those lands (§418.10). At the end of the irrigation season, the required target efficiency must be recalculated for the irrigation season based on the actual irrigated acres and percent use of headgate entitlements.

NEWLANDS PROJECT WATER BUDGET

Line		1988 OCAP[1], Base	1988 OCAP, 1992 Assumptions	1988 0CAP, 1992 w/o Additional Acres	1995 Example
1	Irrigated Acreage (acres)	60,900	64,850	61,630	59,075
2	Maximum Headgate Entitlement [2]	226,450	237,485	226,555	206,230
	Distribution System Losses				
	Evaporation:				
3	Canals/Laterals	6,000	6,200	6,000	5,838
4	Regulatory Reservoirs	15,000	7,500	7,500	7,500
	Seepage:				
5	Canals/Laterals	50,000	51,000	48,500	46,481
6	Regulatory Reservoirs	7,000	4,000	4,000	4,000
7	Operational Losses	87,980	40,800	39,400	38,270
8	TOTAL LOSSES [3]	165,980	109,500	105,400	102,089
9	Max. Allowable Diversion[4] (MAD)	392,430	346,985	331,955	308,319
10	Projected Efficiency (%) [5] Assuming 100% Water Use	58.4	68.4	68.2	66.9
11	Expected Headgate Entitlement Unused[6]	20,930	23,700	22,700	13,611
12	Diversion Reduction for Unused Water[7]	25,430	26,500	25,400	15,279
13	Expected Irrigation Diversions[8]	367,000	320,485	306,555	293,040
14	Expected Efficiency (%) [9]	56.0	66.7	66.5	65.7 [10]

1. All values are in acre-feet except where noted. The first 3 columns of numbers come from the 1988 OCAP, Table 1.
2. Derived by multiplying the acreage by the appropriate water duty.
3. In deriving the 1988 OCAP water budget, it was recognized that the District had reduced losses by 7,400 acre-feet prior to 1988.
4. Maximum Headgate Entitlement (line 2) plus Total Losses (line 8).
5. Maximum Headgate Entitlement (line 2) divided by Maximum Allowable Diversion (line 9) multiplied by 100.
6. Water delivery records show that, historically, lands have been irrigated with less than their full entitlement. In the 1988 OCAP base, the unused portion of the entitlement was assumed to be approximately 9 percent; in the 1988 OCAP 10 percent; in the 1995 example 6.6 percent.
7. Unused Water (line 11) plus a proportional share of Operational Loss (line 7).
8. Maximum Allowable Diversion (line 9) minus Diversion Reduction (line 12).
9. Maximum Headgate Entitlement (line 2) minus Unused Water (line 11) divided by Expected Irrigation Diversion (line 13) multiplied by 100.
10. Expected efficiency at 93.4 percent use of headgate entitlement; other entries based on 90 percent.

(2) The MAD will be calculated annually to ensure an adequate water supply for all water right holders whose water use complies with their decreed entitlement and this part. The MAD is the maximum amount of water permitted to be diverted for irrigation use on the Project in that year. It is calculated to ensure full entitlements can be provided, but is expected to significantly exceed Project requirements. The MAD will be established by the Bureau at least 2 weeks before the start of each irrigation season. All releases of

water from Lahontan Reservoir and diversions from the Truckee Canal (including any diversions from the Truckee Canal to Rock Dam Ditch) must be charged to the MAD except as provided in §§ 418.23 and 418.35 of this part.

(3) On the basis of the methodology adopted in this part (i.e., actual irrigated acres multiplied by appropriate water duties divided by established project efficiency) an example of the MAD calculated for the projected irrigated acreage as shown in the Newlands Project Water Budget table would be 308,319 acre-feet for the 1995 Example. The sample MAD corresponds to a system efficiency for full deliveries at 66.9 percent for 1995 actual acres. Target efficiencies must be based on the percentage of maximum headgate entitlement delivered and not on the percent of water supply available.

(4) The table Expected Project Distribution System Efficiency shows the target efficiencies which will be used over the range of irrigated acreage and percent use of entitlement expected in the future. At the beginning of the irrigation season, the target efficiencies from the Expected Project Distribution System Efficiency table used to calculate the MAD will be based on the expected irrigated acreage and expected percent use of entitlement. At the end of the irrigation season, the actual acreage irrigated and actual percent use of entitlement will be used to determine the required efficiency from the Expected Project Distribution System Efficiency. The target efficiencies are read directly from the table if the acreage and use of entitlement values are shown, otherwise the target efficiency must be extrapolated from the table or calculated using the Efficiency Equation. Appendix A of this part shows the calculations used to derive the Efficiency Equation and the efficiency targets.

Expected Project Distribution System Efficiency (Not Valid Below 75 Percent Headgate Delivery)														
Project Acreage	Efficiency Equation A and B values: Effic. = AxD + B		Actual Project Headgate Delivery Expressed as a Percent of Full Entitlement (efficiency equation variable D)											
	A	B	75%	80%	85%	90%	91%	92%	93%	94%	95%	96%	98%	100%
64,850	0.1840	49.02	62.8	63.7	64.7	65.6	65.8	65.9	66.1	66.3	66.5	66.7	67.1	67.4
64,500	0.1842	48.97	62.8	63.7	64.6	65.5	65.7	65.9	66.1	66.3	66.5	66.7	67.0	67.4
64,000	0.1845	48.90	62.7	63.7	64.6	65.5	65.7	65.9	66.1	66.2	66.4	66.6	67.0	67.3
63,500	0.1847	48.83	62.7	63.6	64.5	65.5	65.6	65.8	66.0	66.2	66.4	66.6	66.9	67.3
63,000	0.1850	48.76	62.6	63.6	64.5	65.4	65.6	65.8	66.0	66.2	66.3	66.5	66.9	67.3
62,500	0.1853	48.69	62.6	63.5	64.4	65.4	65.5	65.7	65.9	66.1	66.3	66.5	66.8	67.2
62,000	0.1856	48.62	62.5	63.5	64.4	65.3	65.5	65.7	65.9	66.1	66.2	66.4	66.8	67.2
61,500	0.1858	48.54	62.5	63.4	64.3	65.3	65.5	65.6	65.8	66.0	66.2	66.4	66.8	67.1
61,000	0.1861	48.47	62.4	63.4	64.3	65.2	65.4	65.6	65.8	66.0	66.1	66.3	66.7	67.1
60,500	0.1864	48.39	62.4	63.3	64.2	65.2	65.4	65.5	65.7	65.9	66.1	66.3	66.7	67.0
60,000	0.1867	48.31	62.3	63.3	64.2	65.1	65.3	65.5	65.7	65.9	66.1	66.2	66.6	67.0
59,500	0.1870	48.24	62.3	63.2	64.1	65.1	65.3	65.4	65.6	65.8	66.0	66.2	66.6	66.9
59,000	0.1873	48.16	62.2	63.1	64.1	65.0	65.2	65.4	65.6	65.8	66.0	66.1	66.5	66.9
58,500	0.1876	48.08	62.1	63.1	64.0	65.0	65.1	65.3	65.5	65.7	65.9	66.1	66.5	66.8
58,000	0.1879	47.99	62.1	63.0	64.0	64.9	65.1	65.3	65.5	65.7	65.8	66.0	66.4	66.8
57,500	0.1882	47.91	62.0	63.0	63.9	64.9	65.0	65.2	65.4	65.6	65.8	66.0	66.4	66.7
57,000	0.1886	47.83	62.0	62.9	63.9	64.8	65.0	65.2	65.4	65.6	65.7	65.9	66.3	66.7
56,500	0.1889	47.74	61.9	62.9	63.8	64.7	64.9	65.1	65.3	65.5	65.7	65.9	66.3	66.6
56,000	0.1892	47.66	61.8	62.8	63.7	64.7	64.9	65.1	65.3	65.4	65.6	65.8	66.2	66.6
55,500	0.1895	47.57	61.8	62.7	63.7	64.6	64.8	65.0	65.2	65.4	65.6	65.8	66.1	66.5
55,000	0.1899	47.48	61.7	62.7	63.6	64.6	64.8	64.9	65.1	65.3	65.5	65.7	66.1	66.5
54,500	0.1902	47.39	61.7	62.6	63.6	64.5	64.7	64.9	65.1	65.3	65.5	65.6	66.0	66.4
54,000	0.1906	47.30	61.6	62.5	63.5	64.4	64.6	64.8	65.0	65.2	65.4	65.6	66.0	66.4
53,500	0.1909	47.20	61.5	62.5	63.4	64.4	64.6	64.8	65.0	65.1	65.3	65.5	65.9	66.3
53,000	0.1913	47.11	61.5	62.4	63.4	64.3	64.5	64.7	64.9	65.1	65.3	65.5	65.9	66.2
52,500	0.1916	47.01	61.4	62.3	63.3	64.3	64.4	64.6	64.8	65.0	65.2	65.4	65.8	66.2
52,000	0.1920	46.91	61.3	62.3	63.2	64.2	64.4	64.6	64.8	65.0	65.2	65.3	65.7	66.1

(5) Adjustments in the MAD must be made by the Bureau each year based on changes in irrigated eligible land from the prior year and subsequent decisions concerning transfers of Project water rights, using the methodology established in this section.

(6) If the MAD for a given year will not meet the water delivery requirements for the eligible land to be irrigated due to weather conditions, canal breaks, or some other unusual or unforeseen condition, the District must ask the Bureau for additional water.

(i) The District's request must include a written statement containing a detailed explanation of the reasons for the request.

(ii) The Bureau must promptly review the request and after consultation with the Federal Water Master and other interested parties, will determine if the request or any portion of it should be approved. The Bureau will make reasonable adjustments for unforeseen causes or events but will not make adjustments to accommodate waste or Project inefficiency or other uses of water not in accordance with this part or with State and Federal law.

(iii) The Bureau will then notify the District of its determination. If the District does not agree with the Bureau's decision, it may seek judicial review. The Bureau and the District will seek to expedite the court proceeding in order to minimize any potential adverse effects.

(b) *Maximum allowable efficiency debits (MED).* The debits in Lahontan Reservoir storage from the District's actual conveyance efficiency not achieving the target efficiency can accumulate over time. If these amounts of borrowed storage get too large they may not be offset later by increased efficiencies and may severely affect the District's water users by imposing an added ''drought'' on top of a real one. Therefore, the maximum efficiency debit cushion is set at 26,000 acre-feet. However, unlike the MAD, it only applies to the subsequent year's operation. The MED is approximately 9 percent of the headgate entitlements.

MONITORING DIVERSIONS

§ 418.14 Recordkeeping requirements.

(a) By the end of each month, the District must submit to the Bureau's Lahontan Area Office reports for the previous month which document monthly inflow and outflow in acre-feet from the Truckee and Carson divisions of the Project for that month. Reports must include any data the Bureau may reasonably require to monitor compliance with this part.

(b) Accounting for farm headgate deliveries must be based on the amount of water actually delivered to the water user. Project operations must provide for the amount of water ordered and the distribution system losses.

(c) The District must keep records of all domestic and other water uses showing the purpose and amount of water usage for each entity. The District must make the records available for review by the Bureau upon request. The Bureau may audit all records kept by the District.

§ 418.15 Operations monitoring.

(a) The Bureau will work with the District to monitor Project operations and will perform field inspections of water distribution during the irrigation season.

(1) Staff members of the Bureau's Lahontan Area Office and the District will meet as often as necessary during the irrigation season after each water distribution report has been prepared to examine the amounts of water used to that point in the season.

(2) On the basis of the information obtained from field observations, water use records, and consultations with District staff, the Bureau will determine at monthly intervals whether the rate of diversion is consistent with this part for that year.

(3) The District will be informed in writing of suggested adjustments that may be made in management of diversions and releases as necessary to achieve target efficiencies and stay within the MAD.

(b) Project operations will be monitored in part by measuring flows at key locations. Specifically, Project diversions (used in the calculations under § 418.18 below) will be determined by:

(1) Adding flows measured at:

(i) Truckee Canal near Wadsworth—U.S. Geological Survey (USGS) gauge number 10351300;

(ii) Carson River below Lahontan Dam—USGS gauge number 10312150;

(iii) Rock Dam Ditch near the end of the concrete lining; and

(2) Subtracting:

(i) Flows measured at the Truckee Canal near Hazen—USGS gauge number 10351400;

(ii) The Carson River at Tarzyn Road near Fallon (below Sagouspe Dam) for satisfying water rights outside of the Project boundaries as described in § 418.25, USGS gauge number 10312275;

(iii) Estimated losses in the Truckee Canal; and

(iv) Spills, precautionary drawdown, and incentive water released at Lahontan Dam under §§ 418.24 and 418.36.

OPERATIONS AND MANAGEMENT

§ 418.16 Using water for power generation.

All use of Project water for power generation must be incidental to releases charged against Project diversions, precautionary drawdown, incentive water (§ 418.35), or spills.

§ 418.17 Truckee and Carson River water use.

Project water must be managed to make maximum use of Carson River water and to minimize diversions of Truckee River water through the Truckee Canal. This will make available as much Truckee River water as possible for use in the lower Truckee River and Pyramid Lake.

§ 418.18 Diversions at Derby Dam.

(a) Diversions of Truckee River water at Derby Dam must be managed to maintain minimum terminal flow to Lahontan Reservoir or the Carson River except where this part specifically permits diversions.

(b) Diversions to the Truckee Canal must be managed to achieve an average terminal flow of 20 cfs or less during times when diversions to Lahontan Reservoir are not allowed (the flows must be averaged over the total time diversions are not allowed in that calendar year; i.e., if flows are not allowed in July and August and then are allowed in September then not allowed in October and November, the average flow will be averaged over the four months of July, August, October, and November).

(c) The Bureau will work cooperatively with the District on monitoring the flows at the USGS gage on the Truckee Canal near Hazen to determine if and when flows are in excess of those needed in accord with this part and bringing the flows back into compliance when excessive.

(d) Increases in canal diversions which would reduce Truckee River flows below Derby Dam by more than 20 percent in a 24-hour period will not be allowed when Truckee River flow, as measured by the gauge below Derby Dam, is less than or equal to 100 cfs.

(e) Diversions to the Truckee Canal will be coordinated with releases from Stampede Reservoir and other reservoirs, in cooperation with the Federal Water Master, to minimize fluctuations in the Truckee River below Derby Dam in order to meet annual flow regimes established by the United States Fish and Wildlife Service for listed species in the lower Truckee River.

§ 418.19 Diversions from the Truckee River to the Truckee Division.

Sufficient water, if available, will be diverted from the Truckee River through the Truckee Canal to meet the direct irrigation, domestic and other entitlements of the Truckee Division.

§ 418.20 Diversions from the Truckee River to Lahontan Reservoir, January through June.

(a) Truckee River diversions through the Truckee Canal will be made to meet Lahontan Reservoir end-of-month storage objectives for the months of January through June. The current month storage objective will be based, in part, on the monthly Natural Resources Conservation Service (NRCS) April through July runoff forecast for the Carson River near Fort Churchill. The forecast will be used to determine the target storage for Lahontan Reservoir and anticipated diversion requirements for the Carson Division. The Bureau, in consultation with the District, Federal Water Master, Fish and Wildlife Service, the Pyramid Lake

Paiute Tribe, and other affected parties, will determine the exceedance levels and predicted Carson River inflows based on the reliability of the NRCS forecast and other available information such as river forecasts from other sources. The end-of-month storage objectives may be adjusted any time during the month as new forecasts or other information become available.

(b) The January through June storage objective will be calculated using the following formula:

LSOCM=TSM/J – (C1* AJ)+L+(C2* CDT)

Where:

(1) LSOCM=current end-of-month storage objectives for Lahontan Reservoir.
(2) TSM/J=current end-of-month May/June Lahontan Reservoir target storage.
(3) C1* AJ=forecasted Carson River inflow for the period from the end of the current month through May or June, with AJ being the Bureau's April through July runoff forecast for the Carson River at Fort Churchill and C1 being an adjustment coefficient.
(4) L=an average Lahontan Reservoir seepage and evaporation loss from the end of the current month through May or June.
(5) C2* CDT=projected Carson Division demand from the end of the current month through May or June, with CDT being the total Carson Division diversion requirement (based on eligible acres anticipated to be irrigated times the appropriate duty times a 95 percent usage rate), and C2 being the estimate of the portion of the total diversion requirement to be delivered during this period.
(6) Values for TSM/J will vary with the Carson Division water demand as shown in § 418.22 and the Adjustments to Lahontan Reservoir Storage Targets table. Values C1, L and C2 are defined in the following table along with an example of TSM/J for Carson River water demand of 271,000 acre-feet.

MONTHLY VALUES FOR LAHONTAN STORAGE COMPUTATIONS

	January	February	March	April	May	June
TSM/J	174.0	174.0	174.0	174.0	174.0	190.0
C1/MAY	0.863	0.734	0.591	0.394		
C1/JUNE	1.190	1.061	0.918	0.721	0.327	
L/MAY	13.9	12.5	9.9	7.1		
L/JUNE	18.2	16.8	14.2	11.4	4.3	
C2/MAY	0.30	0.30	0.28	0.18		
C2/JUNE	0.47	0.47	0.45	0.35	0.17	

(c) The Lahontan Reservoir storage objective for each month is contained in the following table.

LAHONTAN RESERVOIR STORAGE OBJECTIVES

Period	Monthly storage objective
January through April	Lowest of the May calculation, the June calculation, or full reservoir.
May	Lower of the June calculation or full reservoir.
June	June storage target.

(d) Once the monthly Lahontan Reservoir storage objective has been determined, the monthly diversion to the Project from the Truckee River will be based upon water availability and Project demand as expressed in the following relationship:

TRD=TDD+ TCL+CDD+LRL+ LSOCM – ALRS – CRI

Where:

(1) TRD=current month Truckee River diversion in acre-feet to the Project.
(2) TDD=current month Truckee Division demand.
(3) TCL = current month Truckee Canal conveyance loss.
(4) CDD = current month Carson Division demand.
(5) LRL = current month Lahontan Reservoir seepage and evaporation losses.
(6) LSOCM = current month end-of-month storage objective for Lahontan Reservoir.
(7) ALRS = current month beginning-of-month storage in Lahontan Reservoir. (Includes accumulated Stampede credit described below and further adjusted for the net efficiency penalty or efficiency credit described in §§ 418.12, 418.36, and 418.37).
(8) CRI = current month anticipated Carson River inflow to Lahontan Reservoir (as determined by Reclamation in consultation with other interested parties).

(e) The following procedure is intended to ensure that monthly storage objectives are not exceeded. It may be implemented only if the following conditions are met:

(1) Diversions from the Truckee River are required to achieve the current month Lahontan Reservoir storage objective (LSOCM);

(2) Truckee River runoff above Derby Dam is available for diversion to Lahontan Reservoir;

(3) Sufficient Stampede Reservoir storage capacity is available.

(f) The Bureau, in consultation with the Federal Water Master, the District, Fish and Wildlife Service, the Bureau of Indian Affairs, and the Pyramid Lake Paiute Tribe will determine whether the calculated current month Truckee River diversion to Lahontan Reservoir (TRD-TDD-TCL) may be reduced during that month and the amount of reduction credit stored in Stampede Reservoir.

(1) Reductions in diversions may begin in November and continue until the end of June.

(2) Reductions in diversions to Lahontan Reservoir with credit storage in Stampede Reservoir may be implemented to the extent that:

(i) The reduction is in lieu of a scheduled release from Stampede Reservoir for the purpose of supplementing flows to Pyramid Lake; and/or

(ii) Water is captured in Stampede Reservoir that is scheduled to be passed through and diverted to the Truckee Canal.

(3) The Fish and Wildlife Service must approve any proposal to reduce diversions to Lahontan Reservoir for Newlands Project credit purposes without a comparable reduction in release from Stampede Reservoir or any conversion of Stampede Reservoir project water to Newlands Project credit water.

(4) The diversion to Lahontan Reservoir may be adjusted any time during the month as revised runoff forecasts become available. The accumulated credit will be added to current Lahontan Reservoir storage (ALRS) in calculating TRD. If the sum of accumulated credit and Lahontan Reservoir storage exceeds 295,000 acre-feet, credit will be reduced by the amount in excess of 295,000 acre-feet. Credit will also be reduced by the amount of precautionary drawdown or spills in that month. If the end-of-month storage in Lahontan Reservoir plus the accumulated credit in Stampede Reservoir at the end of June exceeds the end-of-month storage objective for Lahontan, the credit will be reduced by the amount exceeding the end-of-month storage objective.

(5) Following consultation with the District, the Federal Water Master, and other interested parties as appropriate, the Bureau will release credit water as needed for Project purposes from July 1 through the end of the irrigation season in which the credit accrues with timing priority given to meeting current year Project irrigation demands.

(6) Conveyance of credit water in the Truckee Canal must be in addition to regularly scheduled diversions for the Project and will be measured at the USGS gauge number 10351300 near Wadsworth.

(7) Newlands credit water in Stampede Reservoir storage will be subject to spill and will not carry over to subsequent years. Newlands credit water in Stampede can be exchanged to other reservoirs and retain its priority. The credit must be reduced to the extent that Lahontan Reservoir storage plus accumulated credit at the end of the previous month exceeds the storage objectives for that month. If Newlands credit water is spilled, it may be diverted to Lahontan Reservoir subject to applicable storage targets.

(i) The Bureau, in consultation with the District, the Federal Water Master, and other interested parties, may release Newlands Project credit water before July 1.

(ii) If any Newlands credit water remains in Stampede Reservoir storage after the end of the current irrigation season in which it accumulated, it will convert to water for cui-ui recovery and will no longer be available for Newlands credit water.

(iii) Newlands credit water stored in Stampede Reservoir will be available for use only on the Carson Division of the Newlands Project.

(g) Subject to the provisions of § 418.20 (b), LSOCM may be adjusted as frequently as necessary when new information indicates the need and diversions from the Truckee River to the Truckee Canal must be adjusted daily

or otherwise as frequently as necessary to meet the monthly storage objective.

§ 418.21 Diversion of Truckee River water to Lahontan Reservoir, July through December.

Truckee River diversions through the Truckee Canal to Lahontan Reservoir from July through December must be made only in accordance with the Adjustments to Lahontan Reservoir Storage Targets table and § 418.22. Diversions shall be started to achieve the end-of-month storage targets listed in the table in § 418.22 and will be discontinued when storage is forecast to meet or exceed the end-of-month storage targets at the end of the month. Diversions may be adjusted any time during the month as conditions warrant (i.e., new forecasts, information from other forecasts becoming available, or any other new information that may impact stream forecasts).

§ 418.22 Future adjustments to Lahontan Reservoir storage targets.

(a) The Lahontan Reservoir storage targets must be adjusted to accommodate changes in water demand in the Carson Division. Using the information reported by the District by March 1 of each year on eligible land expected to be irrigated and end-of-year data on eligible land actually irrigated (§ 418.9(b)), the Bureau will determine if the Lahontan Reservoir storage targets need to be changed. If no change is needed, the storage targets currently in effect will remain in effect.

(1) Only the actual water demand reported for full water years (100 percent water supply) will be considered. Targets will not be changed based on water demand reported for less than full water years.

(2) All changes in storage targets must start on October 1 of any year. If information provided by March 1 and other available information indicates that the Lahontan Reservoir storage targets must be changed, the new set of storage targets must be applied starting October 1 of the same year and remain in effect until changed according to this section.

(b) All changes to storage targets will be made according to the table in this section. The table of storage targets has been developed to provide a consistent Project water supply over a range of demands.

(1) A storage target adjustment must be made in increments of thousands of acre-feet for the change as indicated in the column listing Carson Division Demand and the complete set of monthly targets must be applied.

(2) If the change in reported water demand is above or below the values in the table of storage targets, the adjustment to the storage targets can be calculated. The calculated adjustment is the number that would appear in the column Target Adjustment in the table. The calculated Target Adjustment is then added or subtracted to the base storage target for each month. Target Adjustments must be made in whole increments of 1,000 acre-feet and calculated values will be rounded to the nearest 1,000 acre-feet.

(i) For demands greater than those set forth on the table, the formula for the Target Adjustment is: Target Adjustment = 0.00208 (Demand in acre-feet—271,000 acre-feet). For example, if water demand increased to 292,635 acre-feet per year, the Target Adjustment calculation would be = $0.00208 \times (292{,}535 - 271{,}000)$. The result would be a Target Adjustment of 45 or 45,000 acre-feet. This would be added to the base monthly storage target values so, the January-May target would be 219,000 acre-feet, June would be 235,000 acre-feet, and so on.

(ii) For demands less than those set forth on the table, the formula for the Target Adjustment is: Target Adjustment = 0.00174 (Demand in acre-feet—271,000 acre-feet). For example, if water demand decreased to 248,011 acre-feet per year, the Target Adjustment calculation would be = $0.00174 \times (248{,}011 - 271{,}000)$. The result would be a Target Adjustment of −40 or −40,000 acre-feet. This would be subtracted from the base monthly storage target values so, the January-May target would be 134,000 acre-feet, June would be 150,000 acre-feet, and so on.

ADJUSTMENTS TO LAHONTAN RESERVOIR STORAGE TARGETS

Increase in Storage Targets for Carson Division Diversion Demand Greater than 271,000 acre-feet									
Target Adjust-ment	Carson Division Demand	Jan-May	June	July	Aug	Sep	Oct	Nov	Dec
0	271.0	174	190	160	100	64	52	74	101
1	271.5	175	191	161	101	65	53	75	102
2	272.0	176	192	162	102	66	54	76	103
3	272.4	177	193	163	103	67	55	77	104
4	272.9	178	194	164	104	68	56	78	105
5	273.4	179	195	165	105	69	57	79	106
6	273.9	180	196	166	106	70	58	80	107
7	274.4	181	197	167	107	71	59	81	108
8	274.8	182	198	168	108	72	60	82	109
9	275.3	183	199	169	109	73	61	83	110
10	275.8	184	200	170	110	74	62	84	111
11	276.3	185	201	171	111	75	63	85	112
12	276.8	186	202	172	112	76	64	86	113
13	277.3	187	203	173	113	77	65	87	114
14	277.7	188	204	174	114	78	66	88	115
15	278.2	189	205	175	115	79	67	89	116
16	278.7	190	206	176	116	80	68	90	117
17	279.2	191	207	177	117	81	69	91	118
18	279.7	192	208	178	118	82	70	92	119
19	280.1	193	209	179	119	83	71	93	120
20	280.6	194	210	180	120	84	72	94	121
21	281.1	195	211	181	121	85	73	95	122
22	281.6	196	212	182	122	86	74	96	123
23	282.1	197	213	183	123	87	75	97	124
24	282.5	198	214	184	124	88	76	98	125
25	283.0	199	215	185	125	89	77	99	126
26	283.5	200	216	186	126	90	78	100	127
27	284.0	201	217	187	127	91	79	101	128
28	284.5	202	218	188	128	92	80	102	129
29	284.9	203	219	189	129	93	81	103	130
30	285.4	204	220	190	130	94	82	104	131
31	285.9	205	221	191	131	95	83	105	132
32	286.4	206	222	192	132	96	84	106	133
33	286.9	207	223	193	133	97	85	107	134
34	287.3	208	224	194	134	98	86	108	135
35	287.8	209	225	195	135	99	87	109	136
36	288.3	210	226	196	136	100	88	110	137
37	288.8	211	227	197	137	101	89	111	138
38	289.3	212	228	198	138	102	90	112	139
39	289.8	213	229	199	139	103	91	113	140
40	290.2	214	230	200	140	104	92	114	141

Decrease in Storage Targets for Carson Division Diversion Demand Less than 271,000 acre-feet									
Target Adjust-ment	Carson Division Demand	Jan-May	June	July	Aug	Sep	Oct	Nov	Dec
0	271.0	174	190	160	100	64	52	74	101
-1	270.4	173	189	159	99	63	51	73	100
-2	269.9	172	188	158	98	62	50	72	99
-3	269.3	171	187	157	97	61	49	71	98
-4	268.7	170	186	156	96	60	48	70	97
-5	268.1	169	185	155	95	59	47	69	96
-6	267.6	168	184	154	94	58	46	68	95
-7	267.0	167	183	153	93	57	45	67	94
-8	266.4	166	182	152	92	56	44	66	93
-9	265.8	165	181	151	91	55	43	65	92
-10	265.3	164	180	150	90	54	42	64	91
-11	264.7	163	179	149	89	53	41	63	90
-12	264.1	162	178	148	88	52	40	62	89
-13	263.5	161	177	147	87	51	39	61	88
-14	263.0	160	176	146	86	50	38	60	87
-15	262.4	159	175	145	85	49	37	59	86
-16	261.8	158	174	144	84	48	36	58	85
-17	261.2	157	173	143	83	47	35	57	84
-18	260.7	156	172	142	82	46	34	56	83
-19	260.1	155	171	141	81	45	33	55	82
-20	259.5	154	170	140	80	44	32	54	81
-21	258.9	153	169	139	79	43	31	53	80
-22	258.4	152	168	138	78	42	30	52	79
-23	257.8	151	167	137	77	41	29	51	78
-24	257.2	150	166	136	76	40	28	50	77
-25	256.6	149	165	135	75	39	27	49	76
-26	256.1	148	164	134	74	38	26	48	75
-27	255.5	147	163	133	73	37	25	47	74
-28	254.9	146	162	132	72	36	24	46	73
-29	254.3	145	161	131	71	35	23	45	72
-30	253.8	144	160	130	70	34	22	44	71
-31	253.2	143	159	129	69	33	21	43	70
-32	252.6	142	158	128	68	32	20	42	69
-33	252.0	141	157	127	67	31	19	41	68
-34	251.5	140	156	126	66	30	18	40	67
-35	250.9	139	155	125	65	29	17	39	66
-36	250.3	138	154	124	64	28	16	38	65
-37	249.7	137	153	123	63	27	15	37	64

§ 418.23 Diversion of Rock Dam Ditch water.

Project water may be diverted directly to Rock Dam Ditch from the Truckee Canal only when diversions cannot be made from the outlet works of Lahontan Reservoir. Such diversions will require the prior written approval of the Bureau and be used in calculating Project diversions.

§ 418.24 Precautionary drawdown and spills from Lahontan Reservoir.

(a) Even though flood control is not a specifically authorized purpose of the Project, at the request of the District

and in consultation with other interested parties and the approval of the Bureau, precautionary drawdown of Lahontan Reservoir may be made to limit potential flood damage along the Carson River. The Bureau will develop criteria for precautionary drawdown in consultation with the District and other interested parties.

(1) The drawdown must be scheduled sufficiently in advance and at such a rate of flow in order to divert as much water as possible into the Project irrigation system for delivery to eligible land or storage in reregulating reservoirs for later use on eligible land.

(2) During periods of precautionary drawdown, or when water is spilled from Lahontan Reservoir, Project diversions will be determined by comparison with other years' data and normalized by comparison of differences in climatological data. The Bureau will estimate the normalization in consultation with the District and other interested parties.

(3) Spills from Lahontan Reservoir and precautionary drawdown of the reservoir to create space for storing flood waters from the Carson River Basin that are in excess of the normalized diversions will not be used in calculating Project diversions.

(4) Water captured in Project facilities as a result of a precautionary drawdown or spill will not be counted as storage in Lahontan Reservoir for the purpose of calculating Truckee River Diversions. Such water will not be counted as diversions to the Project unless such water is beneficially applied as described in (a)(5) of this section.

(5) Water from precautionary drawdowns or spills that is captured in Project facilities must be used to the maximum extent possible, and counted as deliveries to eligible lands in the year of the drawdown. If all the drawdown water captured in Project facilities cannot be used in the year of capture for delivery to eligible lands, then that water must be delivered to eligible lands in subsequent years to the maximum extent possible and counted against the water users' annual allocation.

(b) If a precautionary drawdown in one month results in a failure to meet the Lahontan Reservoir storage objective for that month, the storage objective in subsequent months will be reduced by one-half of the difference between that month's storage objective and actual end-of-month storage. The Bureau is not liable for any damage or water shortage resulting from a precautionary drawdown.

§ 418.25 Water use for other than Newlands Project purposes.

The District will release sufficient water to meet the vested water rights below Sagouspe Dam as specified in the *Alpine* decree. These water rights are usually met by return flows. Releases for these water rights will in no case exceed the portion of 1,300 acre-feet per year not supplied by return flows. This water must be accounted for at the USGS gauge number 10312275 (the Carson River at Tarzyn Road near Fallon). Releases for this purpose will not be considered in determining Project diversions since the lands to which the water is being delivered are not part of the Project. (See § 418.15(b)(2)(ii).) Any flow past this gage in excess of the amount specified in this part will be absorbed by the District as an efficiency loss.

§ 418.26 Charges for water use.

The District must maintain a financing and accounting system which produces revenue sufficient to repay its operation and maintenance costs and to discharge any debt to the United States. The District should give consideration to adopting a system which provides reasonable financial incentives for the economical and efficient use of water.

§ 418.27 Distribution system operation.

(a) The District must permit only its authorized employees or agents to open and close individual turnouts and operate the distribution system facilities. After obtaining Bureau approval, the District may appoint agents to operate individual headgates on a specific lateral if it can be shown that the water introduced to the lateral by a District employee is completely scheduled and can be fully accounted for with a reasonable allowance for seepage and evaporation losses.

(b) If agents need to adjust the scheduled delivery of water to the lateral to accommodate variable field conditions, weather, etc., they must immediately notify the District so proper adjustments can be made in the distribution system. Each agent must keep an accurate record of start and stop times for each delivery and the flow during delivery. This record will be given to the District for proper accounting of water delivered.

(c) The program of using agents to operate individual headgates will be reviewed on a regular basis by the District and the Bureau. If it is found that problems such as higher than normal losses, water not accounted for, etc., have developed on an individual lateral, the program will be suspended and the system operated by District employees until the problems are resolved.

ENFORCEMENT

§ 418.28 Conditions of delivery.

There are four basic elements for enforcement with all necessary quantities and review determined in accordance with the relevant sections of this part.

(a) *Valid headgate deliveries*. If water is delivered to ineligible land or in excess of the appropriate water duty then:

(1) The District will stop the illegal delivery immediately;

(2) The District will notify the Bureau of the particulars including the known or estimated location and amounts;

(3) The amount will not be included as a valid headgate delivery for purposes of computing the Project efficiency and resultant incentive credit or debit to Lahontan storage; and

(4) If the amount applies to a prior year, then the amount will be treated directly as a debit to Lahontan storage in the same manner as an efficiency debit.

(b) *District efficiency*. To the extent that the actual District efficiency determined for an irrigation season is greater or less than the established target efficiency, as determined for the corresponding actual valid headgate deliveries, then the difference in efficiency, expressed as a quantity in acre-feet, may be added to or subtracted from the actual Lahontan Reservoir storage level before it is compared to the monthly storage objective as follows:

(1) Greater efficiency—Credited to the District as storage in Lahontan or subtracted from any accumulated debit, or two-thirds as storage in Lahontan for their discretionary use in accordance with state law.

(2) Less efficient—Debited or added to Lahontan storage as an adjustment to the actual storage level.

(c) *Maximum Allowable Diversion (MAD)*. The MAD must be computed each year to determine the amount of water required to enable the delivery of full entitlements at established Project efficiencies. Project diversions must not exceed the MAD. Within the operating year, the Bureau will notify the District in writing of any expected imminent violations of the MAD. The District will take prompt action to avoid such violations. The Bureau will exercise reasonable latitude from month to month to accommodate the District's efforts to avoid exceeding the MAD.

(d) *Maximum Efficiency Debit (MED)*. If the MED exceeds 26,000 AF at the end of any given year, the District must prepare and submit to the Bureau for review and approval, a plan detailing the actions the District will take to either earn adequate incentive credits or to restrict deliveries to reduce the MED to less than 26,000 AF by the end of the next year. The plan must be submitted to the Bureau in writing before the date of March 1 immediately subsequent to the exceeding of the MED. If the District fails to submit an approvable plan, Project allocations will be reduced by an amount equal to the MED in excess of 26,000 plus 13,000 (one-half the allowable MED). Nominally this will mean a forced reduction of approximately five percent of entitlements. The Bureau will notify the District in writing of the specific allocation and method of derivation in sufficient time for the District to implement the allocation. Liabilities arising from shortages occasioned by operation of this provision must be the responsibility of the District or individual water users.

§ 418.29 Project management.

In addition to the provisions of § 418.28, if the District is found to be operating Project facilities or any part thereof in substantial violation of this part, then, upon the determination by the Bureau, the Bureau may take over from the District the care, operation, maintenance, and management of the diversion and outlet works (Derby Dam and Lahontan Dam/Reservoir) or any or all of the transferred works by giving written notice to the District of the determination and its effective date. Following written notification from the Bureau, the care, operation, and maintenance of the works may be retransferred to the District.

§ 418.30 Provisions required in future contracts.

The Bureau must provide in new, amended, or replacement contracts for the operation and maintenance of Project works, for the reservation by the Secretary of rights and options to enforce this part.

WATER MANAGEMENT AND CONSERVATION

§ 418.31 Conservation measures.

(a) Specific conservation actions will be needed for the District and its members to achieve a reasonable efficiency of operation as required by this part. The District is best able to determine the particular conservation measures that meet the needs of its water users. This ensures that the measures reflect the priorities and collective judgment of the water users; and will be practical, understandable and supported. The District also has the discretion to make changes in the measures they adopt as conditions or results dictate.

(b) The District will keep the Bureau informed of the measures they expect to utilize during each year. This will enable the Bureau to stay apprised of any helpful information that may, in turn, help the Bureau assist other irrigation districts. The Bureau will work cooperatively in support of the District's selection of measures and methods of implementation.

§ 418.32 Cooperative programs.

(a) The Bureau and the District will work cooperatively to develop a water management and conservation program to promote efficient management of water in the Project. The program will emphasize developing methods, including computerization and automation, to improve the District's operations and procedures for greater water delivery conservation.

(b) The Bureau will provide technical assistance to the District and cooperatively assist the District in their obligations and efforts to:

(1) Document and evaluate existing water delivery and measurement practices:

(2) Implement improvements to these practices; and

(3) Evaluate and, where practical, implement physical changes to Project facilities.

IMPLEMENTATION

§ 418.33 Purpose of the implementation strategy.

The intent of the implementation strategy for this part is to ensure that the District delivers water within entitlements at a reasonable level of efficiency as a long term average.

(a) The incentives and disincentives provided in this part are designed to encourage local officials with responsibilities for Project operations to select and implement through their discretionary actions, operating strategies which achieve the principles of this part.

(b) The specified efficiencies in the Expected Project Distribution System Efficiency table (§ 418.13 (a)(4)) were developed considering implementation of reasonable conservation measures, historic project operations, economics, and environmental effects.

(c) The efficiency target will be used as a performance standard to establish at the end of each year on the basis of actual operations, whether the District is entitled to a performance bonus in the form of incentive water or a reduction in storage for the amount borrowed ahead.

§ 418.34 Valid headgate deliveries.

Project water may be delivered to headgates only as provided in §§ 418.8 and 418.10. Water delivered to lands that are not entitled to be irrigated or not in accord with decreed water duties is difficult to quantify at best because it is not typically measured. Since it is not likely to be a part of the total actual headgate deliveries, yet is a part of the total deliveries to the Project, it will manifest itself directly as a lower efficiency. Thus, it will either reduce the District's incentive credit or increase the storage debit by the amount improperly diverted. All other users outside the Project are thereby held harmless but the District incurs the consequence. This approach should eliminate any potential disputes between the District and the Bureau regarding the quantity of water misappropriated.

§ 418.35 Efficiencies.

The established target efficiencies under this part are shown in the Expected Project Distribution System Efficiency table (§ 418.13 (a)(4)). The efficiency of the Project will vary with the amount of entitlement water actually delivered at the headgates. Since most of the distribution system losses such as evaporation and seepage do not change significantly with the amount of water delivered (i.e., these losses are principally a function of water surface area and the wetted perimeter of the canals), the Project efficiency requirement is higher as the percent of entitlement water actually delivered at the headgates increases. The actual efficiency is calculated each year after the close of the irrigation season based on actual measured amounts. The application of any adjustments to Lahontan Reservoir storage or Truckee River diversions resulting from the efficiency is always prospective.

§ 418.36 Incentives for additional long term conservation.

(a) As an incentive for the District to increase the efficiency of the delivery system beyond the expected efficiency of 65.7 percent (66.9 percent with full delivery) as shown in the Newlands Project Water Budget table, 1995 Example, the District will be allowed to store and use the Carson River portion of the saved water at its discretion, in accordance with Nevada State Law and this part.

(1) If the District is able to exceed its expected efficiency, the District may store in Lahontan Reservoir two-thirds (2/3) of the additional water saved. (The remaining one-third (1/3) of the water saved will remain in the Truckee River through reduced diversions to Lahontan Reservoir). This water will be considered incentive water saved from the Carson River and will not be counted as storage in determining diversions from the Truckee River or computing the target storage levels for Lahontan Reservoir under this part.

(2) For purposes of this part, incentive water is no longer considered Project water. The District may use the water for any purpose (e.g., wetlands, storage for recreation, power generation, shortage reduction) that is consistent with Nevada State Law and Federal Law. The water will be managed under the District's discretion and may be stored in Lahontan Reservoir until needed subject to the limitations in (a)(3) of this section.

(3) The amount of incentive water stored in Lahontan Reservoir will be reduced under the following conditions:

(i) There is a deficit created and remaining in Lahontan Reservoir from operations penalties in a prior year;

(ii) The District releases the water from the reservoir for its designated use;

(iii) During a spill of the reservoir, the amount of incentive water must be reduced by the amount of spill; and

(iv) At the discretion of the District, incentive water may be used to offset the precautionary drawdown adjustment to the Lahontan storage objective.

(v) At the end of each year, the amount of incentive water will be reduced by the incremental amount of evaporation which occurs as a result of the increased surface area of the reservoir due to the additional storage. The evaporation rate used will be either the net evaporation measured or the net historical average after precipitation is taken into account. The method of calculation will be agreed to

by the District and the Bureau in advance of any storage credit.

(b) An example of this concept is:

Example: Incentive Operation—(1) At the end of the 1996 irrigation season, the Bureau and the District audit the District's water records for 1996. The District's water delivery records show that 194,703 acre-feet of water were delivered to farm headgates. On the basis of their irrigated acreage that year (59,075) the farm headgate entitlement would have been 216,337 acre-feet. On the basis of 90 percent deliveries for 59,075 acres (194,203 divided by 216,337 = 0.90) the established Project efficiency requirement was 65.1 percent.

(2) On the basis of the established Project efficiency (66.1 percent), the Project diversion required to make the headgate deliveries would be expected to be 291,909 acre-feet (194,703 divided by 0.651 = 291,909). An examination of Project records reveals that the District only diverted 286,328 acre-feet which demonstrated actual Project efficiency was 68 percent and exceeded requirements of this part.

(3) The 5,581 acre-feet of savings (291,909–286,328 = 5,581) constitutes the savings achieved through efficiency improvements and the District would then be credited two-thirds (3,721 acre-feet=5,581×2/3) of this water (deemed to be Carson River water savings) as incentive water.

(4) This incentive water may be stored in Lahontan Reservoir or otherwise used by the District in its discretion consistent with State and Federal Law (e.g., power generation, recreation storage, wildlife, drought protection, etc.).

§ 418.37 Disincentives for lower efficiency.

(a) If the District fails to meet the efficiencies established by this part, then, in effect, the District has borrowed from a subsequent year. The amount borrowed will be accounted for in the form of a deficit in Lahontan Reservoir storage. This deficit amount will be added to the actual Lahontan Reservoir storage quantity for the purpose of determining the Truckee River diversions to meet storage objectives as well as all other operating decisions.

(b) The amount of the deficit will be cumulative from year to year but will not be allowed to exceed 26,000 acre-feet (the expected variance between the MAD and actual water use). This limit is expected to avoid increasing the severity of drought and yet still allow for variations in efficiency over time due to weather and other factors. This approach should allow the District to plan its operation to correct for any deficiencies.

(c) The deficit can be reduced by crediting incentive water earned by the District or reducing the percentage of headgate entitlement delivered either through a natural drought or by the District and its water users administratively limiting deliveries while maintaining an efficiency greater than or equal to the target efficiency.

(d) If there is a natural drought and the shortage to the headgates is equal to or greater than the deficit, then the deficit is reduced to zero. If the shortage to headgates is less than the deficit then the deficit is reduced by an amount equal to the headgate shortage. During a natural drought, if the percentage of maximum headgate entitlement delivered is 75 percent or more then the District will be subject to the target efficiencies and resultant deficits or credits.

(e) If the District has a deficit in Lahontan Reservoir and earns incentive water, the incentive water must be used to eliminate the deficit before it can be used for any other purpose. The deficit must be credited on a 1 to 1 basis (i.e., actual efficiency savings rather than ⅓–⅔ for incentive water).

(f) An example of the penalty concept is:

Example: Penalty—In 1996 the District delivers 90 percent of the maximum headgate entitlement or 194,703 acre-feet 216,337×.90) but actually diverts 308,000 acre-feet. The efficiency of the Project is 63.2 percent (194,703 divided by 308,000). Since the established efficiency of 65.1 percent would have required a diversion of only 299,083 acre-feet (194,703 divided by .651) the District has operated the system with 8,917 acre-feet of excess losses. Therefore, 8,917 acre-feet was borrowed and must be added to the actual storage quantities of Lahontan Reservoir for calculating target storage levels and Truckee River diversions.

§ 418.38 Maximum allowable diversion.

(a) The MAD established in this part is based on the premise that the Project should be operated to ensure that it is capable of delivering to the headgate of each water right holder the full water entitlement for irrigable eligible acres and includes distribution

system losses. The MAD will be established (and is likely to vary) each year. The annual MAD will be calculated each year based on the actual acreage to be irrigated that year.

(b) Historically, actual deliveries at farm headgates have been approximately 90 percent of entitlements. This practice is expected to continue but the percentage is expected to change. This variance between headgate deliveries and headgate entitlements will be calculated annually under this part and is allowed to be diverted if needed and thereby provides an assurance that full headgate deliveries can be made. The expected diversion and associated efficiency target for the examples shown in the Newlands Project Water Budget table would be: 285,243 AF and 65.1 percent in 1996 and beyond. These are well below the MAD limits; however, the District may divert up to the MAD if it is needed to meet valid headgate entitlements.

Calculation of Efficiency Equation Slope and Y-Intercept for Adjusted OCAP

	1988 OCAP		With Adjusted OCAP										
	Projected for 1992	Without added ac.											
Irrigated Acreage	64,850	61,630	64,850	64,500	64,000	63,500	63,000	62,500	62,000	61,500	61,000	60,500	60,000
Max. Headgate Entitlement	237,485	226,555	226,586	225,363	223,616	221,869	220,122	218,375	216,628	214,881	213,134	211,387	209,640
Distribution System Losses													
Evaporation													
Canals/Laterals	6,200	6,000	6,200	6,178	6,147	6,116	6,085	6,054	6,023	5,992	5,961	5,930	5,899
Reg. Reservoirs	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500
Seepage													
Canals/Laterals	51,000	48,500	51,000	50,728	50,340	49,952	49,564	49,175	48,787	48,399	48,011	47,623	47,234
Reg. Reservoirs	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000
Operational Losses	40,800	39,400	40,800	40,648	40,430	40,213	39,996	39,778	39,561	39,343	39,126	38,909	38,691
Total System Losses	109,500	105,400	109,500	109,054	108,418	107,781	107,144	106,508	105,871	105,234	104,598	103,961	103,325
100% Use of Entitlement:													
Allowable Diversion	346,985	331,955	336,086	334,417	332,034	329,650	327,266	324,883	322,499	320,115	317,732	315,348	312,965
Conveyance Efficiency	68.44%	68.25%	67.42%	67.39%	67.35%	67.30%	67.26%	67.22%	67.17%	67.13%	67.08%	67.03%	66.99%
75% Use of Entitlement:													
Headgate Ent. Unused	59,371	56,639	56,646	56,341	55,904	55,467	55,031	54,594	54,157	53,720	53,284	52,847	52,410
Headgate Delivery	178,114	169,916	169,939	169,022	167,712	166,402	165,092	163,781	162,471	161,161	159,851	158,540	157,230
Diversion Reduction	68,717	65,554	65,563	65,209	64,704	64,198	63,693	63,187	62,682	62,176	61,671	61,165	60,660
Allowable Diversion	278,268	266,401	270,523	269,208	267,330	265,452	263,574	261,696	259,817	257,939	256,061	254,183	252,305
Conveyance Efficiency	64.01%	63.78%	62.82%	62.78%	62.74%	62.69%	62.64%	62.58%	62.53%	62.48%	62.43%	62.37%	62.32%
Slope	0.1774	0.1787	0.1840	0.1842	0.1845	0.1847	0.1850	0.1853	0.1856	0.1858	0.1861	0.1864	0.1867
Y-Intercept	50.70	50.38	49.02	48.97	48.90	48.83	48.76	48.69	48.62	48.54	48.47	48.39	48.31

Note: (1) The average water duty with Adjusted OCAP assumed to be 3.494 acre-feet/acre based on 1995 conditions.

(2) The conveyance efficiency of the unused entitlement (75% use) assumed to be 86.4% based on Figure 1 and Table 1 of 1988 OCAP.

Calculation of Efficiency Equation Slope and Y-Intercept for Adjusted OCAP

Adjusted OCAP (continued)

Calculation of Efficiency Equation Slope and Y-Intercept for Adjusted OCAP																
Adjusted OCAP (continued)																
Irrigated Acreage	59,500	59,000	58,500	58,000	57,500	57,000	56,500	56,000	55,500	55,000	54,500	54,000	53,500	53,000	52,500	52,000
Max. Headgate Ent.	207893	206146	204399	202652	200905	199158	197411	195664	193917	192170	190423	188676	186929	185182	183435	181688
Distribution Losses																
Evaporation																
Canal/Laterals	5868	5837	5806	5775	5743	5712	5681	5650	5619	5588	5557	5526	5495	5464	5433	5402
Reg. Reservoirs	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500	7500
Seepage																
Canal/Laterals	46846	46458	46070	45682	45293	44905	44517	44129	43741	43352	42964	42576	42188	41800	41411	41023
Reg. Reservoirs	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000	4000
Operational Losses	38474	38257	38039	37822	37604	37387	37170	36952	36735	36517	36300	36083	35865	35648	35430	35213
Total System Losses	102688	102051	101415	100778	100141	99505	98868	98231	97595	96958	96321	95685	95048	94411	93775	93138
100% Use of Ent.																
Allowable Diversion	310581	308197	305814	303430	301046	298663	296279	293895	291512	289128	286744	284361	281977	279593	277210	274826
Convey. Efficiency	66.94%	66.89%	66.84%	66.79%	66.74%	66.68%	66.63%	66.58%	66.52%	66.47%	66.41%	66.35%	66.29%	66.23%	66.17%	66.11%
75% Use of Ent.																
Entitlement Unused	51973	51537	51100	50663	50226	49790	49353	48916	48479	48043	47606	47169	46732	46296	45859	45422
Headgate Delivery	155920	154610	153299	151989	150679	149369	148058	146748	145438	144128	142817	141507	140197	138887	137576	136266
Diversion Reduction	60154	59649	59143	58638	58132	57627	57121	56616	56110	55605	55099	54594	54088	53583	53077	52572
Allowable Diversion	250427	248549	246670	244792	242914	241036	239158	237280	235401	233523	231645	229767	227889	226011	224133	222254
Convey. Efficiency	62.26%	62.20%	62.15%	62.09%	62.03%	61.97%	61.91%	61.85%	61.78%	61.72%	61.65%	61.59%	61.52%	61.45%	61.38%	61.31 %
Slope	0.1870	0.1873	0.1876	0.1879	0.1882	0.1886	0.1889	0.1892	0.1895	0.1899	0.1902	0.1906	0.1909	0.1913	0.1916	0.1920
Y-Intercept	48.24	48.16	48.08	47.99	47.91	47.83	47.74	47.66	47.57	47.48	47.39	47.30	47.20	47.11	47.01	46.91
Note: (1) The average water duty with Adjusted OCAP assumed to be 3.494 acre-feet/acre based on 1995 conditions.																
(2) The conveyance efficiency of the unused entitlement (75% use) assumed to be 86.4% based on Figure 1 and Table 1 of 1988 OCAP.																

PART 419—TRUCKEE RIVER OPERATING AGREEMENT

Sec.
419.1 What is the purpose of this part?
419.2 What are the definitions used in this part?
419.3 What general principles govern implementation of the TROA?
419.4 What specific provisions govern operations of the reservoirs?

AUTHORITY: Public Law 101–618 (104 Stat. 3289, 3294).

SOURCE: 73 FR 74038, Dec. 5, 2008, unless otherwise noted.

§419.1 What is the purpose of this part?

(a) This part satisfies the requirement of Section 205(a)(5) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Settlement Act) that the negotiated agreement for operation of Truckee River Reservoirs be promulgated as a Federal regulation. The Truckee River Operating Agreement (TROA), published in September 2008 by the Bureau of Reclamation, is the agreement negotiated pursuant to Section 205(a) of the Settlement Act and is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 522 (a) and 1 CFR part 51. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. Also, a copy of TROA may be obtained from or inspected at the Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701, 775–884–8356, where copies are on file, or at the following Web site: *http://www.usbr.gov/mp/troa/*.

(b) This part implements the Settlement Act by providing for operation of the Truckee River Reservoirs and other reservoirs in a manner that:

(1) Implements California's allocation of Truckee River basin water and the Nevada and California allocations of Lake Tahoe basin water;

(2) Enhances fish, wildlife, and recreational beneficial uses of water in the Truckee River basin;

(3) Carries out the terms, conditions, and contingencies of the Preliminary Settlement Agreement;

(4) Ensures that water is stored in, released from, and passed through Truckee River Reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch Decree and Truckee River General Electric Decree, except for rights voluntarily relinquished by any persons or transferred under State law;

(5) Provides for the enhancement of spawning flows available in the Lower Truckee River for Pyramid Lake Fishes in a manner consistent with the Secretary of the Interior's responsibilities under the Endangered Species Act, as amended;

(6) Satisfies all applicable dam safety and flood control requirements; and

(7) Minimizes the Secretary of the Interior's costs associated with operation and maintenance of Stampede Reservoir.

§419.2 What are the definitions used in this part?

Act means the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, title II, Public Law 101–618 (104 Stat. 3289, 3294).

Administrator means the individual appointed in accordance with Sections 2.A.2 through 2.A.3 of the Truckee River Operating Agreement (incorporated by reference at §419.1).

Preliminary Settlement Agreement means that Agreement between the Pyramid Lake Paiute Tribe and Sierra Pacific Power Company of May 23, 1989, as subsequently modified and ratified by the United States.

TROA means the Truckee River Operating Agreement.

Truckee River basin means the area which naturally drains into the Truckee River and its tributaries and into Pyramid Lake, including Pyramid Lake, but excluding the Lake Tahoe basin.

Truckee River Reservoirs means Boca Reservoir, Prosser Creek Reservoir, Martis Creek Reservoir, Stampede Reservoir, and the storage provided by the dam at the outlet of Lake Tahoe.

§ 419.3 What general principles govern implementation of the TROA?

The following are general operational principles which provide a framework for the Administrator in implementing the TROA (incorporated by reference at § 419.1). These general principles are intended to be consistent with the specific provisions of TROA, but if they conflict with those specific provisions, the specific TROA provisions control. Operations should meet all of the following criteria:

(a) Be conducted, consistent with the TROA and applicable legal requirements, so that the available water supply in the Truckee River basin satisfies, to the maximum extent possible, multiple beneficial purposes, including municipal and industrial, irrigation, fish, wildlife, water quality, and recreation purposes.

(b) Satisfy vested and perfected rights to use the water of the Truckee River and its tributaries, to the extent that water rights are scheduled to be exercised, and to the extent that water is lawfully available. This includes, but is not limited to, the exercise of water rights under the provisions of the Orr Ditch Decree, except as expressly provided in the Settlement Act and the TROA.

(c) Maintain minimum releases and, to the extent practicable consistent with existing water rights and the TROA, maintain enhanced minimum releases, preferred stream flows, and reservoir recreation levels as described in Article Nine of the TROA.

(d) Comply with applicable flood control requirements for Prosser Creek, Stampede, Boca, and Martis Creek Reservoirs.

(e) Comply with all applicable dam safety requirements.

(f) Use the integrated schedules developed by the Administrator through coordination with the scheduling parties.

(g) Respond to declared Federal, State, or local water-related emergencies presenting a clear and immediate danger to public health, life, property, or essential public services involving an upset or other unexpected occurrence to facilities and resources addressed in the TROA.

§ 419.4 What specific provisions govern operations of the reservoirs?

The specific provisions governing operations of the Truckee River Reservoirs and other reservoirs are contained in the TROA (incorporated by reference at § 419.1). The following table shows the location of the provisions in the TROA.

Provisions governing . . .	Are in the following sections of the TROA . . .
Recitals, Definitions	Recitals 1 through 9. Definitions (1) through (106).
Satisfaction of provisions of law, general operational principles, protection of water rights, imported water, remaining water of the Truckee River, and emergencies.	Sections 1.A through 1.F.
Administration	Sections 2.A through 2.C.
Accounting, reporting, forecasting, and monitoring	Sections 3.A through 3.E.
Incorporation of certain provisions of the preliminary settlement agreement	Sections 4.A through 4.G.
Operation of Floriston Rate and Project Water	Sections 5.A through 5.E.
Truckee River and Lake Tahoe Basin Allocation and Accounting	Sections 6.A through 6.E.
Credit Water Establishment, Storage, and Conversion	Sections 7.A through 7.H.
Priorities and Rules for Operations Following Impoundment or Accumulation of Water in Reservoirs.	Sections 8.A through 8.V.
Beneficial Uses of Water for Instream Flows and Recreation in California	Sections 9.A through 9.F.
Design of Water Wells in the Truckee River Basin in California	Sections 10.A through 10.H.
Scheduling	Sections 11.A through 11.H.
Effectiveness of the TROA	Sections 12.A and 12.B.
Relation of TROA to Settlement Act, Adjustments to Operations and Changes to Agreement.	Sections 13.A through 13.E.
Miscellaneous areas	Sections 14.A through 14.Q.

PART 420—OFF-ROAD VEHICLE USE

Sec.
420.1 Objectives.
420.2 General closure.
420.3 Adjacent lands.
420.4 Enforcement.
420.5 Definitions.

Subpart A—Operating Criteria

420.11 Requirements—vehicles.
420.12 Requirements—operators.

Subpart B—Designated Areas and Permitted Events

420.21 Procedure for designating areas for off-road vehicle use.
420.22 Criteria for off-road vehicle areas.
420.23 Public notice and information.
420.24 Permits for organized events.
420.25 Reclamation lands administered by other agencies.

AUTHORITY: 32 Stat. 388 (43 U.S.C. 391 *et seq.*) and acts amendatory thereof and supplementary thereto; EO 11644 (37 FR 2877).

SOURCE: 39 FR 26893, July 24, 1974, unless otherwise noted.

§ 420.1 Objectives.

The provisions of this part establish regulations for off-road vehicle use on reclamation lands to protect the land resources, to promote the safety of all users, to minimize conflicts among the various uses, and to ensure that any permitted use will not result in significant adverse environmental impact or cause irreversible damage to existing ecological balances.

§ 420.2 General closure.

Reclamation lands are closed to off-road vehicle use, except for an area or trail specifically opened to use of off-road vehicles in accordance with § 420.21.

§ 420.3 Adjacent lands.

When administratively feasible, the regulation of off-road vehicle use on Reclamation lands will be compatible with such use as permitted by recreation-managing agencies on adjacent lands (both public and private).

§ 420.4 Enforcement.

The provisions of this part will be enforced to the extent of Bureau authority, including entering into cooperative agreements with Federal, State, county, or local law enforcement officials.

§ 420.5 Definitions.

As used in this part, the term:

(a) *Off-road vehicle* means any motorized vehicle (including the standard automobile) designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or natural terrain. The term excludes: (1) Nonamphibious registered motorboats; (2) military, fire, emergency, or law enforcement vehicles when used for emergency purpose; (3) self-propelled lawnmowers, snowblowers, garden or lawn tractors, and golf carts while being used for their designed purpose; (4) agricultural, timbering, construction, exploratory, and development equipment and vehicles while being used exclusively as authorized by permit, lease, license, agreement, or contract with the Bureau; (5) any combat or combat support vehicle when used in times of national defense emergencies; and (6) ''official use'' vehicles.

(b) *Bureau* means the Bureau of Reclamation.

(c) *Reclamation lands* mean all lands under the custody and control of the Commissioner, Bureau of Reclamation.

(d) *Off-road vehicle area* means a portion or all of a specifically designated parcel of Reclamation lands opened to off-road vehicle use in accordance with the procedure in section 420.21.

(e) *Off-road vehicle trail* means a specifically delineated path or way varying in width which is designated to be used by and maintained for hikers, horsemen, snow travelers, bicyclists and for motorized vehicles.

(f) *Official use* means use of a vehicle by an employee, agent, or designated representative of the Federal Government who, with special permission from the Bureau of Reclamation, uses a vehicle for an officially authorized purpose.

(g) *Organized Event* means a structured, or consolidated, or scheduled meeting involving 15 or more vehicles for the purpose of recreational use of Reclamation lands involving the use of

off-road vehicles. The term does not include family groups participating in informal recreational activities.

[39 FR 26893, July 24, 1974, as amended at 44 FR 34909, June 15, 1979]

Subpart A—Operating Criteria

§ 420.11 Requirements—vehicles.

Each off-road vehicle that is operated on Reclamation lands shall meet the following requirements:

(a) It shall conform to applicable State laws and vehicle registration requirements.

(b) It shall be equipped with a proper muffler and spark arrestor in good working order and in constant operation. The spark arrestor must conform to Forest Service Spark Arrestor Standard 5100–1a, and there shall be no muffler cutout, bypass, or similar device.

(c) It shall have adequate brakes and, for operation from dusk to dawn, working headlights and taillights.

§ 420.12 Requirements—operators.

(a) In addition to the regulation of part 420, operators shall comply with any applicable State laws pertaining to off-road vehicles; if State laws are lacking or less stringent than the regulations established in this part, then the regulations in part 420 are minimum standards and are controlling.

(b) Each operator of an off-road vehicle operated on Reclamation lands shall possess a valid motor vehicle operator's permit or license; or, if no permit or license is held, he/she shall be accompanied by or under the immediate supervision of a person holding a valid permit or license.

(c) During the operation of snowmobiles, trail bikes, and any other off road vehicle the operator shall wear safety equipment, generally accepted or prescribed by applicable State law or local ordinance for use of the particular activity in which he/she is participating.

(d) No person may operate an off-road vehicle:

(1) In a reckless, careless or negligent manner;

(2) In excess of established speed limits;

(3) While under the influence of alcohol or drugs;

(4) In a manner likely to cause irreparable damage or disturbance of the land, wildlife, vegetative resources, or archeological and historic values of resources; or

(5) In a manner likely to become an unreasonable nuisance to other users of Reclamation or adjacent lands.

Subpart B—Designated Areas and Permitted Events

§ 420.21 Procedure for designating areas for off-road vehicle use.

The Regional Director shall, to the extent practicable, hold public hearings to obtain interested user groups, local populace, and affected Federal, State, and county agencies' opinions for opening or closing an area or trail in a manner that provides an opportunity for the public to express themselves and have their views taken into account. The Regional Director may act independently if he/she deems emergency action to open or close or restrict areas and trails is necessary to attain the objectives of the regulations of this part.

(a) Regional Directors shall designate and publicize those areas and trails which are open to off-road vehicle use in accordance with § 420.23.

(b) Before any area or trail is opened to off-road vehicle use, the Regional Director will establish specific regulations which are consistent with the criteria in these regulations.

(c) The Regional Director will inspect designated areas and trails periodically to determine conditions resulting from off-road vehicle use. If he determines that the use of off-road vehicles will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of the public lands, he shall immediately close such areas or trails to the type of off-road vehicle causing such effects. No area or trail shall be reopened until the Regional Director determines that adverse effects have been eliminated and that measures have been implemented to prevent future recurrence. The public

shall be notified of restrictions or closure in accordance with § 420.23.

[39 FR 26893, July 24, 1974, as amended at 44 FR 34909, June 15, 1979]

§ 420.22 Criteria for off-road vehicle areas.

(a) Areas and trails to be opened to off-road vehicle use shall be located:

(1) To minimize the potential hazards to public health and safety, other than the normal risks involved in off-road vehicle use.

(2) To minimize damage to soil watershed, vegetation, or other resources of the public lands.

(3) To minimize harassment of wildlife or significant disruption of wildlife habitats.

(4) To minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure compatibility of uses with existing conditions in populated areas, taking into account noise and other factors.

(5) In furtherance of the purposes and policy of the National Environmental Policy Act of 1969 (Pub. L. 91–190, 83 Stat. 852).

(b) Areas and trails shall not be located in areas possessing unique natural, wildlife, historic, cultural, archeological, or recreational values unless the Commissioner determines that these unique values will not be adversely affected.

§ 420.23 Public notice and information.

Areas and trails may be marked with appropriate signs to permit, control or prohibit off-road vehicle use on Reclamation lands. All notices concerning the regulation of off-road vehicles shall be posted in a manner that will reasonably bring them to the attention of the public. A copy of any notice shall be made available to the public in the regional office and field offices where appropriate. Such notice, and the reasons therefore, shall be published in the FEDERAL REGISTER together with such other forms of public notice or news release as may be appropriate and necessary to adequately describe the conditions of use and the time periods when the areas involved in an action under these regulations are to be (a) opened to off-road vehicle use, (b) restricted to certain types of off-road vehicle use and (c) closed to off-road vehicle use.

§ 420.24 Permits for organized events.

Regional Directors may issue permits for the operation of off-road vehicles in organized races, rallies, meets, endurance contests, and other events on areas designed for each event. The application for such an event shall:

(a) Be received by the Regional Director at least 60 days before the event;

(b) Provide a plan for restoration and rehabilitation of trails and areas used, and demonstrate that the prospective permittee can be bonded for or deposit the amount that may be required to cover the cost;

(c) Demonstrate that special precautions will be taken to:

(1) Protect the health, safety, and welfare of the public; and

(2) Minimize damage to the land and related resources.

(d) Application fees (in amounts to be determined) as authorized by section 2 of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897), as amended, shall accompany all applications.

§ 420.25 Reclamation lands administered by other agencies.

(a) Off-road vehicle use will be administered in accordance with Executive Order 11644, by those Federal and non-Federal agencies which have assumed responsibility for management of Reclamation lands for recreation purposes.

Specifically:

(1) Reclamation lands managed by the National Park Service, the Bureau of Sport Fisheries and Wildlife, the Bureau of Land Management, the Forest Service, and other Federal agencies will be administered in accordance with regulations of those agencies.

(2) Reclamation lands managed by non-Federal entities will be administered in a manner consistent with both part 420 and applicable non-Federal laws and regulations.

(b) Public lands withdrawn, but not yet utilized for Reclamation purposes, will be administered by the Forest

Service or by the Bureau of Land Management in accordance with regulations of those agencies, but consistent with Reclamation requirements for retaining the land.

PART 422—LAW ENFORCEMENT AUTHORITY AT BUREAU OF RECLAMATION PROJECTS

Sec.
422.1 Purpose of this part.
422.2 Definitions.
422.3 Reclamation law enforcement policy.

RESPONSIBILITIES

422.4 Responsibilities of the Commissioner of Reclamation.
422.5 Responsibilities of the Law Enforcement Administrator.
422.6 Responsibilities of the Chief Law Enforcement Officer.

PROGRAM REQUIREMENTS

422.7 Authorization to perform law enforcement duties.
422.8 Requirements for law enforcement functions and programs.
422.9 Reclamation law enforcement contracts and cooperative agreements.
422.10 Requirements for authorizing officers to exercise Reclamation law enforcement authority.
422.11 Position sensitivity and investigations.
422.12 Required standards of conduct.
422.13 Reporting an injury or property damage or loss.

AUTHORITY: 16 U.S.C. 4601-31; 43 U.S.C. 373b, 373c

SOURCE: 67 FR 38420, June 4, 2002, unless otherwise noted.

§ 422.1 Purpose of this part.

(a) This part implements Public Law No. 107–69, 115 Stat. 593 (November 12, 2001), an Act to Amend the Reclamation Recreation Management Act of 1992, by:

(1) Establishing eligibility criteria, such as fitness and training requirements, for Federal, State, local, and tribal law enforcement personnel to protect Bureau of Reclamation (Reclamation) facilities and lands; and

(2) Ensuring that Federal, State, local, and tribal law enforcement programs comply with applicable laws and regulations when they discharge the Secretary of the Interior's authority.

(b) This part does not apply to, or limit or restrict in any way, the investigative jurisdiction or exercise of law enforcement authority of any Federal law enforcement agency, under Federal law, within a Reclamation project or on Reclamation lands. The provisions of this part apply to non-Department of the Interior Federal law enforcement agents only where Reclamation has entered into a cooperative agreement or contract with a Federal law enforcement agency, pursuant to Public Law 107–69, for the services of specified individual Federal law enforcement agents.

(c) Nothing in this part shall be construed or applied to affect any existing right of a State or local government, or an Indian tribe, or their law enforcement officers, to exercise concurrent civil and criminal jurisdiction within a Reclamation project or on Reclamation lands.

§ 422.2 Definitions.

(a) *Department* means the United States Department of the Interior.

(b) *Reclamation* means the Bureau of Reclamation of the United States Department of the Interior.

(c) *Law Enforcement Program* means Reclamation's program to provide law enforcement and protective services at Reclamation project facilities and on Federal project lands. The activity is directed toward the preservation of public order, safety, and protection of resources and facilities, and their occupants.

(d) *Law Enforcement Administrator (LEA)* means the person designated by the Commissioner of Reclamation to:

(1) Direct the law enforcement program and units;

(2) Develop the policy, procedures, and standards for the law enforcement program within Reclamation; and

(3) Provide for inspection and oversight to control enforcement activity.

(e) *Chief Law Enforcement Officer (CLEO)* means the highest level duly authorized law enforcement officer for a non-Department law enforcement agency.

(f) *Law Enforcement Officer* means:

(1) A duly authorized Federal law enforcement officer, as that term is defined in Public Law 107–69, from any

non-Department Federal agency who is authorized to act as a law enforcement officer on Reclamation projects and lands; or

(2) Law enforcement personnel of any State, local government, or tribal law enforcement agency.

§ 422.3 Reclamation law enforcement policy.

The law enforcement policy of Reclamation is:

(a) To maintain an accountable, professional law enforcement program on Reclamation project facilities, and to protect Federal project lands and their occupants. Reclamation will meet its law enforcement responsibilities by establishing and promoting a law enforcement program which maintains law and order, and protects persons and property within Reclamation property and on Reclamation lands;

(b) To entrust law enforcement authority only to persons deemed to be qualified, competent law enforcement professionals;

(c) To maintain a continuing review and evaluation of Reclamation's law enforcement programs and operations to ensure compliance with applicable Federal laws, regulations, and policies of the Department;

(d) To ensure that approved standards are attained and maintained by each law enforcement unit undertaking a contract or cooperative agreement;

(e) To increase the effectiveness of law enforcement through the efficient handling and exchange of criminal and intelligence information with other Federal, State, local, and tribal agencies, as appropriate;

(f) To provide the public prompt access to information concerning its law enforcement program in accordance with the spirit and intent of the Freedom of Information Act, 5 U.S.C. 552; Department FOIA Regulations, 43 CFR 2; and 383 DM 15, Freedom of Information Act Handbook (*see www.doi.gov*);

(g) To ensure that the use of force by agency personnel under contracts or cooperative agreements with Reclamation complies with the Constitution and the law of the United States; and

(h) To negotiate contracts and cooperative agreements under this part to ensure that:

(1) Reclamation retains flexibility to meet its law enforcement needs; and

(2) Entities entering into contracts and cooperative agreements are appropriately reimbursed.

RESPONSIBILITIES

§ 422.4 Responsibilities of the Commissioner of Reclamation.

(a) The Secretary of the Interior has designated the Commissioner of Reclamation to implement law enforcement authority at Reclamation facilities. The Commissioner is responsible for:

(1) Implementing the provisions of Public Law 107–69;

(2) Ensuring consistency with applicable Departmental and Reclamation requirements for law enforcement officers;

(3) Carrying out the specific responsibilities listed in paragraph (b) of this section; and

(4) Developing any additional policies necessary for the successful accomplishment of Reclamation's law enforcement responsibilities.

(b) The Commissioner's specific responsibilities include the following:

(1) Designating Reclamation's Law Enforcement Administrator (LEA), with authority to discharge the responsibilities assigned by these regulations;

(2) Overseeing the LEA's ability to ensure that all law enforcement officers under contract or cooperative agreement for law enforcement services to Reclamation are properly trained and receive necessary authorizations; and

(3) Overseeing the LEA's development of policy, procedures, and standards for directing the law enforcement units, and the installation of management controls for proper implementation of the law enforcement program.

§ 422.5 Responsibilities of the Law Enforcement Administrator.

(a) The Law Enforcement Administrator (LEA):

(1) Reports directly to the Commissioner;

(2) Oversees the law enforcement program; and

(3) Is responsible for promulgating mission-oriented policy, procedures, and standards to ensure the effective

implementation of Reclamation's law enforcement authority.

(b) The chain of command for law enforcement will run from the Commissioner through the LEA to other positions designated as part of the Reclamation law enforcement managerial structure, which may include a Chief Law Enforcement Officer. The units will be staffed through cooperative agreements or contracts with law enforcement personnel from Department and non-Department Federal agencies or State, local, or tribal law enforcement organizations, with unit command being provided as part of the cooperative agreement or contract.

(c) Within the chain of command specified in paragraph (b) of this section, the LEA provides policy direction, inspection, and oversight for the law enforcement functions of Reclamation.

§ 422.6 Responsibilities of the Chief Law Enforcement Officer.

The Chief Law Enforcement Officer's (CLEO) responsibilities are to ensure that:

(a) Law enforcement officers working at Reclamation facilities and on Federal project lands are duly authorized under § 422.7;

(b) Law enforcement officers authorized under a contract or cooperative agreement meet training and fitness requirements established in this part and abide by standards of conduct and performance established in this part and in the contract or cooperative agreement;

(c) Law enforcement officers are under the immediate supervision of a commanding officer who is part of each law enforcement unit for which Reclamation enters into a contract or cooperative agreement; and

(d) Required reports are made to the LEA, or to another person designated by Reclamation, for purposes of carrying out the law enforcement functions for which Reclamation has a contract or cooperative agreement.

PROGRAM REQUIREMENTS

§ 422.7 Authorization to perform law enforcement duties.

(a) The CLEO must issue written authorization to each officer who is authorized to perform Reclamation law enforcement duties.

(b) Before issuing an authorization under paragraph (a) of this section, the CLEO must ensure that the officer meets:

(1) All the requirements for officers authorized under the law enforcement contract or cooperative agreement with Reclamation; and

(2) All requirements in §§ 422.10, 422.11, and 422.12.

(c) The CLEO must terminate an officer's authorization under paragraph (a) of this section and must notify the issuing Reclamation official when the officer:

(1) Terminates employment as a full-time police officer for any reason;

(2) Is transferred to another area of jurisdiction, where the continued performance of Reclamation duties would be impractical;

(3) Is suspended for any offense that would impair his/her fitness to perform law enforcement duties; or

(4) Is under indictment or has been charged with a crime.

(d) The LEA can, upon showing just cause, revoke the authorization of an individual officer to perform law enforcement services under Reclamation's law enforcement authority after providing written notice to the CLEO.

§ 422.8 Requirements for law enforcement functions and programs.

The requirements in this section apply to Reclamation and to each law enforcement unit exercising Reclamation's law enforcement authority.

(a) The law enforcement program must provide for control, accountability, coordination, and clear lines of authority and communication. This organizational structure must apply both within the law enforcement units, and between the law enforcement units and the LEA or other personnel designated as responsible under the law enforcement contract or cooperative agreement.

(b) Only duly authorized law enforcement officers may discharge law enforcement duties.

(c) Each law enforcement contract or cooperative agreement must specifically name those individuals within the contracting agency who are authorized to exercise Reclamation law enforcement authority consistent with applicable laws, regulations, and the requirements of this part. A CLEO can authorize only duly authorized officers who meet the standards in § 422.7 to exercise law enforcement authority.

(d) Any uniform worn by law enforcement officers must display distinctive identification to ensure that the officer is:

(1) Distinguishable from non-law enforcement personnel; and

(2) Easily recognized by the public as a law enforcement officer.

(e) Officers investigating a violation of Federal law under a law enforcement contract or cooperative agreement with Reclamation will notify applicable Federal law enforcement authorities, as appropriate, pursuant to 43 U.S.C. 373b(d)(4).

(f) The LEA must:

(1) Establish an incident reporting system for incidents that occur on Reclamation lands; and

(2) Include the reporting requirements for incidents as an element of each contract or cooperative agreement.

§ 422.9 Reclamation law enforcement contracts and cooperative agreements.

(a) The LEA, or a person that the LEA designates, may enter into contracts or cooperative agreements with Federal, State, local, or tribal law enforcement agencies to aid in enforcing or carrying out Federal laws and regulations on Reclamation facilities or Reclamation-managed property. Reclamation will rescind the contract or cooperative agreement if an elected governing body with jurisdiction over the local law enforcement agency adopts a resolution objecting to the use of that agency's personnel to enforce Federal laws.

(b) Each contract and cooperative agreement authorizing the exercise of Reclamation law enforcement authority:

(1) Must expire no later than 3 years from its effective date;

(2) May be revoked earlier by either party with written notice;

(3) May be revised or amended with the written consent of both parties;

(4) Must expressly include the requirements for exercise of Reclamation law enforcement authority listed in § 422.10;

(5) Must expressly state that the officer has completed the Federal Bureau of Investigation criminal history review as required by § 422.11; and

(6) Must expressly include the standards of conduct listed in section 422.12.

§ 422.10 Requirements for authorizing officers to exercise Reclamation law enforcement authority.

(a) The CLEO must ensure that each officer receiving an authorization under § 422.7(a):

(1) Is at least 21 years old;

(2) Is certified as a bona fide full-time peace officer under State Peace Officer Standards and Training (POST) requirements, or its functional equivalent or is certified as a Federal law enforcement officer;

(3) Has passed his/her agency's firearms qualifications (which must be consistent with Federal policy) within the 6-month period immediately preceding the granting of the authority;

(4) Re-qualifies to use firearms with all issued service weapons at least semi-annually;

(5) Has neither been convicted of a felony offense, nor convicted of a misdemeanor offense for domestic violence, preventing him/her from possessing a firearm in compliance with section 658 of Public Law 104–208 (the 1996 amendment of the Gun Control Act of 1968);

(6) Is not the subject of a court order preventing him/her from possessing a firearm;

(7) Has no physical impairments that will hinder performance as an active duty law enforcement officer; and

(8) Attends and successfully completes a mandatory orientation session developed by Reclamation to become familiar with Federal laws and procedures and with all pertinent provisions

of statutes, ordinances, regulations, and Departmental and Reclamation rules and policies.

(b) Qualification standards for guards as provided in the Departmental Manual or other Department or Reclamation guidance may only be used for those persons hired exclusively to perform guard duties.

§ 422.11 Position sensitivity and investigations.

Each law enforcement contract or cooperative agreement must include a provision requiring the CLEO to certify that each officer who exercises authority under the Act has completed an FBI criminal history check and is satisfactorily cleared.

§ 422.12 Required standards of conduct.

All law enforcement officers authorized to exercise Reclamation authority must adhere to the following standards of conduct:

(a) Be punctual in reporting for duty at the time and place designated by superior officers;

(b) Be mindful at all times and under all circumstances of their responsibility to be courteous, considerate, patient and not use harsh, violent, profane, or insolent language;

(c) Make required reports of appropriate incidents coming to their attention;

(d) When in uniform and requested to do so, provide their name and identification/badge number orally or in writing;

(e) Immediately report any personal injury or any loss, damage, or theft of Federal government property as required by § 422.13;

(f) Not be found guilty in any court of competent jurisdiction of an offense that has a tendency to bring discredit upon the Department or Reclamation;

(g) Not engage in any conduct that is prejudicial to the reputation and good order of the Department or Reclamation; and

(h) Obey all regulations or orders relating to the performance of the unit's duties under the Reclamation contract or cooperative agreement.

§ 422.13 Reporting an injury or property damage or loss.

(a) An officer must immediately report orally and in writing to his/her supervisor any:

(1) Injury suffered while on duty; and

(2) Any loss, damage, or theft of government property.

(b) The written report must be in detail and must include names and addresses of all witnesses.

(c) When an officer's injuries prevent him/her from preparing a report at the time of injury, the officer's immediate supervisor must prepare the report.

(d) The supervisor must submit all reports made under this section to the Reclamation official designated to receive them, as soon as possible after the incident occurs.

PART 423—PUBLIC CONDUCT ON BUREAU OF RECLAMATION FACILITIES, LANDS, AND WATERBODIES

Subpart A—Purpose, Definitions, and Applicability

Sec.
423.1 Purpose.
423.2 Definitions of terms used in this part.
423.3 When does this part apply?

Subpart B—Areas Open and Closed to Public Use

423.10 What areas are open to public use?
423.11 What areas are closed to public use?
423.12 How will Reclamation notify the public of additional closed areas?
423.13 How will Reclamation establish periodic and regular closures?
423.14 How will Reclamation post and delineate closed areas at the site of the closure?
423.15 How will Reclamation document closures or reopenings?
423.16 Who can be exempted from closures?
423.17 How will Reclamation reopen closed areas?
423.18 Use of closures.

Subpart C—Rules of Conduct

423.20 General rules.
423.21 Responsibilities.
423.22 Interference with agency functions and disorderly conduct.
423.23 Abandonment and impoundment of personal property.
423.24 Trespassing.
423.25 Vandalism, tampering, and theft.

423.26 Public events and gatherings.
423.27 Advertising and public solicitation.
423.28 Memorials.
423.29 Natural and cultural resources.
423.30 Weapons, firearms, explosives, and fireworks.
423.31 Fires and flammable material.
423.32 Hunting, fishing, and trapping.
423.33 Camping.
423.34 Sanitation.
423.35 Animals.
423.36 Swimming.
423.37 Winter activities.
423.38 Operating vessels on Reclamation waters.
423.39 Standards for vessels.
423.40 Vehicles.
423.41 Aircraft.
423.42 Gambling.
423.43 Alcoholic beverages.
423.44 Controlled substances.

Subpart D—Authorization of Otherwise Prohibited Activities

423.50 How can I obtain permission for prohibited or restricted uses and activities?

Subpart E—Special Use Areas

423.60 How special use areas are designated.
423.61 Notifying the public of special use areas.
423.62 Reservations for public use limits.
423.63 Existing special use areas.

Subpart F—Violations and Sanctions

423.70 Violations.
423.71 Sanctions.

AUTHORITY: Public Law 107–69 (November 12, 2001) (Law Enforcement Authority) (43 U.S.C. 373b and 373c); Public Law 102–575, Title XXVIII (October 30, 1992) (16 U.S.C. 460l–31 through 34); Public Law 89–72 (July 9, 1965) (16 U.S.C. 460l–12); Public Law 106–206 (May 26, 2000) (16 U.S.C. 4601–6d); Public Law 59–209 (June 8, 1906) (16 U.S.C. 431–433); Public Law 96–95 (October 31, 1979) (16 U.S.C. 470aa-mm).

SOURCE: 73 FR 75349, Dec. 11, 2008, unless otherwise noted.

Subpart A—Purpose, Definitions, and Applicability

§ 423.1 Purpose.

The purpose of this part is to maintain law and order and protect persons and property within Reclamation projects and on Reclamation facilities, lands, and waterbodies.

§ 423.2 Definitions of terms used in this part.

Aircraft means a device that is used or intended to be used for human flight in the air, including powerless flight, unless a particular section indicates otherwise.

Archaeological resource means any material remains of past human life or activities which are of archaeological interest, as determined under 43 CFR part 7, including, but not limited to, pottery, basketry, bottles, weapons, projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human remains, or any portion of any of the foregoing items. Archaeological resources are a component of cultural resources.

Authorized official means the Commissioner of the Bureau of Reclamation and those Federal, State, local, and tribal officials, and agencies to which the Commissioner has delegated specific and limited authorities to enforce and implement this part 423.

Camping means erecting a tent or shelter; preparing a sleeping bag or other bedding material for use; parking a motor vehicle, motor home, or trailer; or mooring a vessel for the intended or apparent purpose of overnight occupancy.

Closed means a prohibition to all public access.

Cultural resource means any man-made or associated prehistoric, historic, architectural, sacred, or traditional cultural property and associated objects and documents that are of interest to archaeology, anthropology, history, or other associated disciplines. Cultural resources include archaeological resources, historic properties, traditional cultural properties, sacred sites, and cultural landscapes that are associated with human activity or occupation.

Explosive means any device or substance that can be ignited or detonated to produce a violent burst of gas and/or other materials, including, but not limited to, blasting caps and detonatable fireworks and pyrotechnics. This definition does not include fuel and ammunition when properly transported and used.

Firearm means a device that expels a projectile such as a bullet, dart, or pellet by combustion, air pressure, gas pressure, or other means.

Fishing means taking or attempting to take, by any means, any fish, mollusk, or crustacean found in fresh or salt water.

Geophysical discovery device means any mechanism, tool, or equipment including, but not limited to, metal detectors and radar devices, that can be used to detect or probe for objects beneath land or water surfaces.

Historic property means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains related to such a property or resource.

Hunting means taking or attempting to take wildlife by any means, except by trapping or fishing.

Museum property means personal property acquired according to some rational scheme and preserved, studied, or interpreted for public benefit, including, but not limited to, objects selected to represent archaeology, art, ethnography, history, documents, botany, paleontology, geology, and environmental samples.

Natural resources means assets or values related to the natural world, including, but not limited to, plants, animals, water, air, soils, minerals, geologic features and formations, fossils and other paleontological resources, scenic values, etc. Natural resources are those elements of the environment not created by humans.

Off-road vehicle means any motorized vehicle (including the standard automobile) designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or natural terrain. The term excludes all of the following:

(1) Nonamphibious registered motorboats;

(2) Military, fire, emergency, or law enforcement vehicles when used for emergency purpose;

(3) Self-propelled lawnmowers, snowblowers, garden or lawn tractors, and golf carts while being used for their designed purpose;

(4) Agricultural, timbering, construction, exploratory, and development equipment and vehicles while being used exclusively as authorized by permit, lease, license, agreement, or contract with Reclamation;

(5) Any combat or combat support vehicle when used in times of national defense emergencies;

(6) ''Official use'' vehicles; and

(7) Wheelchairs and carts designed and used for transporting persons with disabilities.

Operator means a person who operates, drives, controls, has charge of, or is in actual physical control of any mode of transportation or other equipment.

Permit means any written document issued by an authorized official pursuant to subpart D of this part 423 authorizing a particular activity with specified time limits, locations, and/or other conditions.

Person means an individual, entity, or organization.

Pet means a domesticated animal other than livestock. (''Livestock'' is any hoofed animal used for agricultural, riding, pulling, or packing purposes.)

Public use limit means any limitation on public uses or activities established by law or regulation.

Real property means any legal interest in land and the water, oil, gas, and minerals in, on, and beneath the land surface, together with the improvements, structures, and fixtures located thereon.

Reclamation means the Bureau of Reclamation, United States Department of the Interior.

Reclamation facilities, lands, and waterbodies means Reclamation facilities, Reclamation lands, and Reclamation waterbodies.

Reclamation facility means any facility constructed or acquired under Federal reclamation law that is situated on Reclamation lands and is used or occupied by Reclamation under a lease, easement, right-of-way, license, contract, or other arrangement. The term includes, but is not limited to, any of the following that are under the jurisdiction of or administered by Reclamation: dams, powerplants, buildings,

switchyards, transmission lines, recreation facilities, fish and wildlife facilities, pumping plants, and warehouses.

Reclamation lands means any real property under the jurisdiction of or administered by Reclamation, and includes, but is not limited to, all acquired and withdrawn lands and lands in which Reclamation has a lease interest, easement, or right-of-way.

Reclamation project means any water supply, water delivery, flood control, or hydropower project, together with any associated facilities for fish, wildlife, recreation, or water treatment constructed or administered by Reclamation under the Federal reclamation laws (the Act of June 17, 1902 (32 Stat. 388, chapter 1093; 43 U.S.C. 371 *et seq.*), and Acts supplementary thereto and amendatory thereof).

Reclamation waterbody means any body of water situated on Reclamation lands or under Reclamation jurisdiction.

Refuse means any human or pet waste, litter, trash, garbage, rubbish, debris, contaminant, pollutant, waste liquid, or other discarded materials.

Sacred site means any specific, discrete, or narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the land managing agency of the existence of such a site.

Special use area means an area at or within a Reclamation facility, or an area of Reclamation lands or waterbodies, in which special rules for public conduct apply that may differ from those established in subpart C of this part 423. A special use area must be established by an authorized official as provided in subpart E of this part 423.

State and local laws means the laws, statutes, regulations, ordinances, codes, and court decisions of a State and of the counties, municipalities, or other governmental entities which are enabled by statute and vested with legislative authority.

Traditional cultural property means a discretely defined property that is eligible for inclusion on the National Register of Historic Places because of its association with cultural practices or beliefs of a living community that:

(1) Are rooted in that community's history; and

(2) Are important in maintaining the continuing cultural identity of the community.

Trapping means taking, or attempting to take, wildlife with a snare, trap, mesh, wire, or other implement, object, or mechanical device designed to entrap, ensnare, or kill animals, including fish.

Vehicle means every device in, upon, or by which a person or property is or may be transported or drawn on land, whether moved by mechanical, animal, or human power, including, but not limited to, automobiles, trucks, motorcycles, mini-bikes, snowmobiles, dune buggies, all-terrain vehicles, trailers, campers, bicycles, and those used exclusively upon stationary rails or tracks; except wheelchairs used by persons with disabilities.

Vessel means any craft that is used or capable of being used as a means of transportation on or under water or ice, including, but not limited to, powerboats, cruisers, houseboats, sailboats, airboats, hovercraft, rowboats, canoes, kayaks, ice yachts, or personal watercraft. Inner tubes, air mattresses, and other personal flotation devices are not considered vessels. A seaplane may be considered a vessel.

Weapon means a firearm or any other instrument or substance designed, used, or which can be used to cause or threaten to cause pain, injury, or death.

Wildlife means any non-domestic member of the animal kingdom and includes a part, product, egg, offspring, or dead body or part thereof, including, but not limited to, mammals, birds, reptiles, amphibians, fish, mollusks, crustaceans, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity.

You means a person or entity on Reclamation facilities, lands, or waterbodies.

§ 423.3 When does this part apply?

(a) This part and all applicable Federal, State, and local laws apply to all persons on Reclamation facilities, lands, and waterbodies, with the following exceptions:

(1) Certain exceptions apply to Federal, State, local, and contract employees, as further addressed in paragraph (b) of this section.

(2) Certain exceptions apply to non-Federal entities, as further addressed in paragraph (c) of this section;

(3) Certain exceptions apply on Reclamation facilities, lands, and waterbodies administered by other Federal agencies, as further addressed in paragraph (d) of this section; and

(4) Certain exceptions apply on Reclamation facilities, lands, and waterbodies subject to treaties and Federal laws concerning tribes and Indians, as further addressed in paragraph (e) of this section.

(b) This part does not apply to:

(1) Federal, State, and local law enforcement, fire, and rescue personnel in the performance of their official duties on Reclamation facilities, lands, and waterbodies;

(2) An employee or agent of the Federal, State, or local government, or other political subdivision, when the employee or agent is carrying out official duties; or

(3) An employee or agent of an entity that has entered into a contract or agreement with Reclamation to administer, operate, maintain, patrol, or provide security for Reclamation facilities, lands, and waterbodies, when the employee or agent is working within the scope of the defined activities described in the contract or agreement.

(c) If a non-Federal entity has assumed responsibility for operating, maintaining, or managing Reclamation facilities, lands, or waterbodies through a contract or other written agreement, public conduct in and on those Reclamation facilities, lands, and waterbodies will be regulated by this part 423 as well as any regulations established by the entity, the terms of the entity's contract with Reclamation, and applicable Federal, State, and local law.

(d) Public conduct on Reclamation facilities, lands, and waterbodies administered by other Federal agencies under statute or other authority will be governed by the regulations of those agencies rather than this part 423. However, Reclamation retains the authority to take necessary actions to safeguard the security and safety of the public and such Reclamation facilities, lands, and waterbodies.

(e) This part applies on all Reclamation facilities, lands, and waterbodies that are subject to Treaties with, and Federal laws concerning the rights of, federally recognized tribes, and individual Indians who are members thereof, to the extent that this part is consistent with those Treaties and Federal laws.

(f) This part 423 and other Federal laws will govern over any conflicting regulations of a non-Federal entity.

Subpart B—Areas Open and Closed to Public Use

§ 423.10 What areas are open to public use?

All Reclamation facilities, lands, and waterbodies are open to lawful use by the public unless they are closed to public use under this subpart B of this part 423, or as provided by 43 CFR part 420, Off-Road Vehicle Use.

§ 423.11 What areas are closed to public use?

The following Reclamation facilities, lands, and waterbodies, or portions thereof, are closed to public use:

(a) Those that were closed to public use as of April 17, 2006, as evidenced by fencing, gates, barriers, locked doors, road closures, signage, posting of notices, or other reasonably obvious means, as provided in § 423.14;

(b) Those that are closed after April 17, 2006 under § 423.12;

(c) Those that are closed periodically and regularly under § 423.13; and

(d) Those that are closed to off-road vehicle use pursuant to 43 CFR part 420.

§ 423.12 How will Reclamation notify the public of additional closed areas?

(a) *Non-emergency situations.* In non-emergency situations, an authorized official must provide 30 days advance

public notice before closing all or portions of Reclamation facilities, lands, or waterbodies. The notice must include publication in a newspaper of general circulation in the locale of the Reclamation facilities, lands, or waterbodies to be closed. Non-emergency situations covered by this section include:

(1) Protection and security of Reclamation facilities and of Reclamation's employees and agents;

(2) Protection of public health and safety, cultural resources, natural resources, scenic values, or scientific research activities;

(3) Safe and efficient operation and maintenance of Reclamation projects;

(4) Reduction or avoidance of conflicts among visitor use activities;

(5) National security; or

(6) Other reasons in the public interest.

(b) *Emergency situations.* In emergency situations where delay would result in significant and immediate risks to public safety, security, or other public concerns, an authorized official may close all or portions of Reclamation facilities, lands, or waterbodies without advance public notice.

§ 423.13 How will Reclamation establish periodic and regular closures?

Reclamation facilities, lands, or waterbodies that are closed periodically and regularly, regardless of the date of the initial closure, must be noticed as provided in § 423.12(a) only once, and at any time the schedule of closure is changed.

§ 423.14 How will Reclamation post and delineate closed areas at the site of the closure?

Before or at the time of closing all or portions of Reclamation facilities, lands, or waterbodies to public use, the responsible authorized official must indicate the closure by:

(a) Locked doors, fencing, gates, or other barriers;

(b) Posted signs and notices at conspicuous locations, such as at normal points of entry and at reasonable intervals along the boundary of the closed area; or

(c) Other reasonably obvious means including, but not limited to, onsite personal contact with a uniformed official.

§ 423.15 How will Reclamation document closures or reopenings?

(a) The authorized official must document the reason(s) for establishing any closure or reopening that occurs after April 17, 2006. The official must do this before the closure or reopening, except in the situations described in § 423.12(b). In such situations, the authorized official must complete the documentation as soon as practicable.

(b) Documentation of a closure must cite one or more of the conditions for closure described in § 423.12 of this part.

(c) Documentation of closures or reopenings will be available to the public upon request, except when the release of this documentation could result in a breach of national security or the security of Reclamation facilities.

§ 423.16 Who can be exempted from closures?

(a) You may be exempted from a closure, subject to any terms and conditions established under paragraph (c) of this section, by written authorization from the authorized official who effected or who is responsible for the closure, if you are:

(1) A person with a license or concession agreement that requires you to have access to the closed Reclamation facilities, lands, or waterbodies;

(2) An owner or lessee of real property, resident, or business in the vicinity of closed Reclamation facilities, lands, or waterbodies who cannot reasonably gain access to your property, residence, or place of business without entering and crossing such closed Reclamation facilities, lands, or waterbodies; or

(3) A holder of a permit granting you an exemption from the closure issued under subpart D of this part 423 by the authorized official who effected or who is responsible for the closure.

(b) You may request exemption from a closure by writing to the authorized official who effected or who is responsible for the closure. You need not do so if you have such an exemption in effect on April 17, 2006.

(c) An authorized official may establish terms and conditions on any exemption from a closure, or terminate such exemption, for any of the reasons listed in § 423.12.

§ 423.17 How will Reclamation reopen closed areas?

An authorized official may reopen to public use any Reclamation facilities, lands, and waterbodies, or portions thereof. The authorized official may do this at any time with advance or subsequent public notice, except as required by other statute or regulation, and must document the reopening as provided in § 423.15.

§ 423.18 Use of closures.

Closures are to be used only where all public access is to be prohibited. Special use areas are to be used to restrict specific activities as set forth in subpart E of this part 423.

Subpart C—Rules of Conduct

§ 423.20 General rules.

(a) You must obey all applicable Federal, State, and local laws whenever you are at or on any Reclamation facilities, lands, or waterbodies.

(b) You must comply with all provisions of this subpart C whenever you are at or on any Reclamation facilities, lands, or waterbodies, except as specifically provided by:

(1) A permit issued by an authorized official under subpart D of this part 423;

(2) A contract with Reclamation or agency managing Reclamation facilities, lands, and waterbodies;

(3) The rules established by an authorized official in a special use area under subpart E of this part 423; or

(4) A right-of-use issued under 43 CFR part 429.

§ 423.21 Responsibilities.

(a) You are responsible for finding, being aware of, and obeying all applicable laws and regulations, as well as notices and postings of closed and special use areas established by an authorized official under subpart B and subpart E of this part 423.

(b) You are responsible for the use of any device, vehicle, vessel, or aircraft you own, lease, or operate on Reclamation facilities, lands, or waterbodies. You may be issued a citation for a violation of regulations, including noncompliance with limitations, restrictions, closures, or special use areas applicable to the use of any device, vehicle, vessel, or aircraft as provided in this part as the owner, lessee, or operator.

(c) You are responsible for the use and treatment of Reclamation facilities, lands, and waterbodies, and the cultural resources, wildlife, and other natural resources located thereon, by you and those for whom you are legally responsible. This presumption is sufficient to issue a citation to you for violation of provisions of these regulations by you or by those for whom you are legally responsible.

(d) The regulations governing permits, other use authorizations, and fees on Reclamation lands that are found in subpart D of this part 423 apply to your use of Reclamation facilities, lands, and waterbodies.

(e) You must furnish identification information upon request by a law enforcement officer.

§ 423.22 Interference with agency functions and disorderly conduct.

(a) You must not assault, threaten, disturb, resist, intimidate, impede, or interfere with any employee or agent of Federal, State, or local government engaged in an official duty.

(b) You must comply with any lawful order of an authorized government employee or agent for the purpose of maintaining order and controlling public access and movement during law enforcement actions and emergency or safety-related operations.

(c) You must not knowingly give a false report or other false information to an authorized government employee or agent.

(d) You must not interfere with, impede, or disrupt the authorized use of Reclamation facilities, lands, or waterbodies or impair the safety of any person.

(e) The following acts constitute disorderly conduct and are prohibited:

(1) Fighting, or threatening or violent behavior;

(2) Language, utterance, gesture, display, or act that is obscene, physically threatening or menacing, or that is likely to inflict injury or incite an immediate breach of the peace;

(3) Unreasonable noise, considering the nature and purpose of the person's conduct, location, time of day or night, and other factors that would govern the conduct of a reasonably prudent person under the circumstances;

(4) Creating or maintaining a hazardous or physically offensive condition; or

(5) Any other act or activity that may cause or create public alarm, nuisance, or bodily harm.

§ 423.23 Abandonment and impoundment of personal property.

(a) You must not abandon personal property of any kind in or on Reclamation facilities, lands, or waterbodies.

(b) You must not store or leave unattended personal property of any kind.

(1) Unattended personal property is presumed to be abandoned:

(i) After a period of 24 hours;

(ii) At any time after a posted closure takes effect under subpart B of this part 423; or

(iii) At any time for reasons of security, public safety, or resource protection.

(2) If personal property is presumed abandoned, an authorized official may impound it, store it, and assess a reasonable impoundment fee.

(3) The impoundment fee must be paid before the authorized official will return the impounded property to you.

(c) An authorized official may impound or destroy unattended personal property at any time if it:

(1) Interferes with safety, operation, or management of Reclamation facilities, lands, or waterbodies; or

(2) Presents a threat to persons or Reclamation project resources.

(d) An authorized official may dispose of abandoned personal property in accordance with the procedures contained in title 41 CFR and applicable Reclamation and Department of the Interior policy.

§ 423.24 Trespassing.

You must not trespass on Reclamation facilities, lands, and waterbodies. Trespass includes any of the following acts:

(a) Unauthorized possession or occupancy of Reclamation facilities, lands, or waterbodies;

(b) Personal entry, presence, or occupancy on or in any portion or area of Reclamation facilities, lands, or waterbodies that have been closed to public use pursuant to subpart B of this part 423;

(c) Unauthorized extraction or disturbance of natural or cultural resources located on Reclamation facilities, lands, or waterbodies;

(d) Unauthorized conduct of commercial activities on Reclamation facilities, lands, or waterbodies;

(e) Holding unauthorized public gatherings on Reclamation facilities, lands, or waterbodies; or

(f) Unauthorized dumping or abandonment of personal property on Reclamation facilities, lands, or waterbodies.

§ 423.25 Vandalism, tampering, and theft.

(a) You must not tamper or attempt to tamper with, move, manipulate, operate, adjust, or set in motion property not under your lawful control or possession including, but not limited to, vehicles, equipment, controls, recreational facilities, and devices.

(b) You must not destroy, injure, deface, damage, or unlawfully remove property not under your lawful control or possession.

(c) You must not drop, place, throw, or roll rocks or other items inside, into, down, or from, dams, spillways, dikes, or other structures and facilities.

§ 423.26 Public events and gatherings.

You must not conduct public assemblies, meetings, gatherings, demonstrations, parades, and other events without a permit issued pursuant to subpart D of this part 423. Public gatherings that involve the possession or occupancy of Reclamation facilities, lands, and waterbodies are governed by 43 CFR part 429.

§ 423.27 Advertising and public solicitation.

You must not engage in advertising or solicitation on Reclamation facilities, lands, or waterbodies except as allowed under a valid contract with Reclamation, or as allowed by a permit issued pursuant to subpart D of this part 423.

§ 423.28 Memorials.

You must not bury, deposit, or scatter human or animal remains, or place memorials, markers, vases, or plaques on Reclamation facilities, lands, or waterbodies. This section does not apply to the burial of parts of fish or wildlife taken in legal hunting, fishing, or trapping.

§ 423.29 Natural and cultural resources.

(a) You must not destroy, injure, deface, remove, search for, disturb, or alter natural resources or cultural resources, including abandoned buildings or structures, on or in Reclamation facilities, lands, or waterbodies except in accordance with § 423.29(g) and other applicable Federal, State, and local laws.

(b) You must not introduce wildlife, fish, or plants, including their reproductive bodies, into Reclamation lands and waterbodies.

(c) You must not drop, place, throw, or roll rocks or other items inside, into, at, or down, caves, caverns, valleys, canyons, mountainsides, thermal features, or other natural formations.

(d) You may bring firewood to or gather dead wood on Reclamation lands for fires as allowed under § 423.31. You must not damage or remove any live tree or part thereof except with proper authorization under 43 CFR part 429.

(e) You must not walk on, climb, enter, ascend, descend, or traverse cultural resources on Reclamation lands, including monuments or statues, except as specifically allowed in special use areas designated by an authorized official under subpart E of this part 423.

(f) You must not possess a metal detector or other geophysical discovery device, or use a metal detector or other geophysical discovery techniques to locate or recover subsurface objects or features on Reclamation lands, except:

(1) When transporting, but not using, a metal detector or other geophysical discovery device in a vehicle on a public road as allowed under applicable Federal, State, and local law; or

(2) As allowed by a permit issued pursuant to subpart D of this part 423.

(g) You may engage in renewable natural resource gathering activities such as picking berries and mushrooms, collecting antlers, and other similar activities as regulated by this part 423 and other applicable Federal, State, and local laws.

§ 423.30 Weapons, firearms, explosives, and fireworks.

(a) You may possess firearms, ammunition, bows and arrows, crossbows, or other projectile firing devices on Reclamation lands and waterbodies, provided the firearm, ammunition, or other projectile firing device is stowed, transported, and/or carried in compliance with applicable Federal, State, and local law, with the following exceptions:

(1) You must not have a weapon in your possession when at or in a Reclamation facility.

(2) You must comply with any prohibitions or regulations applicable to weapons in a special use area established by an authorized official under subpart E of this part 423.

(b) You must not discharge or shoot a weapon unless you are:

(1) Using a firearm or other projectile firing device lawfully for hunting or fishing as allowed under § 423.32, or at an authorized shooting or archery range; and

(2) In compliance with applicable Federal, State, and local law.

(c) You must not use or possess explosives, or fireworks or pyrotechnics of any type, except as allowed by a permit issued pursuant to subpart D of this part 423, or in special use areas so designated by an authorized official under subpart E of this part 423.

§ 423.31 Fires and flammable material.

(a) You must not leave a fire unattended, and it must be completely extinguished before your departure.

(b) You must not improperly dispose of lighted smoking materials, including cigarettes, cigars, pipes, matches, or other burning material.

(c) You must not burn materials that produce toxic fumes, including, but not limited to, tires, plastic, flotation materials, or treated wood products.

(d) You must not transport gasoline and other fuels in containers not designed for that purpose.

(e) You must comply with all applicable Federal, State, and local fire orders, restrictions, or permit requirements.

§ 423.32 Hunting, fishing, and trapping.

(a) You may hunt, fish, and trap in accordance with applicable Federal, State, and local laws, and subject to the restrictions of § 423.30, in areas where both of the following conditions are met:

(1) The area is not closed to public use under subpart B of this part 423; and

(2) The area has not been otherwise designated by an authorized official in a special use area under subpart E of this part 423.

(b) You must comply with any additional restrictions pertaining to hunting, fishing, and trapping established by an authorized official in a special use area under subpart E of this part 423.

§ 423.33 Camping.

(a) You may camp on Reclamation lands, except that you must comply with any restrictions, conditions, limitations, or prohibitions on camping established by an authorized official in a special use area under subpart E of this part 423.

(b) You must not camp on Reclamation lands at any single Reclamation project for more than 14 days during any period of 30 consecutive days, except as allowed by a permit issued under 43 CFR part 429;

(c) You must not attempt to reserve a campsite for future use by placing equipment or other items on the campsite, or by personal appearance, without camping on and paying the required fees for that campsite daily;

(d) You must not camp on or place any equipment at a campsite that is posted or otherwise marked as ''reserved'' or ''closed'' by an authorized official without a valid reservation for that campsite, except as allowed by a permit issued under subpart D of this part 423; and

(e) You must not dig in or level any ground, or erect any structure other than a tent, in a designated campground.

§ 423.34 Sanitation.

(a) You must not bring or improperly dispose of refuse on Reclamation facilities, lands, and waterbodies. Both the owner and the person bringing or disposing refuse may be issued a citation for violating this provision.

(b) Campers, picnickers, and all other persons using Reclamation lands must keep their sites free of trash and litter during the period of occupancy and must remove all personal equipment and clean their sites before departure.

(c) You must not place or construct a toilet or latrine such that its lowest point is lower than the high water mark of any Reclamation waterbody, or within 150 feet horizontally of the high water mark of any Reclamation waterbody.

§ 423.35 Animals.

(a) You must not bring pets or other animals into public buildings, public transportation vehicles, or sanitary facilities. This provision does not apply to properly trained animals assisting persons with disabilities, such as seeing-eye dogs.

(b) You must not abandon any animal on Reclamation facilities, lands, or waterbodies, or harass, endanger, or attempt to collect any animal except game you are attempting to take in the course of authorized hunting, fishing, or trapping.

(c) Any unauthorized, unclaimed, or unattended animal on Reclamation lands may be:

(1) Removed in accordance with Federal law, and applicable State and local laws; and

(2) Confined at a location designated by an authorized official, who may assess a reasonable impoundment fee

that must be paid before the impounded animal is released to its owner.

(d) The following animals are prohibited and are subject to removal in accordance with Federal law, and applicable State and local laws:

(1) Captive wild or exotic animals (including, but not limited to, cougars, lions, bears, bobcats, wolves, and snakes), except as allowed by a permit issued under subpart D of this part 423; and

(2) Any pets or animals displaying vicious or aggressive behavior or posing a threat to public safety or deemed a public nuisance.

§ 423.36 Swimming.

(a) You may swim, wade, snorkel, scuba dive, raft, or tube at your own risk in Reclamation waters, except:

(1) Within 300 yards of dams, power plants, pumping plants, spillways, stilling basins, gates, intake structures, and outlet works;

(2) Within 100 yards of buoys or barriers marking public access limits;

(3) In canals, laterals, siphons, tunnels, and drainage works;

(4) At public docks, launching sites, and designated mooring areas; or

(5) As otherwise delineated by signs or other markers.

(b) You must display an international diver down, or inland diving flag in accordance with State and U.S. Coast Guard guidelines when engaging in any underwater activities.

(c) You must not dive, jump, or swing from dams, spillways, bridges, cables, towers, or other structures.

§ 423.37 Winter activities.

(a) You must not tow persons on skis, sleds, or other sliding devices with a motor vehicle or snowmobile, except that you may tow sleds designed to be towed behind snowmobiles if joined to the towing snowmobile with a rigid hitching mechanism, and you may tow disabled snowmobiles by any appropriate means.

(b) You must not ice skate, ice fish, or ice sail within 300 yards of dams, power plants, pumping plants, spillways, stilling basins, gates, intake structures, or outlet works.

(c) You must comply with all other posted restrictions.

§ 423.38 Operating vessels on Reclamation waters.

(a) You must comply with Federal, State, and local laws applicable to the operation of a vessel, other watercraft, or seaplane on Reclamation waters, and with any restrictions established by an authorized official.

(b) You must not operate a vessel, other watercraft, or seaplane in an area closed to the public.

(c) You must observe restrictions established by signs, buoys, and other regulatory markers.

(d) You must not operate a vessel, or knowingly allow another person to operate a vessel, in a reckless or negligent manner, or in a manner that endangers or is likely to endanger a person, property, natural resource, or cultural resource.

(e) You must not operate a vessel when impaired or intoxicated under the standards established by applicable State and local law.

(f) You must not occupy a vessel overnight, except where otherwise designated under applicable Federal, State, or local law, or where otherwise designated by an authorized official in a special use area.

(g) You must not use a vessel as a place of habitation or residence.

(h) You must remove your vessels from Reclamation lands and waters when not in actual use for a period of more than 24 hours, unless they are securely moored or stored at special use areas so designated by an authorized official.

(i) You must not attach or anchor a vessel to structures such as locks, dams, regulatory or navigational buoys, or other structures not designed for such purpose.

(j) You must display an international diver down, or inland diving flag in accordance with State and U.S. Coast Guard guidelines when operating a vessel involved in any underwater activities.

(k) You may engage in towing activities, including, but not limited to, waterskiing and tubing, only during daylight hours and subject to any applicable Federal, State, and local law.

§ 423.39 Standards for vessels.

(a) All vessels on Reclamation waters must:

(1) Be constructed and maintained in compliance with the standards and requirements established by, or promulgated under, Title 46 United States Code, and any applicable State and local laws and regulations;

(2) Have safety equipment, including personal flotation devices, on board in compliance with U.S. Coast Guard boating safety requirements and in compliance with applicable State and local boating safety laws and regulations; and

(3) If motorized, have and utilize a proper and effective exhaust muffler as defined by applicable State and local laws. Actions or devices which render exhaust mufflers ineffective are prohibited.

(b) Owners or operators of vessels not in compliance with this § 423.39 may be required to remove the vessel immediately from Reclamation waterbodies until items of non-compliance are corrected.

§ 423.40 Vehicles.

(a) When operating a vehicle on Reclamation lands and Reclamation projects, you must comply with applicable Federal, State, and local laws, and with posted restrictions and regulations. Operating any vehicle through, around, or beyond a restrictive sign, recognizable barricade, fence, or traffic control barricade, is prohibited.

(b) You must not park a vehicle in violation of posted restrictions and regulations, or in a manner that would obstruct or impede normal or emergency traffic movement or the parking of other vehicles, create a safety hazard, or endanger any person, property, or natural feature. Vehicles so parked are subject to removal and impoundment at the owner's expense.

(c) You must not operate any vehicle, or allow another person to operate a vehicle in your control, in a careless, negligent or reckless manner that would endanger any person, property, natural resource, or cultural resource.

(d) In addition to the regulations in this part, the regulations governing off-road-vehicle use in 43 CFR part 420 apply.

§ 423.41 Aircraft.

(a) You must comply with any applicable Federal, State, and local laws, and with any additional requirements or restrictions established by an authorized official in a special use area under subpart E of this part 423, with respect to aircraft landings, takeoffs, and operation on or in the proximity of Reclamation facilities, lands, and waterbodies. Pilots are responsible for awareness of all applicable laws, regulations, requirements, and restrictions. This paragraph does not apply to pilots engaged in emergency rescue or in the official business of Federal, State, or local governments or law enforcement agencies, or who are forced to land due to circumstances beyond the pilot's control.

(b) You must not operate any aircraft while on or above Reclamation facilities, lands, and waterbodies in a careless, negligent, or reckless manner so as to endanger any person, property, or natural feature.

(c) This section does not provide authority to deviate from Federal or State regulations, or prescribed standards, including, but not limited to, regulations and standards concerning pilot certifications or ratings and airspace requirements.

(d) Except in extreme emergencies threatening human life or serious property loss, you must not use non-standard boarding and loading procedures to deliver or retrieve people, material, or equipment by parachute, balloon, helicopter, or other aircraft.

(e) You must comply with all applicable U.S. Coast Guard rules when operating a seaplane on Reclamation waterbodies.

(f) You must securely moor any seaplane remaining on Reclamation waterbodies in excess of 24 hours at mooring facilities and locations designated by an authorized official. Seaplanes may be moored for periods of less than 24 hours on Reclamation waterbodies, except in special use areas otherwise designated by an authorized official, provided:

(1) The mooring is safe, secure, and accomplished so as not to damage the rights of the Government or the safety of persons; and

(2) The operator remains in the vicinity of the seaplane and reasonably available to relocate the seaplane if necessary.

(g) You must not operate model aircraft except as allowed in special use areas established by an authorized official under subpart E of this part 423.

§ 423.42 Gambling.

Commercial gambling in any form, or the operation of gambling devices, is prohibited on Reclamation facilities, lands, and waterbodies unless authorized by applicable treaties or Federal, State, and local laws or regulations.

§ 423.43 Alcoholic beverages.

You must not possess or consume alcoholic beverages in violation of Federal, State, or local law, or the rules of a special use area established by an authorized official under subpart E of this part 423.

§ 423.44 Controlled substances.

You must not possess, consume, deliver, or be under the influence of, controlled substances included in schedules I, II, III, IV, or V of part B of the Controlled Substance Act (21 U.S.C. 812) on Reclamation facilities, lands, or waterbodies, unless the controlled substance was legally obtained through a valid prescription or order.

Subpart D—Authorization of Otherwise Prohibited Activities

§ 423.50 How can I obtain permission for prohibited or restricted uses and activities?

(a) Authorized officials may issue permits to authorize activities on Reclamation facilities, lands, or waterbodies otherwise prohibited or restricted by §§ 423.16(a)(3), 423.26, 423.27, 423.29(f), 423.30(c), 423.33(d), and 423.35(d)(1), and may terminate or revoke such permits for non-use, noncompliance with the terms of the permit, violation of any applicable law, or to protect the health, safety, or security of persons, Reclamation assets, or natural or cultural resources.

(b) You may apply for permission to engage in activities otherwise prohibited or restricted by the sections listed in paragraph (a) of this section. You may apply to the authorized official responsible for the area in which your activity is to take place, and this authorized official may grant, deny, or establish conditions or limitations on this permission.

(c) You must pay all required fees and properly display applicable permits, passes, or receipts.

(d) You must not violate the terms and conditions of a permit issued by an authorized official. Any such violation is prohibited and may result in suspension or revocation of the permit, or other penalties as provided in subpart F of this part 423, or both.

(e) You must, upon request by a law enforcement officer, security guard, or other government employee or agent acting within the scope of their official duties, display any permit authorizing your presence or activity on Reclamation facilities, lands, and waterbodies.

Subpart E—Special Use Areas

§ 423.60 How special use areas are designated.

(a) After making a determination under paragraph (b) of this section, an authorized official may:

(1) Establish special use areas within Reclamation facilities, lands, or waterbodies for application of reasonable schedules of visiting hours; public use limits; and other conditions, restrictions, allowances, or prohibitions on particular uses or activities that vary from the provisions of subpart C of this part 423, except § 423.28; and

(2) From time to time revise the boundaries of a previously designated special use area and revise or terminate previously imposed schedules of visiting hours; public use limits; and other conditions, restrictions, allowances, or prohibitions on a use or activity.

(b) Before taking action under paragraph (a) of this section, an authorized official must make a determination that action is necessary for:

(1) The protection of public health and safety;

(2) The protection and preservation of cultural and natural resources;

(3) The protection of environmental and scenic values, scientific research, the security of Reclamation facilities,

the avoidance of conflict among visitor use activities; or

(4) Other reasons in the public interest.

(c) An authorized official establishing a special use area must document in writing the determination described in paragraph (b) of this section. Such documentation must occur before the action, except in emergencies or situations of immediate need as described in § 423.61(c), in which case the documentation is required within 30 days after the date of the action. Reclamation will make documents produced under this section available to the public upon request except where such disclosure could compromise national or facility security, or human safety.

§ 423.61 Notifying the public of special use areas.

When establishing, revising, or terminating a special use area, Reclamation must notify the public as required by this section.

(a) *What notices must contain.* The notice must specify: (1) The location of the special use area; and

(2) The public use limits, conditions, restrictions, allowances, or prohibitions on uses and activities that are to be applied to the area or that are to be revised or terminated.

(b) *How notice must be made.* Reclamation must notify the public at least 15 days before the action takes place by one or more of the following methods:

(1) Signs posted at conspicuous locations, such as normal points of entry and reasonable intervals along the boundary of the special use area;

(2) Maps available in the local Reclamation office and other places convenient to the public;

(3) Publication in a newspaper of general circulation in the affected area; or

(4) Other appropriate methods, such as the use of electronic media, brochures, and handouts.

(c) *When notice may be delayed.*

(1) Notice under this section may be delayed in an emergency or situation of immediate need where delaying designation, revision, or termination of a special use area would result in significant risk to:

(i) National security;

(ii) The safety or security of a Reclamation facility, Reclamation employees, or the public; or

(iii) The natural or cultural environment.

(2) If the exception in paragraph (c)(1) of this section applies, Reclamation must comply with paragraph (b) of this section within 30 days after the effective date of the designation.

(3) Failure to meet the notice deadlines in paragraphs (b) or (c)(2) of this section will not invalidate an action, so long as Reclamation meets the remaining notification requirements of this section.

(d) *When advance notice is not required.* Advance notice as described in paragraph (b) of this section is not required if all the following conditions are met:

(1) The action will not result in a significant change in the public use of the area;

(2) The action will not adversely affect the area's natural, esthetic, scenic, or cultural values;

(3) The action will not require a long-term or significant modification in the resource management objectives of the area; and

(4) The action is not highly controversial.

§ 423.62 Reservations for public use limits.

To implement a public use limit, an authorized official may establish a registration or reservation system.

§ 423.63 Existing special use areas.

Areas where rules were in effect on April 17, 2006 that differ from the rules set forth in subpart C are considered existing special use areas, and such differing rules remain in effect to the extent allowed by subpart A, and to the extent they are consistent with § 423.28. For those existing special use areas, compliance with §§ 423.60 through 423.62 is not required until the rules applicable in those special use areas are modified or terminated.

Subpart F—Violations and Sanctions

§ 423.70 Violations.

(a) When at, in, or on Reclamation facilities, lands, or waterbodies, you must obey and comply with:

(1) Any closure orders established under subpart B of this part 423;

(2) The regulations in subpart C of this part 423;

(3) The conditions established by any permit issued under subpart D of this part 423; and

(4) The regulations established by an authorized official in special use areas under subpart E of this part 423.

(b) Violating any use or activity prohibition, restriction, condition, schedule of visiting hours, or public use limit established by or under this part 423 is prohibited.

(c) Any continuous or ongoing violation of these regulations constitutes a separate violation for each calendar day in which it occurs.

§ 423.71 Sanctions.

Under section (1)(a) of Public Law 107–69, you are subject to a fine under chapter 227, subchapter C of title 18 United States Code (18 U.S.C. 3571), or can be imprisoned for not more than 6 months, or both, if you violate:

(a) The provisions of this part 423; or

(b) Any condition, limitation, closure, prohibition on uses or activities, or public use limits, imposed under this part 423.

PART 424—REGULATIONS PERTAINING TO STANDARDS FOR THE PREVENTION, CONTROL, AND ABATEMENT OF ENVIRONMENTAL POLLUTION OF CONCONULLY LAKE AND CONCONULLY RESERVOIR, OKANOGAN COUNTY, WASH.

§ 424.1 Regulations.

Pursuant to the provisions of Article 34 and 25 of repayment contract I1r–1534, dated September 20, 1948, between the United States and the Okanogan Irrigation District, it is ordered as follows:

The Okanogan Irrigation District shall require that all recipients of cabinsite and recreation resort leases on Federal lands situated on Conconully Lake (formerly Salmon Lake) and Conconully Reservoir, Okanogan County, Wash., comply with applicable Federal, state and local laws, rules and regulations pertaining to water quality standards and effluent limitations for the discharge of pollutants into said reservoirs, including county regulations governing subsurface waste disposal systems.

(The Reclamation Act of June 17, 1902, as amended and supplemented, Articles 34, and 25 of the Repayment Contract I1r–1534 dated Sept. 20, 1948, between the United States and the Okanagon Irrigation District)

[42 FR 60144, Nov. 25, 1977]

PART 426—ACREAGE LIMITATION RULES AND REGULATIONS

Sec.

426.1 Purpose.
426.2 Definitions.
426.3 Conformance to the discretionary provisions.
426.4 Attribution of land.
426.5 Ownership entitlement.
426.6 Leasing and full-cost pricing.
426.7 Trusts.
426.8 Nonresident aliens and foreign entities.
426.9 Religious or charitable organizations.
426.10 Public entities.
426.11 Class 1 equivalency.
426.12 Excess land.
426.13 Excess land appraisals.
426.14 Involuntary acquisition of land.
426.15 Commingling.
426.16 Exemptions and exclusions.
426.17 Small reclamation projects.
426.18 Landholder information requirements.
426.19 District responsibilities.
426.20 Assessment of administrative costs.
426.21 Interest on underpayments.
426.22 Public participation.
426.23 Recovery of operation and maintenance (O&M) costs.
426.24 Reclamation decisions and appeals.
426.25 Reclamation audits.
426.26 Severability.

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 553; 16 U.S.C. 590z–11; 31 U.S.C. 9701; and 32 Stat. 388 and all acts amendatory thereof or supplementary thereto including, but not limited to, 43 U.S.C. 390aa to 390zz–1, 43 U.S.C. 418, 43 U.S.C. 423 to 425b, 43 U.S.C. 431, 434, 440, 43 U.S.C. 451 to 451k, 43 U.S.C. 462, 43 U.S.C. 485 to 485k, 43 U.S.C. 491 to 505, 43 U.S.C. 511 to 513, and 43 U.S.C. 544.

SOURCE: 61 FR 66805, Dec. 18, 1996, unless otherwise noted.

§ 426.1 Purpose.

These rules and regulations implement certain provisions of Federal reclamation law that address the ownership and leasing of land on Federal Reclamation irrigation projects and the pricing of Federal Reclamation project irrigation water, and establish terms and conditions for the delivery of Federal Reclamation project irrigation water.

§ 426.2 Definitions.

As used in these rules:

Acreage limitation entitlements mean the ownership and nonfull-cost entitlements.

Acreage limitation provisions mean the ownership limitations and pricing restrictions specified in Federal reclamation law, including but not limited to, Sections 203(b), 204, and 205 of the Reclamation Reform Act of 1982 (43 U.S.C. 390aa *et seq.*).

Acreage limitation status means whether a landholder is a qualified recipient, limited recipient, or prior law recipient.

Commissioner means the Commissioner of the Bureau of Reclamation, U.S. Department of the Interior.

Compensation rate means a water rate applied, in certain situations, to water delivery to ineligible land that is not discovered until after the delivery has taken place. The compensation rate is equal to the established full-cost rate that would apply to the landholder if the landholder was to receive irrigation water on land that exceeded a nonfull-cost entitlement.

Contract means any repayment or water service contract or agreement between the United States and a district providing for the payment to the United States of construction charges and normal operation, maintenance, and replacement costs under Federal reclamation law, even if the contract does not specifically identify the portion of the payment that is to be attributed to operation and maintenance and that portion that is to be attributed to construction. This definition includes contracts made in accordance with the Distribution System Loans Act, as amended (43 U.S.C. 421).

Contract rate means the assessment, as set forth in a contract, that is to be paid by a district to the United States, and recomputed if necessary on a per acre or per acre foot basis.

Dependent means any natural person within the meaning of the term dependent in the Internal Revenue Code of 1954 (26 U.S.C. 152) and any subsequent amendments.

Direct when used in connection with the terms landholder, landowner, lessee, lessor, or owner, means that the party is the owner of record or holder of title, or the lessee of a land parcel, as appropriate. However, landholdings of joint tenants and tenants-in-common will not be considered direct under these regulations.

Discretionary provisions refer to Sections 390cc through 390hh, except for 390cc(b), of the Reclamation Reform Act of 1982 (43 U.S.C. 390aa *et seq.*).

District means any individual or any legal entity established under State law that has entered into a contract or can potentially enter into a contract with the United States for irrigation water service through federally developed or improved water storage and/or distribution facilities.

Eligible, except where otherwise provided, means permitted to receive an irrigation water supply from a Reclamation project under applicable Federal reclamation law.

Entity, *see* definition of *legal entity*.

Excess land means nonexempt land that is in excess of a landowner's maximum ownership entitlement under the applicable provisions of Federal reclamation law.

Exempt, except where otherwise provided, means not subject to the acreage limitation provisions.

Extended recordable contract means a recordable contract whose term was extended due to moratoriums established in 1976 and 1977 on the sale of excess land.

Full cost or *full-cost rate* means an annual rate established by Reclamation that amortizes the expenditures for construction properly allocable to irrigation facilities in service, including all operation and maintenance deficits funded, less payments, over such periods as may be required under Federal reclamation law, or applicable contract provisions. Interest will accrue on both the construction expenditures and

funded operation and maintenance deficits from October 12, 1982, on costs outstanding at that date, or from the date incurred in the case of costs arising subsequent to October 12, 1982. The full-cost rate includes actual operation, maintenance, and replacement costs required under Federal reclamation law.

Full-cost charge means the full-cost rate less the actual operation, maintenance, and replacement costs required under Federal reclamation law.

Indirect, when used in connection with the terms landholder, landowner, lessee, lessor or owner, means that such party is not the owner of record or holder of title, or the lessee of a land parcel, but that such party has a beneficial interest in the legal entity that is the owner of record or holder of title, or the lessee of a land parcel. Landholdings of joint tenants and tenants-in-common will be considered indirect under these regulations. A security interest held by lenders, who are not otherwise considered a landholder of the land in question, in a legal entity or in a land parcel will not be considered an indirect interest or a beneficial interest for purposes of these regulations.

Individual means any natural person, including his or her spouse, and including other dependents; provided that, under prior law, the term individual does not include a natural person's spouse or dependents.

Ineligible, except where otherwise provided, means not permitted to receive an irrigation water supply under applicable Federal reclamation law regardless of the rate paid for such water.

Intermediate entity means an entity that is a part owner of another entity and in turn is owned by others, either another entity or individuals.

Involuntary acquisition means land that is acquired through an involuntary foreclosure or similar involuntary process of law, conveyance in satisfaction of a debt (including, but not limited to, a mortgage, real estate contract or deed of trust), inheritance, or devise.

Irrevocable election means the execution of the legal instrument that a landholder subject to prior law provisions submits to become subject to the discretionary provisions of Federal reclamation law.

Irrevocable elector means a landholder who makes an irrevocable election to conform to the discretionary provisions of Federal reclamation law.

Irrigable land means land so classified by Reclamation under a specific project plan for which irrigation water is, can be, or is planned to be provided, and for which facilities necessary for sustained irrigation are provided or are planned to be provided.

Irrigation land means any land receiving water from a Reclamation project facility for irrigation purposes in a given water year, except for land that has been specifically exempted by statute or administrative action from the acreage limitation provisions of Federal reclamation law.

Irrigation water means water made available for agricultural purposes from the operation of Reclamation project facilities pursuant to a contract with Reclamation.

Landholder means a party that directly or indirectly owns or leases nonexempt land.

Landholding means the total acreage of nonexempt land directly or indirectly owned or leased by a landholder.

Lease means any arrangement between a landholder (the lessor) and another party (the lessee) under which the economic risk and the use or possession of the lessor's land is partially or wholly transferred to the lessee. If a management arrangement or consulting agreement is one in which the manager or consultant performs a service for the landholder for a fee, but does not assume the economic risk in the farming operation, and the landholder retains the right to the use and possession of the land, is responsible for payment of the operating expenses, and is entitled to receive the profits from the farming operation, then the agreement or arrangement will not be considered to be a lease.

Legal entity or entity for the purpose of establishing application of the acreage limitation entitlements means, but is not limited to, corporations, partnerships, organizations, and any business or property ownership arrangements such as joint tenancies and tenancies-in-common. For purposes of the

information requirements specified in § 426.18 only, trusts will be considered to be legal entities.

Limited recipient means any legal entity established under State or Federal law benefiting more than 25 natural persons. In order to become limited recipients, legal entities must be subject to the discretionary provisions through either district contract action or irrevocable election.

Nondiscretionary provisions means sections 390cc(b) and 390ii through 390zz 1 of the RRA.

Nonexempt land means either irrigation land or irrigable land that is subject to the acreage limitation provisions. Areas used for field roads, farm ditches and drains, tailwater ponds, temporary equipment storage, and other improvements subject to change at will by the landowner, are included in the nonexempt acreage. Areas occupied by and currently used for homesites, farmstead buildings, and corollary permanent structures such as feedlots, equipment storage yards, permanent roads, permanent ponds, and similar facilities, together with roads open for unrestricted use by the public are excluded from nonexempt acreage.

Nonfull-cost entitlement means the maximum acreage a landholder may irrigate with irrigation water at a nonfull-cost rate.

*Nonfull-cost rate*means any water rate other than the full-cost rate. Nonfull-cost rates are paid for irrigation water made available to land in a landholder's nonfull-cost entitlement.

Nonproject water means water from sources other than Reclamation project facilities.

Nonresident alien means any natural person who is neither a citizen nor a resident alien of the United States.

Operation and maintenance costs or *O&M costs* mean all direct charges and overhead costs incurred by the United States after the date that Reclamation has declared a project, or a part thereof, substantially complete to operate, maintain, provide replacements of, administer, manage, and oversee project facilities and lands.

Ownership entitlement means the maximum acreage a landholder may directly or indirectly own and irrigate with irrigation water.

Part owner means an individual or legal entity that has a beneficial interest in a legal entity, but does not own 100 percent of that legal entity. A lender, who is not otherwise considered a landholder of the land in question, with a security interest in a legal entity or land owned by a legal entity shall not be considered a part owner under these regulations.

Prior law means the Reclamation Act of 1902, and acts amendatory and supplementary thereto (43 U.S.C. 371 *et seq.*) that were in effect prior to the enactment of the RRA, and as amended by the RRA.

Prior law recipient means an individual or legal entity that has not become subject to the discretionary provisions.

Project means any irrigation project authorized by Federal reclamation law, or constructed by the United States pursuant to such law, or in connection with a repayment or water service contract executed by the United States pursuant to such law, or any project constructed by the United States through Reclamation for the reclamation of lands. The term project includes any incidental features of an irrigation project.

Public entity means States, political subdivisions or agencies thereof, and agencies of the Federal Government.

Qualified recipient means an individual who is a citizen or a resident alien of the United States or any legal entity established under State or Federal law that benefits 25 natural persons or less. A married couple may become a qualified recipient if either spouse is a United States citizen or resident alien. In order to become qualified recipients, individuals and legal entities must be subject to the discretionary provisions through either district contract action or irrevocable election.

Reclamation means the Bureau of Reclamation, U.S. Department of the Interior.

Reclamation fund means a special fund established by the Congress under the Reclamation Act of 1902, as amended, for the receipts from the sale of public lands and timber, proceeds from the Mineral Leasing Act, and certain other revenues.

Recordable contract means a written contract between Reclamation and a landowner capable of being recorded under State law, providing for the disposition of land held by that landowner in excess of the ownership limitations of Federal reclamation law.

Resident alien means any natural person within the meaning of the term as defined in the Internal Revenue Act of 1954 (26 U.S.C. 7701) as it may be amended.

RRA means the Reclamation Reform Act of 1982, Public Law 97–09293, Title II, 96 Stat. 1263, (43 U.S.C. 390aa *et seq.*) as amended.

Secretary means Secretary of the U.S. Department of the Interior.

Standard certification or reporting forms mean forms on which landholders provide complete information about the directly and indirectly owned and leased nonexempt lands in their landholdings.

Water year means a 365-day period (or 366 days during leap years) whose start date is specified within a contract between Reclamation and the district or through some other agreement between Reclamation and the district.

Westwide means the 17 Western States where Reclamation projects are located, namely: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

§ 426.3 Conformance to the discretionary provisions.

(a) *Districts that are subject to the discretionary provisions.* Unless an exemption in § 426.16 applies, a district is subject to the discretionary provisions if:

(1) The district executes a new or renewed contract with Reclamation after October 12, 1982. The discretionary provisions apply as of the execution date of the new or renewed contract;

(2) The district amends its contract to conform to the discretionary provisions:

(i) A district may ask Reclamation to amend its contract to conform to the discretionary provisions;

(ii) The district's request to Reclamation must be accompanied by a duly adopted resolution dated and signed by the governing board of the district obligating the district to take, in a timely manner, actions required by applicable State law to amend its contract; and

(iii) If the requirements of paragraphs (a)(2)(i) and (ii) of this section are met, then Reclamation will amend the contract, and the district becomes subject to the discretionary provisions from the date the district's request was submitted to Reclamation;

(iv) If the district only wants to amend its contracts to become subject to the discretionary provisions, the amendments need only be to the extent required to conform to the discretionary provisions; or

(3) The district amends its contract after October 12, 1982, to provide the district with additional or supplemental benefits. The amendment must also include the district's conformance to the discretionary provisions:

(i) The discretionary provisions apply as of the date that Reclamation executes the contract amendment;

(ii) For purposes of application of the acreage limitation provisions Reclamation considers a contract amendment as providing additional or supplemental benefits if that amendment:

(A) Requires the United States to expend significant funds;

(B) Requires the United States to commit significant additional water supplies; or

(C) Substantially modifies contract payments due the United States; and

(iii) For purposes of application of the acreage limitation provisions Reclamation does not consider the following contract actions as providing additional or supplemental benefits:

(A) The construction of facilities for conveyance of irrigation water for which districts contracted on or before October 12, 1982;

(B) Minor drainage and construction work contracted under a prior repayment or water service contract;

(C) Operation and maintenance (O&M) amendments;

(D) The deferral of payments provided the deferral is for a period of 12 months or less;

(E) A temporary supply of irrigation water as set forth in § 426.16(d);

(F) The transfer of water on an annual basis from one district to another, provided that:

(*1*) Both districts have contracts with the United States;

(*2*) The rate paid by the district receiving the transferred water:

(*i*) Is the higher of the applicable water rate for either district;

(*ii*) Does not result in any increased operating losses to the United States above those that would have existed in the absence of the transfer; and

(*iii*) Does not result in any decrease in capital repayment to the United States below what would have existed in the absence of the transfer; and

(*3*) The recipients of the transferred water pay a rate for the water that is at least equal to the actual O&M costs or the full-cost rate in those cases where, for whatever reason, the recipients would have been subject to such costs had the water not been considered transferred water;

(G) Contract actions pursuant to the Reclamation Safety of Dams Act of 1978, as amended (43 U.S.C. 506); or

(H) Other contract actions that Reclamation determines do not provide additional or supplemental benefits.

(b) *Districts that are subject to prior law.* Any district which had a contract in force on October 12, 1982, that required landholders to comply with the ownership limitations of Federal reclamation law remains subject to prior law unless and until the district:

(1) Enters into a new or renewed contract requiring it to conform to the discretionary provisions, as provided in paragraph (a)(1) of this section;

(2) Makes a contract action requiring conformance to the discretionary provisions, as provided in paragraphs (a)(2) or (3) of this section; or

(3) Becomes exempt, as provided in § 426.16.

(c) *Standard RRA contract article.* (1) New or renewed contracts executed after October 12, 1982, or contracts that are amended to conform to the discretionary provisions before or on the effective date of these rules must include the following clause:

The parties agree that the delivery of irrigation water or use of Federal facilities pursuant to this contract is subject to reclamation law, as amended and supplemented, including but not limited to the Reclamation Reform Act of 1982 (43 U.S.C. 390aa *et seq.*).

(2) New or renewed contracts executed after the effective date of these rules, or contracts that are amended to conform to the discretionary provisions after the effective date of these rules must include the following clause:

The parties agree that the delivery of irrigation water or use of Federal facilities pursuant to this contract is subject to Federal reclamation law, including but not limited to the Reclamation Reform Act of 1982 (43 U.S.C. 390aa *et seq.*), as amended and supplemented, and the rules and regulations promulgated by the Secretary of the Interior under Federal reclamation law.

(d) *The effect of a master contractor's and subcontractor's actions to conform to the discretionary provisions.* If a district provides irrigation water to other districts through subcontracts and the master contracting district is subject to:

(1) The discretionary provisions, then all subcontracting districts who are entitled to receive irrigation water must also conform to the discretionary provisions; or

(2) Prior law, then the subcontracting district can amend its subcontract to conform to the discretionary provisions without subjecting the master contractor or any other subcontractor of the master contractor to the discretionary provisions. If a subcontract that does not include the United States as a party is amended to conform to the discretionary provisions, or the subcontract is a new or renewed contract executed after October 12, 1982, then the amended, new, or renewed subcontract must include the United States as a party.

(e) *The effect on a landholder's status when a district becomes subject to the discretionary provisions.* If a district conforms to the discretionary provisions and the landholder is:

(1) Other than a nonresident alien or a legal entity that is not established under State or Federal law, and is:

(i) A direct landholder in that district, then the landholder becomes subject to the discretionary provisions and the associated acreage limitation status will apply in any district in which the landholder holds land; or

(ii) Only an indirect landholder in that and all other discretionary provisions districts, then the landholder's acreage limitation status is not affected. Such a landholder can receive irrigation water as a prior law recipient on indirectly held lands in districts that conform to the discretionary provisions.

(2) A nonresident alien, or legal entity not established under State or Federal law, and the landholder is:

(i) A direct landholder, then since such a landholder cannot become subject to, and has no eligibility under the discretionary provisions:

(A) All direct landholdings in districts that conform to the discretionary provisions become ineligible; and

(B) Directly held land that becomes ineligible as a result of the district's action to conform to the discretionary provisions may be placed under recordable contract as subject to the conditions specified in § 426.12; or

(ii) An indirect landholder, then such a landholder may receive irrigation water on land indirectly held in districts conforming to the discretionary provisions, with the entitlements for such landholder determined as specified in § 426.8.

(f) *Landholder actions to conform to the discretionary provisions.* (1) In the absence of a district's action to conform to the discretionary provisions, United States citizens, resident aliens, or legal entities established under State or Federal law, can elect to conform to the discretionary provisions by executing an irrevocable election. Upon execution of an irrevocable election:

(i) The elector's entire landholding in all districts shall be subject to the discretionary provisions;

(ii) The election shall be binding on the elector and his or her landholding, but will not be binding on subsequent landholders of that land;

(iii) An irrevocable election by a legal entity is binding only upon that entity and not on the part owners of that entity;

(iv) An irrevocable election by a part owner of a legal entity binds only the part owner making the election and not the entity or other part owners of the entity; and

(v) An irrevocable election by a lessor does not affect the status of a lessee, and vice versa. However, the eligibility and entitlement of neither a lessor nor a lessee may be enhanced through leasing.

(2) A landholder makes an irrevocable election by completing a Reclamation issued irrevocable election form:

(i) The elector's original irrevocable election form must be filed by the district with Reclamation and must be accompanied by a completed certification form, as specified in § 426.18;

(ii) The elector must file copies of the irrevocable election and certification forms concurrently with each district where the elector holds nonexempt land;

(iii) Reclamation will prepare a letter advising the recipient of the approval or disapproval of the election. Reclamation will base approval upon whether the election form and the accompanying certification form(s) indicate the elector's satisfaction of the various requirements of Federal reclamation law and these regulations;

(iv) If the election is approved, the letter of approval, with a copy of the irrevocable election form and the original certification form(s), will be sent by Reclamation to each district where the elector holds land;

(v) The district(s) shall retain the forms; and

(vi) If the irrevocable election is disapproved, the landholder and the district will be advised by letter along with the reasons for disapproval.

(3) A landholder that only holds land indirectly in a district that has conformed to the discretionary provisions, other than a nonresident alien or a legal entity not established under State or Federal law, may make an irrevocable election also by simply submitting certification forms to all districts where the landholder holds land subject to the acreage limitation provisions. An election made in this manner is binding in all districts in which such elector holds land.

(g) *District reliance on irrevocable election form information.* The district is entitled to rely on the information contained in the irrevocable election form. The district does not need to make an

independent investigation of the information.

(h) *Time limits for amendments or elections to conform to the discretionary provisions.* Reclamation will allow at anytime a landholder to elect or a district to amend its contract to conform to the discretionary provisions. An irrevocable election that was made after April 12, 1987, but on or before May 13, 1987, shall be considered effective as of April 12, 1987.

§ 426.4 Attribution of land.

(a) *Prohibition on increasing acreage limitation entitlements.* Except as specifically provided in these rules, a landholder cannot increase acreage limitation entitlements or eligibility by acquiring or holding a beneficial interest in a legal entity. Similarly, the acreage limitation status of an individual or legal entity that holds or has acquired a beneficial interest in another legal entity will not be permitted to enlarge the latter legal entity's acreage limitation entitlements or eligibility.

(b) *Attribution of owned land.* For purposes of determining acreage to be counted against acreage limitation entitlements, acreage will be attributed to all:

(1) Direct landowners in proportion to the direct beneficial interest the landowners own in the land; and

(2) Indirect landowners in proportion to the indirect beneficial interest they own in the land.

(c) *Attribution of leased land.* Leased land will be attributed to the direct and indirect landowners as well as to the direct and indirect lessees in the same manner as described in paragraphs (b) and (d) of this section.

(d) *Attribution of land held through intermediate entities.* If land is held by a direct landholder and a series of indirect landholders, Reclamation will attribute that land to the acreage limitation entitlements of the direct landholder and each indirect landholder in proportion to each landholder's beneficial interest in the entity that directly holds the land.

(e) *Leasebacks.* Any land a landholder directly or indirectly owns and that is directly or indirectly leased back will only count once against that particular landholder's nonfull-cost entitlement.

(f) *Effect on an entity of attribution to part owners.* For purposes of determining eligibility, the entire landholding will be attributed to all the direct and indirect landholders. If the interests in a legal entity are:

(1) Undivided, then all of the indirect part owners must be eligible in order for the entity to be eligible; or

(2) Divided, in such a manner that specific parcels are attributable to each indirect landholder, then the entity may qualify for eligibility on those portions of the landholding not attributable to any part owner who is ineligible.

§ 426.5 Ownership entitlement.

(a) *General.* Except as provided in §§ 426.12 and 426.14, all nonexempt land directly or indirectly owned by a landholder counts against that landholder's ownership entitlement. In addition, land owned or controlled by a public entity that is leased to another party counts against the lessee's ownership entitlement, as specified in § 426.10.

(b) *Qualified recipient ownership entitlement.* A qualified recipient is entitled to receive irrigation water on a maximum of 960 acres of owned nonexempt land, or the Class 1 equivalent thereof. This entitlement applies on a westwide basis.

(c) *Limited recipient ownership entitlement.* A limited recipient is entitled to receive irrigation water on a maximum of 640 acres of owned nonexempt land, or the Class 1 equivalent thereof. This entitlement applies on a westwide basis.

(d) *Prior law recipient ownership entitlement.* (1) Ownership entitlements for prior law recipients are determined by whether the recipient is one individual or a married couple, and for entities by the type of entity, as follows:

(i) An individual subject to prior law is entitled to receive irrigation water on a maximum of 160 acres of owned nonexempt land;

(ii) Married couples who hold equal interests are entitled to receive irrigation water on a maximum of 320 acres of jointly owned nonexempt land;

(iii) Surviving spouses until remarriage are entitled to receive irrigation

water on that land owned jointly in marriage up to a maximum of 320 acres of owned nonexempt land. If any of that land should be sold, the applicable ownership entitlement would be reduced accordingly, but not to less than 160 acres of owned nonexempt land;

(iv) Children are each entitled to receive irrigation water on a maximum of 160 acres of owned nonexempt land, regardless of whether they are independent or dependent;

(v) Joint tenancies and tenancies-in-common subject to prior law are entitled to receive irrigation water on a maximum of 160 acres of owned nonexempt land per tenant, provided each tenant holds an equal interest in the tenancy;

(vi) Partnerships subject to prior law are entitled to receive irrigation water on a maximum of 160 acres of owned nonexempt land per partner if the partners have separable and equal interests in the partnership and the right to alienate that interest. Partnerships where each partner does not have a separable interest and the right to alienate that interest are entitled to receive irrigation water on a maximum of 160 acres of nonexempt land owned by the partnership; and

(vii) All corporations subject to prior law are entitled to receive irrigation water on a maximum of 160 acres of owned nonexempt land.

(2) Prior law recipient ownership entitlements specified in this section apply on a westwide basis unless the land was acquired by the current owner on or before December 6, 1979. For land acquired by the current owner on or before that date, prior law ownership entitlements apply on a district-by-district basis.

(3) For those entities where an equal interest held by the part owners would result in a 160-acre per part owner entitlement for the entity, if the part owners interests are not equal then the entitlement of the entity will be determined by the relative interest held in the entity by each part owner.

§ 426.6 Leasing and full-cost pricing.

(a) *Conditions that a lease must meet.* Districts can make irrigation water available to leased land only if the lease meets the following requirements. Land that is leased under a lease instrument that does not meet the following requirements will be ineligible to receive irrigation water until the lease agreement is terminated or modified to satisfy these requirements.

(1) The lease is in writing;

(2) The lease includes the effective date and term of the lease, the length of which must be:

(i) 10 years or less, including any exercisable options; however, for perennial crops with an average life longer than 10 years, the term may be equal to the average life of the crop as determined by Reclamation, and

(ii) In no case may the term of a lease exceed 25 years, including any exercisable options;

(3) The lease includes a legal description, that is at least as detailed as what is required on the standard certification and reporting forms, of the land subject to the lease;

(4) Signatures of all parties to the lease are included;

(5) The lease includes the date(s) or conditions when lease payments are due and the amounts or the method of computing the payments due;

(6) The lease is available for Reclamation's inspection and Reclamation reviews and approves all leases for terms longer than 10 years; and

(7) If either the lessor or the lessee is subject to the discretionary provisions, the lease provides for agreed upon payments that reflect the reasonable value of the irrigation water to the productivity of the land; except

(8) Leases in effect as of the effective date of these regulations do not need to meet the criteria specified under paragraphs (a) (3) and (4) of this section, unless and until such leases are renewed.

(b) *Nonfull-cost entitlements.* (1) The nonfull-cost entitlement for qualified recipients is 960 acres, or the Class 1 equivalent thereof.

(2) The nonfull-cost entitlement for limited recipients that received irrigation water on or before October 1, 1981, is 320 acres or the Class 1 equivalent thereof. The nonfull-cost entitlement for limited recipients that did not receive irrigation water on or prior to October 1, 1981, is zero.

(3) The nonfull-cost entitlement for prior law recipients is equal to the recipient's maximum ownership entitlement as set forth in § 426.5(d). However, for the purpose of computing the acreage subject to full cost, all owned and leased irrigation land westwide must be included in the computation.

(c) *Application of the nonfull-cost and full-cost rates.* (1) A landholder may irrigate at the nonfull-cost rate directly and indirectly held acreage equal to his or her nonfull-cost entitlement.

(2) If a landholding exceeds the landholder's nonfull-cost entitlement, the landholder must pay the appropriate full-cost rate for irrigation water delivered to acreage that equals the amount of leased land that exceeds that entitlement.

(3) In the case of limited recipients, a landholder does not have to lease land to exceed a nonfull-cost entitlement, since the nonfull-cost entitlement is less than the ownership entitlement. Therefore, limited recipients must pay the appropriate full-cost rate for irrigation water delivered to any acreage that exceeds their nonfull-cost entitlement.

(d) *Types of lands that count against the nonfull-cost entitlement.* (1) All directly and indirectly owned irrigation land and irrigation land directly or indirectly leased for any period of time during 1-water year counts towards a landholder's nonfull-cost entitlement, except:

(i) Involuntarily acquired land, as provided in §§ 426.12 and 426.14; and

(ii) Land that is leased for incidental grazing or similar purposes during periods when the land is not receiving irrigation water.

(2) Reclamation's process for determining if a nonfull-cost entitlement has been exceeded is as follows:

(i) All land counted toward a landholder's nonfull-cost entitlement will be counted on a cumulative basis during any 1-water year;

(ii) Once a landholder's nonfull-cost entitlement is met in a given water year, any additional eligible land may be irrigated only at the full-cost rate; and

(iii) Irrigation land will be counted towards nonfull-cost entitlements on a westwide basis, even for prior law recipients, regardless of the date of acquisition.

(e) *Selection of nonfull-cost land.* (1) A landholder that has exceeded his or her nonfull-cost entitlement may select in each water year, from his or her directly held irrigation land, the land that can be irrigated at a nonfull-cost rate and the land that can be irrigated only at the full-cost rate. Selections for full-cost or nonfull-cost land may include:

(i) Leased land;

(ii) Nonexcess owned land;

(iii) Land under recordable contract, unless that land is already subject to application of the full-cost rate under an extended recordable contract; or

(iv) A combination of all three.

(2) Once a landholder has received irrigation water on a given land parcel during a water year, the selection of that parcel as full cost or nonfull-cost is binding until the landholder has completed receiving irrigation water westwide for that water year.

(f) *Applicability of a full-cost selection to an owner or lessee.* If a landowner or lessee should select land as subject to full-cost pricing, then that land can receive irrigation water only at the full-cost rate, regardless of eligibility of the other party to receive the irrigation water at the nonfull-cost rate.

(g) *Subleased land.* Land that is subleased (the lessee transfers possession of the land to a sublessee) will be attributed to the landholding of the sublessee and not to the lessee.

(h) *Calculating full-cost charges.* Reclamation will calculate a district's full-cost charge using accepted accounting procedures and under the following conditions.

(1) The full-cost charge does not recover interest retroactively before October 12, 1982. But, interest on the unpaid balance does accrue from October 12, 1982, where the unpaid balance equals the irrigation allocated construction costs for facilities in service plus cumulative federally funded O&M deficits, less payments.

(2) The full-cost charge will be determined:

(i) As of October 12, 1982, for contracts entered into before that date regardless of amendments to conform to the discretionary provisions; and

(ii) At the time of contract execution for new and renewed contracts entered into on or after October 12, 1982.

(3) For repayment contracts, the full-cost charge will fix equal annual payments over the amortization period. For water service contracts, the full-cost charge will fix equal payments per acre-foot of projected water deliveries over the amortization period.

(4) If there are additional construction expenditures, or if the cost allocated to irrigation changes, then a new full-cost charge will be determined.

(5) Reclamation will notify the respective districts of changes in the full-cost charge at the time the district is notified of other payments due the United States.

(6) In determining full-cost charges, the following factors will be considered:

(i) *Amortization period.* The amortization period for calculating the full-cost charge is the remaining balance of:

(A) For contracts entered into before October 12, 1982, the contract repayment period as of October 12, 1982;

(B) For contracts entered into on or after October 12, 1982, the contract repayment period;

(C) For water service contracts, the period from October 12, 1982, or the execution date of the contract, whichever is later, to the anticipated date of project repayment; and

(D) In cases where water services rates are designed to completely repay applicable Federal expenditures in a specific time period, that time period may be used as the amortization period for full-cost calculations related to these expenditures; but, in no case will the amortization period exceed the project payback period authorized by the Congress;

(ii) *Construction costs.* For determining full cost, construction costs properly allocable to irrigation are those Federal project costs for facilities in service that have been assigned to irrigation within the overall allocation of total project construction costs. Total project construction costs include all direct expenditures necessary to install or implement a project, such as:

(A) Planning;

(B) Design;

(C) Land;

(D) Rights-of-way;

(E) Water-rights acquisitions;

(F) Construction expenditures;

(G) Interest during construction; and

(H) When appropriate, transfer costs associated with services provided from other projects;

(iii) *Facilities in service.* Facilities in service are those facilities that are in operation and providing irrigation services;

(iv) *Operation and maintenance (O&M) deficits funded.* O&M deficits funded are the annual O&M costs including project-use pumping power allocated to irrigation that have been federally funded and that have not been paid by the district;

(v) *Payments received.* In calculating the payments that have been received, all receipts and credits applied to repay or reduce allocated irrigation construction costs in accordance with Federal reclamation law, policy, and applicable contract provisions will be considered. These may include:

(A) Direct repayment contract revenues;

(B) Net water service contract income;

(C) Contributions;

(D) Ad valorem taxes; and

(E) Other miscellaneous revenues and credits excluding power and municipal and industrial (M&I) revenues;

(vi) *Interest rates.* Interest rates to be used in calculating full-cost charges will be determined by the Secretary of the Treasury as follows:

(A) For irrigation water delivered to qualified recipients, limited recipients receiving water on or before October 1, 1981, and extended recordable contract land owned by prior law recipients, the interest rate for expenditures made on or before October 12, 1982, will be the greater of 7.5 percent per annum or the weighted average yield of all interest-bearing marketable issues sold by the Treasury during the fiscal year when the expenditures were made by the United States. The interest rate for expenditures made after October 12, 1982, will be the arithmetic average of:

(*1*) The computed average interest rate payable by the Treasury upon its outstanding marketable public obligations that are neither due nor callable

for redemption for 15 years from the date of issuance at the beginning of the fiscal year when the expenditures are made; and

(*2*) The weighted average yield on all interest-bearing marketable issues sold by the Treasury during the fiscal year preceding the fiscal year the expenditures are made;

(B) For irrigation water delivered to limited recipients not receiving irrigation water on or before October 1, 1981, and prior law recipients, except for land owned subject to extended recordable contract, the interest rate will be determined as of the fiscal year preceding the fiscal year the expenditures are made, except that the interest rate for expenditures made before October 12, 1982, will be determined as of October 12, 1982. The interest rate will be based on the arithmetic average of:

(*1*) The computed average interest rate payable by the Treasury upon its outstanding marketable public obligations that are neither due nor callable for redemption for 15 years from the date of issuance; and

(*2*) The weighted average yield on all interest-bearing marketable issues sold by the Treasury.

(C) Landholders who were prior law recipients and become subject to the discretionary provisions after April 12, 1987, are eligible for the full-cost interest rate specified in paragraph (h)(6)(vi)(A) of this section, unless they are limited recipients that did not receive irrigation water on or before October 1, 1981, in that case they remain subject to the full-cost interest rate specified in paragraph (h)(6)(vi)(B) of this section.

(i) *Direct and proportional charges for full-cost water*. In situations where water delivery charges are contractually or customarily levied on a per-acre basis, full-cost assessments will be made on a per-acre basis. In situations where water delivery charges are contractually or customarily levied on a per acre-foot basis, one of the following methods must be used to make full-cost assessments:

(1) Assessments will be based on the actual amounts of water used in situations where measuring devices are in use, to the satisfaction of Reclamation, to reasonably determine the amounts of irrigation water being delivered to full-cost and nonfull-cost land; or

(2) In situations where, as determined by Reclamation, measuring devices are not a reliable method for determining the amounts of water being delivered to full-cost and nonfull-cost land, then water charges must be based on the assumption that equal amounts of water per acre are being delivered to both types of land during periods when both types of land are actually being irrigated.

(j) *Disposition of revenues obtained through full-cost water pricing*—(1) *Legal deliveries*. If irrigation water has been delivered in compliance with Federal reclamation law and these regulations, then:

(i) That portion of the full-cost rate that would have been collected if the land had not been subject to full cost will be credited to the annual payments due under the district's contractual obligation;

(ii) Any O&M revenues collected over and above those required under the district's contract will be credited to the project O&M account; and

(iii) The remaining full-cost revenues will be credited to the Reclamation fund unless otherwise provided by law, with any capital component of the full-cost rate credited to project repayment, if applicable.

(2) *Illegal deliveries*. Revenues resulting from the assessment of compensation charges for illegal deliveries of irrigation water will be deposited into the Reclamation fund in their entirety, and will not be credited toward any contractual obligation, or O&M or repayment account of the district or project. For purposes of these regulations only, this does not include revenues from any charges that may be assessed by the district to cover district operation, maintenance, and administrative expenses.

§ 426.7 Trusts.

(a) *Definitions for purposes of this section:*

Grantor revocable trust means a trust that holds irrigable land or irrigation land that may be revoked at the discretion of the grantor(s), or terminated by the terms of the trust, and revocation or termination results in title to the

land held in trust reverting either directly or indirectly to the grantor(s).

Irrevocable trust means a trust that holds irrigable land or irrigation land and does not allow any individual, including the grantor or beneficiaries, the discretion to decide when or under what conditions the trust terminates, and that upon termination the title to the land held in trust transfers either directly or indirectly to a person(s) or entity(ies) other than the grantor(s).

Otherwise revocable trust means a trust that holds irrigable land or irrigation land and that may be revoked at the discretion of the grantor(s) or other parties, or terminated by the terms of the trust, and revocation or termination results in the title to the land held in trust transferring either directly or indirectly to a person(s) or entity(ies) other than the grantor(s).

(b) *Attribution of land held by a trust.* The acreage limitation entitlements of a trust are only limited by the acreage limitation entitlements of the trustees, grantors, or beneficiaries to whom land held by the trust must be attributed as provided for in § 426.4. The entitlements of the parties to whom trusted land is attributed are determined according to §§ 426.5, 426.6, and 426.8, and other applicable provisions of Federal reclamation law and these regulations. Reclamation attributes nonexempt land held by a trust to the following parties:

(1) For land held in an *irrevocable trust,* the land is attributed to the beneficiaries in proportion to their beneficial interest in the trust. However, this attribution is only made if the criteria listed in paragraphs (b)(1) (i) and (ii) of this section are met. If the trust fails to meet any portion of these criteria, Reclamation attributes the land held in the trust to the trustee.

(i) The trust is in written form and approved by Reclamation; and

(ii) The beneficiaries of the trust and the beneficiaries' respective interests are identified within the trust document.

(2) For land held in a *grantor revocable trust,* the land is attributed to the grantor according to the grantor's acreage limitation status and the land's eligibility immediately prior to its transfer to the trust. However, this attribution is only made if the criteria listed in paragraphs (b)(2) (i), (ii), (iii), and (iv) of this section are met. If the trust fails to meet any portion of these criteria, the land held in trust will be ineligible to receive irrigation water until all of the criteria are met. The only exception is if the trust's and grantor's standard certification or reporting forms indicate that the land held by the trust has been attributed to the trust's grantor(s).

(i) The trust meets the criteria specified in paragraph (b)(1) of this section;

(ii) The grantor(s) of all land held by the trust is (are) identified within the trust document;

(iii) The conditions under which the trust may be revoked or terminated are identified within the trust document; and

(iv) The recipient(s) of the trust land upon revocation or termination is (are) identified within the trust document.

(3) For land held in an *otherwise revocable trust,* the land is attributed to the beneficiaries in proportion to their beneficial interests in the trust. However, this attribution is only made if the trust meets the criteria specified in paragraph (b)(1) of this section and the trust meets the additional criteria specified in paragraph (b)(2) of this section.

(i) If Reclamation cannot determine who will hold the land in trust upon termination or revocation of the trust, or who is the grantor(s) of the land held in trust, then irrigation water will not be made available to the land held in trust until the trust satisfies the additional criteria listed in paragraph (b)(2) of this section.

(ii) If the trust fails to meet the criteria listed in paragraph (b)(1) of this section, but does meet the additional criteria listed in paragraphs (b)(2) (ii) through (iv) of this section, then the land is attributed to the trustee.

(c) *Class beneficiaries.* For purposes of identifying beneficiaries, a class of beneficiaries specified within the trust document will be acceptable, as long as the trust document is specific as to the beneficial interest to which each member of the class will be entitled and the members of the class are identifiable.

(1) Attribution during any given water year will be provided only to

class beneficiaries that are natural persons and established legal entities. For purposes of administering the acreage limitation provisions, attribution to unborn or deceased persons, or entities not yet established, will not be allowed.

(2) If a trust includes a class of beneficiaries to which land subject to the acreage limitation provisions will be attributed, the trustee and each of the beneficiaries will be required to submit standard certification or reporting forms annually. The submittal of verification forms, as provided in § 426.18(l), will not be applicable to such trusts.

(d) *Application of full-cost rate to land held by grantor revocable trusts.* If a grantor revocable trust that meets the criteria specified in paragraph (b)(2) of this section is revised by the grantor in a manner that precludes attribution of the land held in trust to the grantor:

(1) Before April 20, 1988, Reclamation will not assess full-cost rates for the land held by the revised trust for the period before it was revised; or

(2) On or after April 20, 1988, Reclamation will charge the full-cost rate for irrigation water delivered to any land held by the trust that exceeds the grantor's nonfull-cost entitlement, commencing December 23, 1987, until the trust agreement is revised to make it an irrevocable trust or an otherwise revocable trust.

§ 426.8 Nonresident aliens and foreign entities.

(a) *Definitions for purposes of this section:*

Domestic entity means a legal entity established under State or Federal law.

Foreign entity means a legal entity not established under State or Federal law.

(b) *Restriction on receiving irrigation water.* Notwithstanding any other provision of Federal reclamation law or these regulations, a nonresident alien or foreign entity that directly holds land in a district that is subject to the discretionary provisions is not eligible to receive irrigation water on such land. Nonresident aliens and foreign entities may hold land indirectly in discretionary districts and both directly and indirectly in prior law districts and receive irrigation water on such land, subject to their acreage limitation entitlements.

(c) *Entitlements for nonresident aliens and foreign entities.* Except as provided in paragraph (d) of this section, all nonresident aliens and foreign entities will be considered prior law recipients, and shall have entitlements and eligibility only as prior law recipients as specified in §§ 426.5(d) and 426.6(b)(3).

(d) *Exception to prior law entitlement application.* (1) If a nonresident alien is a citizen of or a foreign entity is established in a country that has one of the following treaties with the United States or is a member of the listed organization, then that nonresident alien or foreign entity will not be restricted to prior law entitlements, provided the eligible landholding subject to the acreage limitation provisions is held indirectly:

(i) Friendship, Commerce and Navigation Treaty;

(ii) Bilateral Investment Treaty;

(iii) North American Free Trade Agreement;

(iv) Canada-United States Free Trade Agreement; or

(v) Organization for Economic Cooperation and Development.

(2) Nonresident aliens and foreign entities that meet the criteria listed in paragraph (d)(1) of this section will be required to provide proof of citizenship or documentation certifying the country in which the entity in question was established. Districts will retain such documentation in the landholder's file.

(3) If a nonresident alien or foreign entity meets the criteria listed in paragraph (d)(1) of this section, and only holds eligible land subject to the acreage limitation provisions indirectly, then the nonresident alien may be treated as a United States citizen or the foreign entity may be treated as a domestic entity for purposes of application of the acreage limitation provisions for the land held indirectly.

(i) The nonresident alien or foreign entity may submit an irrevocable election to conform to the discretionary provisions as provided for in § 426.3(f). Conformance to the discretionary provisions through the submittal of a certification form will not be allowed as specified in § 426.3(f)(3).

(ii) Upon Reclamation's approval of the irrevocable election, a nonresident alien will be treated as having the ownership entitlement of a qualified recipient as described in § 426.5(b), for any land held indirectly. A foreign entity will be treated as a qualified recipient or a limited recipient as determined by the number of natural persons who are beneficiaries of the entity as specified by the definitions found in § 426.2, and the subsequent entitlement as provided in § 426.5(b) or (c), for any land held indirectly. The applicable nonfull-cost entitlements will be determined as described in § 426.6(b).

(iii) Reclamation will not approve irrevocable elections submitted by a nonresident alien or a foreign entity that holds any land directly in any prior law district.

(iv) Reclamation will not approve irrevocable elections submitted by a nonresident alien that is not a citizen of or foreign entity that has not been established in a country that has a treaty or international membership as specified in paragraph (d)(1) of this section.

§ 426.9 Religious or charitable organizations.

(a) *Definitions for purposes of this section:*

Central organization means the organization to which all subdivisions, such as parishes, congregations, chapters, etc., ultimately report.

Religious or charitable organization means an organization or each congregation, chapter, parish, school, ward, or similar subdivision of a religious or charitable organization that is exempt from paying Federal taxes under § 501 of the Internal Revenue Code of 1954, as amended.

(b) *Acreage limitation status of religious or charitable organizations that are subject to the discretionary provisions.* (1) Religious or charitable organizations or their subdivisions that are subject to the discretionary provisions have qualified recipient status, if:

(i) The organization's or subdivision's agricultural produce and proceeds from the sales of such produce are used only for charitable purposes;

(ii) The organization or subdivision, itself, operates the land; and

(iii) No part of the net earnings of the organization or subdivision accrues to the benefit of any private shareholder or individual.

(2) If Reclamation determines that a religious or charitable organization or any of its subdivisions does not meet the criteria listed in paragraph (b)(1) of this section, then:

(i) If the central organization has not met the criteria, Reclamation will treat the entire organization, including all subdivisions, as a single entity; or

(ii) If a subdivision has not met the criteria, only that subdivision and any subdivisions of it will be treated as a single entity and not the central organization or other subdivisions of the central organization; and

(iii) In order to ascertain the acreage limitation status, Reclamation determines the total number of members in both the organization that has not met the criteria and in any subdivisions that are under that organization. If Reclamation determines that total number equals:

(A) More than 25 members, then Reclamation treats that organization and every subdivision under that organization as a single legal entity with a limited recipient status; or

(B) 25 members or less, then Reclamation treats that organization and every subdivision under that organization as a single legal entity with a qualified recipient status.

(c) *Acreage limitation status of prior law religious or charitable organizations or subdivisions.* (1) Religious or charitable organizations and each of their subdivisions are treated as separate prior law corporations, if neither the district nor that religious or charitable organization or its subdivisions elect to conform to the discretionary provisions.

(2) Reclamation will treat the entire organization, including all subdivisions, as a single prior law corporation, if the central organization or any subdivisions do not meet the criteria specified in paragraph (b)(1) of this section.

(d) *Affiliated farm management between a religious or charitable organization and a more central organization of the same*

affiliation. Reclamation permits a subdivision of a religious or charitable organization to retain its status as an individual entity while cooperating with a more central organization of the same affiliation in farm operation and management. Reclamation permits affiliated farm management regardless of whether the subdivision is the owner of the land being operated.

§ 426.10 Public entities.

(a) *Application of the acreage limitation provisions to public entities*. Reclamation does not subject public entities to the acreage limitation provisions of Federal reclamation law with respect to land that Reclamation determines public entities farm primarily for nonrevenue producing functions. However, public entities are required to meet certification and reporting requirements as specified in § 426.18.

(b) *Sale of public land*. Reclamation does not require public entities to seek price approval before they sell nonexempt lands. Once sold, Reclamation can make irrigation water available to such land if the purchaser meets RRA eligibility requirements.

(c) *Leasing of public land*. Public entities can lease irrigation land that they own or control to eligible landholders. Land leased from a public entity counts towards the lessee's ownership and nonfull-cost entitlement.

§ 426.11 Class 1 equivalency.

(a) *General application*. Class 1 equivalency determinations will establish, on a district-wide basis, the acreage of land with lower productive potential (Classes 2, 3, and 4) that would be equivalent in productive potential to the most suitable land (Class 1) in the local agricultural economic setting.

(1) Reclamation establishes equivalency factors by comparing the weighted average farm size required to produce a given level of income on each of the lower classes of land with the farm size required to produce that income level on Class 1 land.

(2) For equivalency purposes, Reclamation will classify all irrigable land as Class 1, 2, or 3; no other classifications are permissible for irrigable land. Class 4 and special-use land classes will be allocated to one of these three classes on a case-by-case basis.

(3) Once the Class 1 equivalency determinations have been made, individual landowners with land classified as 2 or 3 for equivalency purposes will have the right to adjust their actual landholding acreage to its Class 1 equivalent acreage.

(4) In a district subject to prior law, Class 1 equivalency can be applied only to landholders who are subject to the discretionary provisions.

(5) Requests for equivalency determinations will be scheduled by region, with the regional director of each Reclamation region having responsibility for such scheduling. Generally, requests will be honored on a first-come-first-served basis. However, if requests exceed the region's ability to fulfill them expeditiously, priority will be given on the basis of greatest immediate need.

(b) *Who may request a Class 1 equivalency determination?* Only districts may request Class 1 equivalency determinations. Upon the request of any district subject to the acreage limitation provisions, Reclamation will make a Class 1 equivalency determination for that district. Equivalency determinations can be made only on a district-wide basis.

(c) *Definition of Class 1 land*. Class 1 land is defined and will be classified as that irrigable land within a particular agricultural economic setting that:

(i) Most completely meets the various parameters and specifications established by Reclamation for irrigable land classes;

(ii) Has the relatively highest level of suitability for continuous, successful irrigation farming; and

(iii) Is estimated to have the highest relative productive potential measured in terms of net income per acre (reflecting both productivity and costs of production). The equivalency analysis will establish the acreage of each of the lower classes of land which is equal in productive potential (measured in terms of net farm income) to 1 acre of Class 1 land.

(2) All land that Reclamation has not classified, or for which Reclamation has not yet performed the necessary economic studies, will be considered

Class 1 land for the purposes of determining entitlements under these rules until such time as the necessary classifications or studies have been completed.

(d) *Determination of land classes.* The extent and location of Class 1 land and land in lower land classes in a district have been, or will be, determined by Reclamation.

(1) Reclamation will take into account the influence of economic and physical factors upon the productive potential of the land lying within the district. These factors will include, but are not limited to the following and their effect on agricultural practices:

(i) The physical and chemical characteristics of the soil;

(ii) Topography;

(iii) Drainage status;

(iv) Costs of production;

(v) Land development costs;

(vi) Water quality and adequacy;

(vii) Elevation;

(viii) Crop adaptability; and

(ix) Length of growing season.

(2) Acceptable levels of detail for land classification studies to be utilized in making Class 1 equivalency determinations for a given district will be evaluated on the basis of the physical and agricultural economic characteristics of the area. For districts where the sole purpose of the land classification study is for a Class 1 equivalency determination, the level of detail of the land classification to be made will never be greater than that required to make a Class 1 equivalency determination.

(3) Reclamation will pay for at least a portion of the costs associated with the land classification study. The amount to be paid by Reclamation will be determined as follows:

(i) Reclamation has provided basic land classification data as part of the project development process since 1924. Accordingly, if Reclamation determines that acceptable land classification data are not available for making requested Class 1 equivalency determinations and if the project was authorized for construction since 1924, such data will be made available at Reclamation's expense; or

(ii) For each district located in projects authorized for construction prior to 1924, Reclamation will pay 50 percent of the costs and the district must pay 50 percent of the costs of new land classification studies required to make accurate Class 1 equivalency determinations.

(4) When basic land classification data are available for a district, but the district does not agree with the accuracy or asserts that the data have become outdated, the district may request, and Reclamation may perform, a reclassification under the authority contained in the Reclamation Project Act of 1939 (43 U.S.C. 485), with the following conditions:

(i) The requesting district will pay 50 percent of the costs of performing such reclassifications and 100 percent of the costs of all other studies involved in the equivalency process; and

(ii) The results of such reclassifications will be binding upon the requesting district and Reclamation.

(e) *Additional studies required for Class 1 equivalency determinations.* Economic studies related to Class 1 equivalency determinations will measure net farm income by land classes within the district.

(1) Net farm income will be determined by considering the disposable income accruing to the farm operator's labor, management, and equity from the sale of farm crops and livestock produced on irrigated land, after all fixed and variable costs of production, including costs of irrigation service, are accounted for.

(2) Net farm income will be the measure of productivity to establish equivalency factors reflecting the acreage of each of the lower classes of land which is equal in productive potential to 1 acre of Class 1 land.

(3) The cost of performing new or additional economic studies and computations inherent in the equivalency process will be the responsibility of the requesting district.

(f) *Use of Class 1 equivalency with the acreage limitation provisions.* Class 1 land and land in lower classes will be identified on a district basis by Reclamation using a standard approach in which the land classification for the entire district is considered. Equivalency factors will then be computed for the district and applied to specific

tracts within individual landholdings. If adequate land classification data are not available, they will be developed as specified in paragraph (d) of this section using standard procedures established by Reclamation.

(1) For purposes of ownership entitlement, Class 1 equivalency will not be applied until a final determination has been made by Reclamation concerning the district's request for equivalency.

(i) Reclamation will protect excess landowners' property interests by ensuring that equivalency determinations are completed in advance of maturity dates on recordable contracts, provided the district requests an equivalency determination at least 6 months prior to the maturity of the recordable contract, the district fulfills its obligations under this section, and the district notifies Reclamation 6 months in advance of the maturity dates for the need for an expedited review.

(ii) Once the determination has been made, owners of land subject to recordable contracts may withdraw land from such recordable contracts in order to reach their ownership entitlement in Class 1 equivalent acreage.

(iii) The requirement that land under recordable contract be sold at a price approved by Reclamation does not apply to land which is withdrawn from a recordable contract and included as part of a landowner's nonexcess landholding as a result of an equivalency determination.

(iv) In cases of equivalency determination disputes, Reclamation will not undertake the sale of the reasonable increment of the excess land under a matured recordable contract which could be affected by a reclassification, provided the dispute is determined by Reclamation not to be an attempt to thwart the sale of excess land.

(2) For purposes of nonfull-cost entitlement, Class 1 equivalency will not be applied until a final determination has been made by Reclamation on a district's request for equivalency.

(i) During the time when such determinations are pending, the full-cost rate will be assessed based on a landholder's nonfull-cost entitlement as determined in the absence of Class 1 equivalency.

(ii) Following Reclamation's final determination, Reclamation will reimburse the district for any full-cost charges that would not have been assessed had Class 1 equivalency been in place from the date of the district's request. Districts will return such reimbursements to the appropriate landholders.

(3) A landholder with holdings in more than one district is entitled to equivalency only in those districts which have requested equivalency (or are already subject to equivalency). That part of the landholding in a district or districts not requesting equivalency will be counted as Class 1 land for purposes of overall entitlement.

(g) *Prior equivalency determinations*. In districts where equivalency was a provision of project authorization, those equivalency factor determinations will be honored as originally calculated unless the district requests a reclassification.

§ 426.12 Excess land.

(a) *The process of designating excess and nonexcess land*. If a landowner owns more land than the landowner's ownership entitlement, all of the landowner's nonexempt land must be designated as excess and nonexcess as follows:

(1) The landowner designates which land is excess and which is nonexcess in accordance with the instructions on the appropriate certification or reporting forms; or

(2) If a landowner fails to designate his or her land as excess or nonexcess on the appropriate certification or reporting forms:

(i) And all of the landowner's nonexempt land is in only one district:

(A) If the district's contract with Reclamation includes designation procedures, then the land is designated according to those procedures; or

(B) If the district's contract with Reclamation does not include designation procedures, then:

(*1*) Reclamation will notify the landowner and the district that the landowner must designate the land as excess and nonexcess on the appropriate certification or reporting forms within 30-calendar days of the notification;

(*2*) If the landowner fails to make the designation within 30-calendar days of

notification, the district will make the designation within 30-calendar days thereafter; or

(*3*) If the district does not make the designation within its 30-calendar days, Reclamation will make the designation; or

(ii) If the landowner owns nonexempt land in more than one district, then Reclamation will notify the landowner and the districts that the landowner has 60-calendar days from the date of notification to make the designation. If the landowner does not make the designation in the 60-calendar days, Reclamation will make the designation.

(b) *Changing excess and nonexcess land designations.* (1) Landowners must file with the district(s) in which the land is located and with Reclamation the designation of excess and nonexcess land. The designation of land as excess is binding on the land. However, the landowner may change the designation under the following circumstances without Reclamation's approval if:

(i) The excess land becomes eligible to receive irrigation water because the landowner becomes subject to the discretionary provisions as provided in § 426.3;

(ii) A recordable contract is amended to remove excess land when the landowner's entitlement increases because the landowner becomes subject to the discretionary provisions as provided in paragraph (j)(5) of this section; or

(iii) The excess land becomes eligible to receive irrigation water as a result of Class 1 equivalency determinations, as provided in § 426.11.

(2) No other redesignation of excess land is allowable without the approval of Reclamation in accordance with established Reclamation procedures. Reclamation will not approve a redesignation request if:

(i) The purpose of the redesignation is for achieving, through repeated redesignation, an effective farm size in excess of that permitted by Federal reclamation law; or

(ii) The landowner sells some or all of his or her land that is currently classified as nonexcess.

(3) When a redesignation involves an exchange of nonexcess land for excess land, a landowner must make an equal exchange of acreage (or Class 1 equivalent acreage) through the redesignation.

(c) *Land that becomes excess when a district first contracts with Reclamation.* (1) If a landowner owned irrigable land on the execution date of the district's first water service or repayment contract, and the execution date was on or before October 12, 1982, the landowner's excess land is ineligible until the landowner:

(i) Becomes subject to the discretionary provisions and the landowner designates the excess land, up to his or her ownership entitlement, as nonexcess as provided for in paragraph (b)(1)(i) of this section;

(ii) Places such excess land under a recordable contract, provided the period for executing recordable contracts under the district's contract has not expired;

(iii) Sells or transfers such excess land to an eligible buyer at a price and on terms approved by Reclamation; or

(iv) Redesignates the land as nonexcess with Reclamation's approval as provided for in paragraph (b)(2) of this section.

(2) If the landowner owned irrigable land on the execution date of the district's first water service or repayment contract and the execution date is after October 12, 1982, the landowner's excess land is ineligible until the landowner:

(i) Places such excess land under a recordable contract, provided the period for executing recordable contracts under the district's contract has not expired;

(ii) Sells or transfers such excess land to an eligible buyer at a price and on terms approved by Reclamation; or

(iii) Redesignates the land as nonexcess with Reclamation's approval as provided for in paragraph (b)(2) of this section.

(d) *Land acquired into excess after the district has already contracted with Reclamation.* (1) If a landowner acquires land after the date the district first entered into a repayment or water service contract that was nonexcess to the previous owner and is excess to the acquiring landowner, the first repayment or water service contract was executed on or before October 12, 1982, and:

(i) Irrigation water was physically available when the landowner acquires such land, then the land is ineligible to receive such water until:

(A) The landowner becomes subject to the discretionary provisions and the landowner designates the excess land, up to his or her ownership entitlement, as nonexcess as provided for in paragraph (b)(1)(i) of this section;

(B) The landowner sells or transfers such land to an eligible buyer at a price and on terms approved by Reclamation;

(C) The sale from the previous landowner is canceled; or

(D) The landowner redesignates the land as nonexcess with Reclamation's approval as provided for in paragraph (b)(2) of this section; or

(ii) Irrigation water was not physically available when the landowner acquired the land, then the land is ineligible to receive water until:

(A) The landowner becomes subject to the discretionary provisions and the landowner designates the excess land, up to his or her ownership entitlement, as nonexcess as provided for in paragraph (b)(1)(i) of this section;

(B) The landowner sells or transfers the land to an eligible buyer at a price and on terms approved by Reclamation;

(C) The sale from the previous landowner is canceled;

(D) The landowner places the land under recordable contract when water becomes available; or

(E) The landowner redesignates the land as nonexcess with Reclamation's approval as provided for in paragraph (b)(2) of this section.

(2) If a landowner acquires land after the date the district first entered into a repayment or water service contract that was nonexcess to the previous owner and is excess to the acquiring landowner, the first repayment or water service contract was executed after October 12, 1982, and:

(i) Irrigation water was physically available when the landowner acquired such land, then the land is ineligible until:

(A) The landowner sells or transfers the land to an eligible buyer at a price and on terms approved by Reclamation;

(B) The sale from the previous landowner is canceled; or

(C) The landowner redesignates the land as nonexcess with Reclamation's approval as provided for in paragraph (b)(2) of this section; or

(ii) Irrigation water was not physically available when the landowner acquired such land, then the land is ineligible to receive water until:

(A) The landowner sells or transfers the land to an eligible buyer at a price and on terms approved by Reclamation;

(B) The sale from the previous landowner is canceled;

(C) The landowner redesignates the land as nonexcess with Reclamation's approval as provided for in paragraph (b)(2) of this section; or

(D) The landowner places the land under recordable contract when water becomes available.

(e) *If the status of land is changed by law or regulations.* (1) If the district had a contract with Reclamation on or before October 12, 1982, and eligible land became excess because the landowner's entitlement changed from being based on a district-by-district basis to a westwide basis, then such formerly eligible land is ineligible until:

(i) The landowner places such land under recordable contract. The recordable contract does not need to include the sales price approval clause and application of the deed covenant provision will not be required; or

(ii) The landowner sells or transfers such land to an eligible buyer. The sales price does not need Reclamation's approval.

(2) If the district had a contract with Reclamation on or before October 12, 1982, and the landowner was a nonresident alien or a legal entity not established under State or Federal law, who directly held eligible land and such land is no longer eligible to receive water, then such formerly eligible land is ineligible until:

(i) The landowner places such land under recordable contract. The recordable contract does not need to include the sales price approval clause and application of the deed covenant provision will not be required; or

(ii) The landowner sells or transfers such land to an eligible buyer. The

sales price does not need Reclamation's approval.

(3) If the district first entered a contract with Reclamation after October 12, 1982, and land would have been eligible before October 12, 1982, but is now ineligible because the landowner is a direct landholder and either a nonresident alien or a legal entity not established under State or Federal law, then such land that would have been eligible remains ineligible until:

(i) If the landowner acquired such land before the date of the district's contract:

(A) The landowner places such land under a recordable contract requiring Reclamation sales price approval; or

(B) Sells or transfers the land to an eligible buyer subject to Reclamation sales price approval; or

(ii) If the landowner acquired such land after the date of the district's contract, the landowner sells or transfers such land to an eligible buyer subject to Reclamation sales price approval.

(4) Eligible nonexcess land that is indirectly owned on or before December 18, 1996 by a nonresident alien or a legal entity not established under State or Federal law, and that becomes ineligible because of § 426.8 is ineligible until:

(i) The landowner places such land under recordable contract. The recordable contract does not need to include the sales price approval clause and application of the deed covenant provision will not be required; or

(ii) The landowner sells or transfers such land to an eligible buyer. The sales price does not need Reclamation's approval.

(f) *Excess land that is acquired without price approval.* If a landowner acquires land that is subject to Reclamation price approval, without obtaining such approval, the land is ineligible to receive water until:

(1) The sales price is reformed to conform to the price approved by Reclamation and is eligible to receive irrigation water in the landowner's ownership entitlement; or

(2) Such landowner sells or transfers the land to an eligible buyer at a price approved by Reclamation.

(g) *Excess land that is disposed of and subsequently reacquired.* Districts may not make available irrigation water to excess land disposed of by a landholder at a price approved by Reclamation, whether or not under a recordable contract, if the landholder subsequently becomes a direct or indirect landholder of that land through either a voluntary or involuntary action, unless:

(1) The landholder became or contracted to become a direct or indirect landholder of that land prior to December 18, 1996, and the land in question is otherwise eligible to receive irrigation water;

(2) Such land becomes exempt from the acreage limitations of Federal reclamation law;

(3) The landholder pays the full-cost rate for any irrigation water delivered to the landholder's formerly excess land that is otherwise eligible to receive irrigation water. If a landholder is a part owner of a legal entity that becomes the direct or indirect landholder of the land in question, then the full-cost rate will be applicable to the proportional share of irrigation water delivered to the land that reflects the part owner's interest in that legal entity; or

(4) The deed covenant associated with the sale has expired as provided for in paragraph (i) of this section.

(h) *Application of the compensation rate for irrigating ineligible excess land with irrigation water.* Reclamation will charge the following for irrigation water delivered to ineligible excess land in violation of Federal reclamation law and these regulations:

(1) The appropriate compensation rate for irrigation water delivered; and

(2) any other applicable fees as specified in § 426.20.

(i) *Deed covenants.* (1) All land that is acquired from excess status after October 12, 1982, must have the following covenant (that runs with the land) placed in the deed transferring the land to the acquiring party in order for the land to be eligible to receive irrigation water except as otherwise specified in these regulations. The covenant must be in the deed regardless of whether or not the land was under recordable contract.

This covenant is to satisfy the requirements in 209(f)(2) of Pub. L. 97–293 (43 U.S.C 390, *et seq.*). This covenant expires on (date)

. Until the expiration date specified herein, sale price approval is required on this land. Sale by the landowner and his or her assigns of these lands for any value that exceeds the sum of the value of newly added improvements plus the value of the land as increased by the market appreciation unrelated to the delivery of irrigation water will result in the ineligibility of this land to receive Federal project water, provided however:

(i) The terms of this covenant requiring price approval shall not apply to this land if it is acquired into excess status pursuant to a bona fide involuntary foreclosure or similar involuntary process of law, conveyance in satisfaction of a debt (including, but not limited to, a mortgage, real estate contract, or deed of trust), inheritance, or devise (hereinafter Involuntary Conveyance). Thereafter, this land may be sold to a landholder at its fair market value without regard to any other provision of the Reclamation Reform Act of 1982 enacted on October 12, 1982, (43 U.S.C. 390aa *et seq.*), or to Section 46 of the Act entitled ''an Act to adjust water rights charges, to grant certain relief on the Federal irrigation projects, and for other purposes,'' enacted May 25, 1926 (43 U.S.C. 423e);

(ii) If the status of this land changes from nonexcess into excess after a mortgage or deed of trust in favor of a lender is recorded and the land is subsequently acquired by a bona fide Involuntary Conveyance by reason of a default under that loan, this land may thereupon or thereafter be sold to a landholder at its fair market value;

(iii) The terms of this covenant requiring price approval shall not apply to the sales price obtained at the time of the Involuntary Conveyances described in subparagraphs (i) and (ii), nor to any subsequent voluntary sales by a landholder of this land after the Involuntary Conveyances or any subsequent Involuntary Conveyance;

(iv) Upon the completion of an Involuntary Conveyance, Reclamation shall reconvey or otherwise terminate this covenant of record;

(v) However, the deed covenant shall not be reconveyed or otherwise terminated if the involuntarily acquiring landowner is the landowner who sold this land from excess status, unless that landowner is a financial institution as defined in § 426.14(a) of the Acreage Limitation Rules and Regulations (43 CFR Part 426); and

(vi) The party whose excess ownership originally required the placement of this covenant may not receive Federal reclamation project irrigation water on the land subject to this covenant as a direct or indirect landowner or lessee, unless an exception provided for in § 426.12(g) is met.

NOTE 1 Clauses (v) and (vi) of this covenant shall only be required on those covenants placed in deeds transferring land after January 1, 1998.

NOTE 2 The date that the covenant expires shall be 10 years from the date the land was first transferred from excess to nonexcess status.

(2) A landholder may purchase or otherwise voluntarily acquire into nonexcess status, land subject to a deed covenant, at a price approved by Reclamation if the land is within the landholder's ownership entitlement.

(3) Upon expiration of the terms of the deed covenant, a landowner may resell such land at fair market value. A landowner may not sell more of such land in his or her lifetime than an amount equal to his or her ownership entitlement. Once the landowner reaches this limit, any additional excess land or land subject to a deed covenant the landowner acquires is ineligible to receive irrigation water, until such land is sold to an eligible buyer at a price approved by Reclamation.

(4) If a landholder acquires land burdened by such a deed covenant through involuntary foreclosure or similar involuntary process of law, conveyance in satisfaction of a debt, including, but not limited to, a mortgage, real estate contract, or deed of trust, inheritance, or devise, and is not the party whose excess ownership originally required placement of the deed covenant, then Reclamation must terminate the deed covenant upon the landholder's request. The provisions in paragraph (i)(1)(v) of this section and § 426.14(e) address termination of deed covenants for landholders whose excess ownership originally required placement of the deed covenant.

(j) *Recordable contracts*—(1) *Qualifications for recordable contracts.* A landowner can make excess land eligible to receive irrigation water by entering into a recordable contract with the United States if the landowner qualifies under applicable provisions of:

(i) The district's contract with Reclamation;

(ii) Federal reclamation law; and

(iii) These regulations.

(2) *Clauses to be included in recordable contracts.* A recordable contract must include:

(i) A clause whereby the landowner agrees to dispose of the excess land to an eligible buyer, excluding mineral rights and easements, under terms and

conditions of the sale, in accordance with § 426.13; and within the period allowed for the disposition of excess land, that must be within 5 years from the date that the recordable contract is executed by Reclamation (except for the Central Arizona Project wherein the time period is 10 years from the date water becomes available to the land); and

(ii) A clause granting power of attorney to Reclamation to sell the land held under the recordable contract, if the landholder has not already sold the land by the recordable contract's maturation.

(3) *Date Reclamation can make irrigation water available.* Reclamation can make available irrigation water to land that the landowner plans to place under a recordable contract on the day that Reclamation receives the landowner's written request to execute a recordable contract. The landowner has 20-working days in which to execute the recordable contract from the date Reclamation sends the recordable contract to the landowner. Reclamation, in its discretion, may extend this period upon the landowner's request.

(4) *Water rate.* The rate for irrigation water delivered to land placed under recordable contract will be determined as follows:

(i) If both the landowner and any lessee are prior law recipients, land placed under a recordable contract can receive irrigation water at a contract rate that does not cover full operation and maintenance (O&M) costs;

(ii) If either landowner or any lessee is subject to the discretionary provisions, the water rate applicable to the recordable contract must cover, at a minimum, all O&M costs; or

(iii) If a landholder leases land subject to a recordable contract and is in excess of his or her nonfull-cost entitlement, the lessee may select such land as the land on which the full-cost rate will be charged for the delivery of irrigation water, unless the land is already subject to the full-cost rate because of an extended recordable contract.

(5) *Amending a recordable contract to include less acreage.* (i) Reclamation permits a landowner to amend a recordable contract to transfer land out of a recordable contract to nonexcess status, if:

(A) The landowner has an increased ownership entitlement because of becoming subject to the discretionary provisions; or

(B) Land becomes eligible by implementation of Class 1 equivalency, if the landowner amends the recordable contract prior to performance of appraisal.

(ii) Landholders must receive Reclamation's approval to amend recordable contracts.

(A) The disposition period for any land remaining under a recordable contract will not change because of an amendment to remove some land.

(B) For land removed from a recordable contract based on paragraph (j)(5)(i) of this section, any requirement for application of a deed covenant will no longer be applicable.

(6) *Sale of land by Reclamation.* If the landowner does not dispose of the excess land held under recordable contract within the period specified in the recordable contract, Reclamation will sell that land. Reclamation will not sell the land if the landowner complies with all requirements for sale of excess land under these rules within the period specified, regardless if Reclamation gives final approval of the sale within that period or after.

(7) *Delivery of water when a recordable contract has matured.* Reclamation can make available irrigation water at the current applicable rate, pursuant to paragraph (j)(4) of this section, to excess land held under a matured recordable contract until Reclamation sells the land.

(8) *Procedures Reclamation follows in selling excess land.* If Reclamation must sell excess land, the following procedures will be used:

(i) If Reclamation determines it to be necessary, a qualified surveyor will make a land survey. The United States will pay for the survey initially, but such costs will be added to the approved sales price for the land. The United States will be reimbursed for these costs from the sale of the land;

(ii) Reclamation will appraise the value of the excess land, in the manner prescribed by § 426.13, to determine the appropriate sales price. The United

States will pay for the appraisal initially, but such costs will be added to the approved sales price for the land. The United States will be reimbursed for these costs from the sale of the land; and

(iii) Reclamation will advertise the sale of the property in farm journals and in newspapers within the county in which the land lies, and by other public notices as deemed advisable. The United States will pay for the advertisements and notices initially, but such costs will be added to the approved sales price for the land. The United States will be reimbursed for these costs from the sale of the land. The notices must state:

(A) The minimum acceptable sales price for the property (which equals the appraised value plus the cost of the appraisal, survey, and advertising);

(B) That Reclamation will sell the land by auction for cash, or on terms acceptable to the landowner, to the highest eligible bidder whose bid equals or exceeds the minimum acceptable sales price; and

(C) The date of the sale (which must not exceed 90 calendar days from the date of the advertisement and notices);

(iv) The proceeds from the sale of the land will be paid:

(A) First, to the landowner in the amount of the appraised value;

(B) Second, to the United States for costs of the survey, appraisal, advertising, etc.; and

(C) Third, any remaining proceeds will be credited to the Reclamation fund or other funds as prescribed by law; and

(v) Reclamation will close the sale of the excess land when parties complete all sales arrangements. Reclamation will execute a deed conveying the land to the purchaser. Reclamation will not require the purchaser to include a covenant in the deed, as specified in paragraph (i) of this section, that restricts any further resale of the land.

§ 426.13 Excess land appraisals.

(a) *When does Reclamation appraise the value of a landowner's land?* Reclamation appraises excess land or land burdened by a deed covenant upon a landowner's request or when required by Reclamation. If a landowner does not request an appraisal within 6 months of the maturity date of a recordable contract, Reclamation, in its discretion, can initiate the appraisal.

(b) *Procedures Reclamation uses to determine the sale price of excess land or land burdened by a deed covenant.* Reclamation complies with the following procedures to determine the sale price of excess land and land burdened by a deed covenant, except if a landholder owns land subject to a recordable contract that was in force on October 12, 1982, or other pertinent contract that was in force on that date, and these regulations would be inconsistent with provisions in such a contract:

(1) *Appraisals of land.* Reclamation will base all appraisals of land on the fair market value of the land at the time of appraisal without reference to the construction of the irrigation works. Reclamation must use standard appraisal procedures including: the income, comparable sales, and cost methods, as applicable. Reclamation will consider nonproject water supply factors as provided in paragraph (c)(1) of this section as appropriate; and

(2) *Appraisal of improvements to land.* Reclamation will assess the contributory fair market value of improvements to land, as of the date of appraisal, using standard appraisal procedures.

(c) *Appraisals of nonproject water supplies.* (1) The appraiser will consider nonproject water supply factors, where appropriate, including:

(i) Ground water pumping lift;

(ii) Surface water supply;

(iii) Water quality; and

(iv) Trends associated with paragraphs (c)(1) (i) through (iii) of this section, where appropriate.

(2) Reclamation will develop the nonproject water supply and trend information with the assistance of:

(i) The district in which the land is located, if the district desires to participate;

(ii) Landowners of excess land or land burdened by a deed covenant and prospective buyers who submit information either to the district or Reclamation; and

(iii) Public meetings and forums, at the discretion of Reclamation.

(3) Data submitted may include:

(i) Historic geologic data;

(ii) Changing crops and cropping patterns; and

(iii) Other factors associated with the nonproject water supply.

(4) If Reclamation and the district cannot reach agreement on the nonproject water supply information within 60-calendar days, Reclamation will review and update the trend information as it deems necessary and make all final determinations considering the data provided by Reclamation and the district. Reclamation will provide these data to the appraisers who must consider the data in the appraisal process, and clearly explain how they used the data in the valuation of the land.

(d) *The date of the appraisal.* The date of the appraisal will be the date of last inspection by the appraiser(s) unless there is a prior signed instrument, such as an option, contract for sale, agreement for sale, etc., affecting the property. In those cases, the date of appraisal will be the date of such instrument.

(e) *Cost of appraisal.* If the appraisal is:

(1) The land's first appraisal, the United States will initially pay the costs of appraising the value of the land, but such costs will be added to the approved sale price for the land. The United States will reimburse itself for these costs from the sale of the land;

(2) Not the land's first appraisal, the landowner requesting the appraisal must pay any costs associated with the reappraisal, unless the value set by the reappraisal differs by more than 10 percent, in which case the United States will pay for the reappraisal; or

(3) Associated with a sales price reformation as specified in § 426.12(f)(1), the landowner requesting the appraisal must pay any costs associated with the appraisal.

(f) *Appraiser selection.* Reclamation will select a qualified appraiser to appraise the excess land or land burdened by a deed covenant, except as specified within paragraph (g) of this section.

(g) *Appraisal dispute resolution.* The landowner who requested the appraisal may request that the United States conduct a second appraisal of the excess land or land burdened by a deed covenant if the landowner disagrees with the first appraisal. The second appraisal will be prepared by a panel of three qualified appraisers, one designated by the United States, one designated by the district, and the third designated jointly by the first two. The appraisal made by the panel will fix the maximum value of the excess land and will be binding on both parties after review and approval as provided in paragraph (h) of this section.

(h) *Review of appraisals of excess land or land burdened by a deed covenant.* Reclamation will review all appraisals of excess land or land burdened by a deed covenant for:

(1) Technical accuracy and compliance with these rules and regulations;

(2) Applicable portions of the ''Uniform Appraisal Standards for Federal Land Acquisition-Interagency Land Acquisition Conference 1973,'' as revised in 1992;

(3) Reclamation policy; and

(4) Any detailed instructions provided by Reclamation setting conditions applicable to an individual appraisal.

§ 426.14 Involuntary acquisition of land.

(a) *Definitions for purposes of this section. Financial institution* means a commercial bank or trust company, a private bank, an agency or branch of a foreign bank in the United States, a thrift institution, an insurance company, a loan or finance company, or the Farm Credit System.

Involuntarily acquired land means land that is acquired through an involuntary foreclosure or similar involuntary process of law, conveyance in satisfaction of a debt (including, but not limited to, a mortgage, real estate contract or deed of trust), inheritance, or devise.

(b) *Ineligible excess land that is involuntarily acquired.* Reclamation cannot make available irrigation water to land that was ineligible excess land before the new landowner involuntarily acquired it, unless:

(1) The land becomes nonexcess in the new landowner's ownership; and

(2) The deed to the land contains the 10-year covenant requiring Reclamation sale price approval, and that deed

commences when the land becomes eligible to receive irrigation water.

(3) If either of these conditions is not met, the land remains ineligible excess until sold to an eligible buyer at an approved price, and the seller places the 10-year covenant requiring Reclamation price approval, as specified in § 426.12(i), in the deed transferring title to the land to the buyer.

(c) *Land that was held under a recordable contract and is acquired involuntarily*. Reclamation can make available irrigation water to land held under a recordable contract that is involuntarily acquired under the terms of the recordable contract to the extent the land continues to be excess in his or her landholding, if the landowner:

(1) Assumes the recordable contract; and

(2) Executes an assumption agreement provided by Reclamation.

(3) This land will remain eligible to receive irrigation water for the longer of 5 years from the date that the land was involuntarily acquired, or for the remainder of the recordable contract period. The sale of this land shall be under terms and conditions set forth in the recordable contract and must be satisfactory to and at a price approved by Reclamation.

(d) *Mortgaged land*. Reclamation treats mortgaged land that changed from nonexcess status to excess status after the mortgage was recorded, and which is subsequently acquired by a lender through an involuntary foreclosure or similar process of law, or by a bona fide conveyance in satisfaction of a mortgage, in the following manner:

(1) If the new landowner designates the land as excess in his or her holding, then:

(i) The land is eligible to receive irrigation water for a period of 5 years or until transferred to an eligible landowner, whichever occurs first;

(ii) During the 5-year period Reclamation will charge a rate for irrigation water equal to the rate paid by the former owner, unless the land becomes subject to full-cost pricing through leasing; and

(iii) The land is eligible for sale at its fair market value without a deed covenant restricting its future sales price; or

(2) If the new landowner is eligible to designate the land as nonexcess and he or she designates the land as nonexcess, the land will be treated in the same manner as any other nonexcess land and will be eligible for sale at its fair market value without a deed covenant restricting its future sales price.

(e) *Nonexcess land that becomes excess when acquired involuntarily*. (1) Reclamation can make irrigation water available for a period of 5 years to a landowner who involuntarily acquires land that becomes excess in the involuntarily acquiring landowner's holding provided the land was nonexcess to the previous owner and:

(i) The acquiring landowner never previously held such land as ineligible excess land or under a recordable contract;

(ii) The acquiring landholder is a financial institution; or

(iii) The acquiring landowner previously held the land as ineligible excess or under a recordable contract and § 426.12(g)(1), (3), or (4) applies.

(2) The following will be applicable in situations that meet the criteria specified under paragraph (e)(1) of this section:

(i) Reclamation will charge a rate for irrigation water delivered to such land equal to the rate paid by the former owner, except Reclamation will charge the full-cost rate if:

(A) The land becomes subject to full-cost pricing through leasing; or

(B) If the involuntarily acquired land is eligible to receive irrigation water only because § 426.12(g)(3) applies and the deed covenant has not expired;

(ii) The new landowner may not place such land under a recordable contract;

(iii) The new landowner may request that Reclamation remove a deed covenant as provided in § 426.12(i)(4), and may sell such land at any time without price approval and without the deed covenant. However, the deed covenant will not be removed and the terms of the deed covenant will be fully applied if the new landowner is the landowner who sold the land in question from excess status, except for:

(A) Financial institutions; or

(B) Landowners for which § 426.12(g)(1) or (2) apply; and

(iv) Such land will become ineligible to receive irrigation water 5 years after it was acquired and will remain ineligible until sold to an eligible buyer or redesignated as provided for in paragraph (f) of this section.

(f) *Redesignation of excess land to nonexcess.* Landholders who designate involuntarily acquired land as excess as provided for in paragraphs (d)(1) and (e)(1) of this section and want to redesignate the land as nonexcess, must utilize the redesignation process specified under § 426.12(b)(2).

(1) However, such redesignations will not be approved if the water rate specified in paragraphs (d)(1)(ii) or (e)(2)(i) of this section is less than what would have been charged for water deliveries to the land in question if the landholder that involuntarily acquired the land had originally designated the land as nonexcess.

(2) Such landholders may utilize the redesignation process, if they remit to Reclamation the difference between the rate paid and the rate that would have been paid, if the land had been designated as nonexcess when involuntarily acquired, for all irrigation water delivered to the land in question while the land was designated as excess.

(g) *Effect of involuntarily acquiring land subject to the discretionary provisions.* A landowner does not automatically become subject to the discretionary provisions if the landowner acquires irrigation land involuntarily which was formerly subject to the discretionary provisions. However, a landholder that is subject to the prior law provisions will become subject to the discretionary provisions upon involuntarily acquiring land if:

(1) The land is located in a district that is subject to the discretionary provisions;

(2) The landholder in question will be the direct landowner of the land; and

(3) The landholder in question declares the land as nonexcess.

(h) *Land acquired by inheritance or devise.* If a landowner receives irrigation land through inheritance or devise, the 5-year eligibility period for receiving irrigation water on the newly acquired land per paragraphs (c)(3) and (e) of this section begins on the date of the previous landowner's death.

§ 426.15 Commingling.

(a) *Definition for purposes of this section*:

Commingled water means irrigation water and nonproject water that use the same facilities.

(b) *Application of Federal reclamation law and these regulations to prior commingling provisions in contracts.* If a district entered into a contract with Reclamation prior to October 1, 1981, and that contract has provisions addressing commingled water situations, those provisions stay in effect for the term of that contract and any renewals of it.

(c) *Establishment of new commingling provision in contracts.* New, amended, or renewed contracts may provide that irrigation water can be commingled with nonproject water as follows:

(1) If the facilities used for the commingling of irrigation water and nonproject water are constructed without funds made available pursuant to Federal reclamation law, the provisions of Federal reclamation law and these regulations will apply only to the landholders who receive irrigation water, provided:

(i) That the water requirements for eligible lands can be established; and

(ii) The quantity of irrigation water to be used is less than or equal to the quantity necessary to irrigate eligible lands.

(2) If the facilities used for commingling irrigation water and nonproject water are funded with monies made available pursuant to Federal reclamation law, landholders who receive nonproject water will be subject to Federal reclamation law and these regulations unless:

(i) The district collects and pays to the United States an incremental fee which reasonably reflects an appropriate share of the cost to the Federal Government, including interest, of storing or delivering the nonproject water; and

(ii) The fee will be established by Reclamation and will be in addition to the district's obligation to pay for capital, operation, maintenance, and replacement costs associated with the facilities required to provide the service.

(3) If paragraphs (c)(2) (i) and (ii) of this section are met, the provisions of Federal reclamation law and these regulations will be applicable to only those landholders who receive irrigation water. Accordingly, the provisions of Federal reclamation law and these regulations will not be applicable to landholders who receive nonproject water delivered through facilities funded with monies made available pursuant to Federal reclamation law if those paragraphs are met.

(d) *When Federal reclamation law and these regulations do not apply*. Federal reclamation law and these regulations do not apply to landholders receiving irrigation water from federally financed facilities if the irrigation water is acquired by an exchange and that exchange results in no material benefit to the recipient of the irrigation water.

§ 426.16 Exemptions and exclusions.

(a) *Army Corps of Engineers (Corps) projects*. (1) If Reclamation determines that land receives its agricultural water from a Corps project, Reclamation will exempt that land from specific provisions of Federal reclamation law, including the RRA, unless:

(i) Federal law explicitly designates, integrates, or incorporates that land into a Federal Reclamation project; or

(ii) Reclamation provides project works for the control or conveyance of the agricultural water supply from the Corps project to that land.

(2) Upon such determination, Reclamation will:

(i) Notify the district of its exemption status;

(ii) Require the district's agricultural water users to continue, under contracts made with Reclamation, to repay their share of construction, operation and maintenance, and contract administration costs of the Corps project allocated to conservation or irrigation storage; and

(iii) At the request of the district delete provisions of the district's repayment or water service contract that imposes acreage limitation for those lands served by Corps projects.

(b) *Repayment of construction obligations*. The acreage limitation provisions do not apply to land in a district after the district has repaid, in accordance with the district's contract with Reclamation, all obligated construction costs for project facilities.

(1) Payments by periodic installments over the contract repayment term, as well as lump-sum and accelerated payments, if allowed by the district's contract with Reclamation, will qualify the district to become exempt.

(2) If a district has a contract with the United States providing for individual landowner repayment of construction charges allocated to land, and the landowner has repaid all obligated construction costs allocated for that landowner's land, that landowner will become exempt from the acreage limitation provisions.

(3) Upon payout Reclamation will:

(i) Notify the district, and individual landowner in cases of individual landowner payout, of the exemption from the acreage limitation provisions;

(ii) Notify the district or individual landowner that the exemption does not relieve the district or individual landowner of the obligation to continue to pay, on an annual basis, O&M costs applicable to the district or landowner;

(iii) Upon request by the owner of land for which repayment has occurred, provide a certificate from Reclamation acknowledging that the land is free of the acreage limitation provisions of Federal reclamation law;

(iv) Except as provided for in § 426.19(e), no longer apply the certification and reporting requirements to the district, if the entire district is exempt, or to exempt landowners as specified in paragraph (b)(2) of this section; and

(v) Consider on a case-by-case basis continuation of the exemption if additional construction funds for the project are requested.

(c) *Rehabilitation and Betterment loans*. If Reclamation makes a Rehabilitation and Betterment loan (pursuant to the Rehabilitation and Betterment Act of October 7, 1949, as amended, 43 U.S.C. 504) to a project that was authorized under Federal reclamation law prior to the submittal of the loan request, by or for the district, Reclamation:

(1) Considers the loan as a loan for maintenance, including replacements that cannot be financed currently;

(2) Does not consider the loan in determining whether the district has discharged its obligation to repay the construction cost of project facilities used to make irrigation water available for delivery to land in the district; and

(3) Will not allow such a loan to serve as the basis for reinstating acreage limitation provisions in a district that has completed payment of its construction obligation, nor serve as the basis for increasing the construction obligation of the district and thereby extending the period during which acreage limitation provisions will apply.

(d) *Temporary supplies of water.* If Reclamation announces availability of temporary supplies of water resulting from an unusually large water supply, not otherwise storable for project purposes, or from infrequent and otherwise unmanaged floodflows of short duration a district may request that Reclamation make such supplies available to excess land. However, such water deliveries must not have an adverse effect on other authorized project purposes. Upon approval of the district's request, Reclamation will notify the requesting district of the availability of the temporary supply of water under the following conditions:

(1) The contract for the temporary supply of water will be for 1 year or less in accordance with prior policies and practices;

(2) The acreage limitation provisions will not be applicable to the temporary supply of water;

(3) An applicable price for the water, if any, will be established; and

(4) Such other conditions as Reclamation may include.

(e) *Isolated tracts.* If a landowner requests that Reclamation determine that portions of his or her owned land are isolated tracts that can be farmed economically only if included in a farming operation that already exceeds the landowners ownership entitlement, and Reclamation makes such a determination, then Reclamation:

(1) Will exempt such land from the ownership limitations of Federal reclamation law; and

(2) Will assess the full-cost rate for any irrigation water delivered to the isolated tract that exceeds the landowner's nonfull-cost entitlement.

(f) *Indian trust or restricted lands.* (1) Indian trust or restricted lands are excluded from application of the acreage limitation provisions.

(2) Indian tribes and tribal entities operating on Indian trust or restricted lands are excluded from application of the water conservation provisions.

§ 426.17 Small reclamation projects.

(a) *Effect of the RRA on loan contracts made under the Small Reclamation Projects Act.* (1) If a district entered into a loan contract under the Small Reclamation Projects Act of 1956 (43 U.S.C. 422) (SRPA) on or after October 12, 1982, the contract is subject to the provisions of the SRPA, as amended by Section 223 of the RRA and as amended by Title III of Pub. L. 99–546.

(2) If a district entered into an SRPA loan contract prior to October 12, 1982, and the district:

(i) Did not amend the loan contract to conform to the SRPA, as amended by Section 223 of the RRA, prior to October 27, 1986, then the acreage provisions of the contract continue in effect, unless the contract is amended to conform to the SRPA as amended by section 307 of Pub. L. 99–546.

(ii) Amended the loan contract to conform to the SRPA, as amended by Section 223 of the RRA, prior to October 27, 1986, the contract is subject to the increased acreage provisions provided in Section 223 of the RRA. Reclamation cannot alter, modify or amend any other provision of the SRPA loan contract without the consent of the non-Federal party.

(b) *Other sections of these regulations that apply to SRPA loans.* No other sections of these regulations apply to SRPA loans, except as specified in § 426.3(a)(3)(ii) and paragraph (d) of this section.

(c) *Effect of SRPA loans in determining whether a district has repaid its construction obligations on a water service or repayment contract.* If a district has a water service or repayment contract in addition to an SRPA contract, Reclamation does not consider the SRPA loan:

(1) In determining whether the district has discharged its construction cost obligation for the project facilities;

(2) As a basis for reinstating acreage limitation provisions in a district that has completed payment of its construction cost obligation(s); or

(3) As a basis for increasing the construction obligation of the district and extending the period during which acreage limitation provisions will apply to that district.

(d) *Districts that have an SRPA loan contract and a contract as defined in § 426.2.* If a district has an SRPA loan contract and a contract as defined in § 426.2, the SRPA contract does not supersede the RRA requirements applicable to such contracts.

§ 426.18 Landholder information requirements.

(a) *Definition for purposes of this section:*

Irrigation season means the period of time between the district's first and last water delivery in any water year.

(b) *Who must provide information to Reclamation?* All landholders and other parties involved in the ownership or operation of nonexempt land must provide Reclamation, as required by these regulations or upon request, any records or information, in a form suitable to Reclamation, deemed reasonably necessary to implement the RRA or other provisions of Federal reclamation law.

(c) *Required form submissions.* (1) Landholders who are subject to the discretionary provisions must annually submit standard certification forms, except as provided in paragraph (l) of this section.

(2) Landholders who make an irrevocable election must submit the standard certification forms with their irrevocable election in the year that they make the election.

(3) Landholders who are subject to prior law must annually submit standard reporting forms, except as provided in paragraph (l) of this section.

(4) Landholders who qualify under an exemption as specified in paragraph (g) of this section need not submit any forms.

(d) *Required information.* Landholders must declare on the appropriate certification or reporting forms all nonexempt land that they hold directly or indirectly westwide and other information pertinent to their compliance with Federal reclamation law.

(e) *District receipt of forms and information.* Landholders must submit the appropriate, completed form(s) to each district in which they directly or indirectly hold irrigation land.

(f) *Certification or reporting forms for wholly owned subsidiaries.* The ultimate parent legal entity of a wholly owned subsidiary or of a series of wholly owned subsidiaries must file the required certification or reporting forms. The ultimate parent legal entity must disclose all direct and indirect landholdings of its subsidiaries as required on such forms.

(g) *Exemptions from submitting certification and reporting forms.* (1) A landholder is exempt from submitting the certification and reporting forms only if:

(i) The landholder's district has Category 1 status, as specified in paragraph (h) of this section, and the landholder is a:

(A) Qualified recipient who holds a total of 240 acres westwide or less; or

(B) Limited recipient or a prior law recipient who holds a total of 40 acres westwide or less.

(ii) The landholder's district has Category 2 status, as specified in paragraph (h) of this section, and the landholder is a:

(A) Qualified recipient who holds a total of 80 acres westwide or less; or

(B) Limited recipient or a prior law recipient who holds a total of 40 acres westwide or less.

(2) A wholly owned subsidiary is exempted from submitting certification or reporting forms, if its ultimate parent legal entity has properly filed such forms disclosing the landholdings of each of its subsidiaries.

(3) In determining whether certification or reporting is required for purposes of this section:

(i) Class 1 equivalency factors as determined in § 426.11 shall not be used; and

(ii) Indirect landholders need not count involuntarily acquired acreage designated as excess by the direct landowner.

(h) *District categorization.* (1) For purposes of this section each district has Category 2 status, unless the following

criteria have been met. If the district has met both criteria, it will be granted Category 1 status.

(i) The district has conformed by contract to the discretionary provisions; and

(ii) The district is current in its financial obligations to Reclamation.

(2) Reclamation considers a district current in its financial obligation if as of September 30, the district is current in its:

(i) Financial obligations specified in its contract(s) with Reclamation; and

(ii) Payment obligations established by the RRA, and these rules.

(i) *Application of Category 1 status.* Once a district achieves Category 1 status, it will only be withdrawn if the Regional Director determines the district is not current in its financial obligations as specified in paragraph (h)(2) of this section. The withdrawal of Category 1 status will be effective at the end of the current water year and can be restored only as provided under paragraph (h) of this section. With the withdrawal of Category 1 status, the district will have a Category 2 status.

(j) *Submissions by landholders holding land in both a Category 1 district and a Category 2 district.* If a qualified recipient holds land in a Category 1 district, then the 240-acre forms threshold will be applicable in determining if the landholder must submit a certification form to that Category 1 district. If the same qualified recipient also holds land in a Category 2 district, then the 80-acre forms threshold will be applicable in determining if the landholder must submit a certification form to the Category 2 district.

(k) *Notification requirements for landholders whose ownership or leasing arrangements change after submitting forms.* If a landholder's ownership or leasing arrangements change in any way:

(1) During the irrigation season, the landholder must:

(i) Notify the district office, either verbally or in writing within 30-calendar days of the change; and

(ii) Submit new forms to all districts in which the landholder holds nonexempt land, within 60-calendar days of the change.

(2) Outside of the irrigation season, then the landholder must submit new standard certification or reporting forms to all districts in which nonexempt land is held prior to any irrigation water deliveries following such changes.

(l) *Notification requirements for landholders whose ownership or leasing arrangements have not changed.* If a landholder's ownership or leasing arrangements have not changed since last submitting a standard certification or reporting form, the landholder can satisfy the annual certification or reporting requirements by submitting a verification form instead of a standard form. On that form the landholder must verify that the information contained on the last submitted standard certification or reporting form remains accurate and complete.

(m) *Actions taken if required submission(s) is not made.* (1) If a landholder does not submit required certification or reporting form(s), then:

(i) The district must not deliver, and the landholder is not eligible to receive and must not accept delivery of, irrigation water in any water year prior to submission of the required certification or reporting form(s) for that water year; and

(ii) Eligibility will be regained only after all required certification or reporting forms are submitted by the landholder to the district.

(2) If one or more part owners of a legal entity do not submit certification or reporting forms as required:

(i) The entire entity will be ineligible to receive irrigation water until such forms are submitted; or

(ii) If the documents forming the entity provide for the part owners' interest to be separable and alienable, then only that portion of the land attributable to the noncomplying part owners will be ineligible to receive irrigation water.

(n) *Actions taken by Reclamation if a landholder makes false statements on the appropriate certification or reporting forms.* If a landholder makes a false statement on the appropriate certification or reporting form(s) Reclamation can prosecute the landholder pursuant to the following statement which

is included in all certification and reporting forms:

Under the provisions of 18 U.S.C. 1001, it is a crime punishable by 5 years imprisonment or a fine of up to $10,000, or both, for any person knowingly and willfully to submit or cause to be submitted to any agency of the United States any false or fraudulent statement(s) as to any matter within the agency's jurisdiction. False statements by the landowner or lessee will also result in loss of eligibility. Eligibility can only be regained upon the approval of the Commissioner.

(o) *Information requirements and Office of Management and Budget approval.* The information collection requirements contained in this section have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control numbers 1006–0005 and 1006–0006. The information is being collected to comply with Sections 206, 224(c), and 228 of the RRA. These sections require that, as a condition to the receipt of irrigation water, each landholder in a district which is subject to the acreage limitation provisions of Federal reclamation law, as amended and supplemented by the RRA, will furnish to his or her district annually a certificate/report which indicates that he or she is in compliance with the provisions of Federal reclamation law. Completion of these forms is required to obtain the benefit of irrigation water. The information collected on each landholding will be summarized by the district and submitted to Reclamation in a form prescribed by Reclamation.

(p) *Protection of forms pursuant to the Privacy Act of 1974.* The Privacy Act of 1974 (5 U.S.C. 552) protects the information submitted in accordance with certification and reporting requirements. As a condition to execution of a contract, Reclamation requires the inclusion of a standard contract article which provides for district compliance with the Privacy Act of 1974 and 43 CFR part 2, subpart D, in maintaining the landholder certification and reporting forms.

§ 426.19 District responsibilities.

A district that delivers irrigation water to nonexempt land under a contract with the United States must:

(a) Provide information to landholders concerning the requirements of Federal reclamation law and these regulations;

(b) Provide Reclamation, as required by these regulations or upon request, and in a form suitable to Reclamation, records and information as Reclamation may deem reasonably necessary to implement the RRA and other provisions of Federal reclamation law;

(c) Be responsible for payments to Reclamation of all appropriate charges specified in these regulations. Districts must collect the appropriate charges from each landholder based on the landholder's acreage limitation status, landholdings, and entitlements, and must not average the costs over the entire district, unless the charges prove uncollectible from the responsible landholders;

(d) Distribute, collect, and review landholder certification and reporting forms;

(e) File and retain landholder certification and reporting forms. Districts must retain superseded landholder certification and reporting forms for 6 years; thereafter, districts may destroy such superseded forms, except:

(1) Districts must keep on file the last fully completed standard certification or reporting form, in addition to the current verification form; or

(2) If Reclamation specifically requests a district to retain superseded forms beyond 6 years.

(f) Comply with the requirements of the Privacy Act of 1974, with respect to landholder certification and reporting forms;

(g) Annually summarize information provided on landholder certification and reporting forms on separate summary forms provided by Reclamation and submit these forms to Reclamation on or before the date established by the appropriate regional director;

(h) Withhold deliveries of irrigation water to any landholder not eligible to receive irrigation water under the certification or reporting requirements or any other provision of Federal reclamation law and these regulations; and

(i) Return to Reclamation, for deposit as a general credit to the Reclamation fund, all revenues received

from the delivery of water to ineligible land. For purposes of these regulations only, this does not include revenues from any charges that may be assessed by the district to cover district operation, maintenance, and administrative expenses.

§ 426.20 Assessment of administrative costs.

(a) *Assessment of administrative costs for delivery of water to ineligible land.* Reclamation will assess a district administrative costs as described in paragraph (e) of this section if the district delivers irrigation water to land that was ineligible because the landholders did not submit certification or reporting forms prior to the receipt of irrigation water in accordance with § 426.18; or to ineligible excess land as provided in § 426.12.

(1) Reclamation will apply the assessment on a yearly basis in each district for each landholder that received irrigation water in violation of § 426.18, or for each landholder that received irrigation water on ineligible land as specified above.

(2) In applying the assessment to legal entities, compliance by an entity will be treated independently from compliance by its part owners or beneficiaries.

(3) The assessment in paragraph (a) of this section will be applied independently of the assessment specified in paragraph (b) of this section.

(b) *Assessment of administrative costs when form corrections are not made.* Reclamation will assess a district for the administrative costs described in paragraph (e) of this section, unless the district provides Reclamation with requested reporting or certification form corrections within 60-calendar days of the date of Reclamation's written request. If Reclamation receives the required corrections within this 60-calendar day time period, Reclamation will consider the requirements of § 426.18 satisfied.

(1) Reclamation will apply the assessment on a yearly basis in each district for each landholder that received irrigation water and for whom the district does not provide corrected forms within the applicable 60-calendar day time period.

(2) In applying the assessment to legal entities, compliance by an entity will be treated independently from compliance by its part owners or beneficiaries.

(3) The assessment in paragraph (b) of this section will be applied independently of the assessment specified in paragraph (a) of this section.

(c) *Party responsible for paying assessments.* Districts are responsible for payment of Reclamation assessments described under paragraphs (a) and (b) of this section.

(d) *Disposition of assessments.* Reclamation will deposit to the general fund of the United States Treasury, as miscellaneous receipts, administrative costs assessed and collected under paragraphs (a) and (b) of this section.

(e) *Amount of the assessment.* The administrative costs assessment required under paragraphs (a) and (b) of this section is set at $260. Reclamation will review the associated costs at least once every 5 years, and will adjust the assessment amount, if needed, to reflect new cost data. Notice of the revised assessment for administrative costs will be published in the FEDERAL REGISTER in December of the year the data are reviewed.

§ 426.21 Interest on underpayments.

(a) *Definition of underpayment.* For the purposes of this section *underpayment* means the difference between what a landholder owed for the delivery of irrigation water under Federal reclamation law and what that landholder paid.

(b) *Collection of interest on underpayments.* If a landholder has incurred an underpayment, Reclamation will collect from the appropriate district such underpayment with interest. Interest accrues from the original payment due date until the district pays the amount due. The original payment due date is the date the district should have paid the United States for water delivered to the landholder.

(c) *Underpayment interest rate.* The Secretary of the Treasury determines the interest rate charged the district based on the weighted average yield of all interest-bearing marketable issues sold by the Department of the Treasury during the period of underpayment.

§ 426.22 Public participation.

(a) *Notification of contract actions.* Except for proposed contracts having a duration of 1 year or less for the sale of surplus water or interim irrigation water, Reclamation will:

(1) Provide notice of proposed irrigation or amendatory irrigation contract actions 60-calendar days prior to contract execution by publishing announcements in general circulation newspapers in the affected area;

(2) Issue announcements in the form of news releases, legal notices, official letters, memoranda, or other forms of written material; and

(3) Directly notify individuals and entities who made a timely written request for such notice to the appropriate Reclamation regional or local office.

(b) *Notification of modification of a proposed contract.* In the event that modifications are made to a proposed contract the regional director must:

(1) Provide copies of revised proposed contracts to all parties who requested copies of the proposed contract in response to the initial notice; and

(2) Determine whether or not to republish the notice or to extend the comment period. The regional director must consider, among other factors:

(i) The significance of the impact(s) of the modification to possible affected parties; and

(ii) The interest expressed by the public over the course of contract negotiations.

(c) *Information that Reclamation will include in published announcements.* Each published announcement will include, as appropriate:

(1) A brief description of the proposed contract terms and conditions being negotiated;

(2) Date, time, and place of meetings, workshops, or hearings;

(3) The address and telephone number to which inquiries and comments may be addressed to Reclamation; and

(4) The period of time during which Reclamation will accept comments.

(d) *Public availability of proposed contracts.* Anyone can get copies of a proposed contract from the appropriate regional director or his or her designated public contact when the proposed contracts become available for review and comment, as specified in the published announcement.

(e) *Opportunities for public participation.* (1) Reclamation can provide, as appropriate: meetings, workshops, or hearings to provide local information. Advance notice of meetings, workshops, or hearings will be provided to those parties who make timely written request for such notice. Request for notice of meetings, workshops, or hearings should be sent to the appropriate Reclamation regional or local office.

(2) Reclamation or the district can invite the public to observe any contract proceedings.

(3) All public participation procedures will be coordinated with those involved with National Environmental Policy Act compliance, if Reclamation determines that the contract action may or will have ''significant'' environmental effects.

(f) *Individuals authorized to negotiate the terms of contract proposals.* Only persons authorized to act on behalf of the district may negotiate the terms and conditions of a specific contract proposal.

(g) *Agency use of comments submitted during the period provided for comment or made at hearings.* (1) Reclamation will review and summarize for use by the contract approving authority, testimony presented at any public hearing or any written comments submitted to the appropriate Reclamation officials at locations and within the comment period, as specified in the advance published announcement.

(2) Reclamation will make available to the public all written correspondence regarding proposed contracts under the terms and procedures of the Freedom of Information Act (5 U.S.C. 552), as amended.

§ 426.23 Recovery of operation and maintenance (O&M) costs.

(a) *General.* All new, amended, and renewed contracts shall provide for payment of O&M costs as specified in this section.

(b) *Amount of O&M costs a district must pay if it executes a new or renewed contract.* If a district executes a new or renewed contract after October 12, 1982, then that district must pay all of the

O&M costs that Reclamation allocates to irrigation.

(c) *Amount of O&M costs a district must pay if it amends its contract to conform to the discretionary provisions.* If a district has a contract executed prior to October 12, 1982, and the district amends the contract after October 12, 1982, as provided for in § 426.3(a)(2) to conform to the discretionary provisions, then the following applies:

(1) The district must pay all of the O&M costs that Reclamation allocates to irrigation;

(2) If in the year the amendment is executed, the district's contract rate was more than the O&M costs allocated to the district in that year then that positive difference at the time of the contract amendment must continue to be factored into the contract rate and annually paid to the United States. This would be in addition to any adjusted O&M cost that results from paragraph (c)(1) of this section. The positive difference would be factored into the contract rate for the remainder of the term of the contract; and

(3) The district will not be required to pay an increased amount toward the construction costs of a project as a condition of the district's agreeing to a contract amendment pursuant to paragraph (c) of this section.

(d) *Amount of O&M cost a district must pay if it amends its contract to provide supplemental or additional benefits.* If a district amends its contract after October 12, 1982, to provide supplemental or additional benefits, as provided for in § 426.3(a)(3), then the following must be complied with:

(1) The district must pay all of the O&M costs that Reclamation allocates to irrigation;

(2) If in the year the amendment is executed, the district's contract rate was more than the O&M costs allocated to the district in that year then that positive difference at the time of the contract amendment must continue to be factored into the contract rate and annually paid to the United States. This would be in addition to any adjusted O&M cost that results from paragraph (d)(1) of this section. The positive difference would be factored into the contract rate for the remainder of the term of the contract; and

(3) The district must pay any increases in the amount paid annually toward the construction costs of a project that the United States requires the district to pay as a condition of agreeing to provide the district with supplemental and additional benefits.

(e) *Amount of O&M a district pays under a prior contract.* For a district whose prior contract was executed prior to October 12, 1982, the district must pay all of the O&M costs allocated by Reclamation to irrigation unless the contract specifically provides contrary terms.

(f) *Amount of O&M that Reclamation charges an irrevocable elector.* (1) Regardless of any terms to the contrary within a prior contract with a district, a landholder who makes an irrevocable election, as provided for in § 426.3(f) must pay, annually, his or her proportionate share of all O&M costs allocated by Reclamation to irrigation. The irrevocable elector's proportionate share is based upon the ratio of:

(i) The amount of land in the district held by the irrevocable elector that received irrigation water to the total amount of land in the district that received irrigation water; or

(ii) The amount of irrigation water in the district received by the irrevocable elector to the total amount of irrigation water that the district delivered.

(2) The district(s) where the irrevocable elector's landholding is located must collect from the irrevocable elector an amount equal to the irrevocable elector's proportionate share of all O&M costs allocated by Reclamation to irrigation and the following apply:

(i) If in the year the election is executed, the district's contract rate was more than the O&M costs allocated to the district in that year, then that positive difference at the time of the contract amendment must continue to be factored into the contract rate. This would be in addition to any adjusted O&M cost that results from paragraph (f)(1) of this section. The positive difference would be factored into the contract rate for the remainder of the term of the contract; and

(ii) Such collections must be forwarded annually to the United States.

(g) *Amount of O&M that Reclamation charges if a landholder is subject to full-*

cost pricing. In a district subject to prior law, if a landholder is subject to full-cost pricing the district must ensure that all O&M costs are included in any full-cost assessment, regardless of whether the landholder is subject to the discretionary provisions. The revenues from such full-cost assessments must be collected and submitted to the United States.

§ 426.24 Reclamation decisions and appeals.

(a) *Reclamation decisions*—(1) *Decision-maker for Reclamation's final determinations*. The appropriate regional director makes any final determination that these regulations require or authorize. If Reclamation's final determination is likely to involve districts, or landholders with landholdings located in more than one region, the Commissioner designates one regional director to make that final determination.

(2) *Notice to affected parties*. The appropriate regional director will transmit any final determination to any district and landholder, as appropriate, whose rights and interests are directly affected.

(3) *Effective date for regional director's final determinations*. A regional director's decisions will take effect the day after the expiration of the period during which a person adversely affected may file a notice of appeal unless a petition for stay is filed together with a timely notice of appeal.

(b) *Appeal of final determinations*—(1) *Appeal Submittal*. Any district or landholder whose rights and interests are directly affected by a regional director's final determination can submit a written notice of appeal. Such notice of appeal must be submitted to the Commissioner of Reclamation within 30-calendar days from the date of the regional director's final determination.

(2) *Submittal of supporting information*. The affected party will have 60-calendar days from the date that the regional director issues a final determination to submit a supporting brief or memorandum to the Commissioner. The Commissioner may extend the time for submitting a supporting brief or memorandum, if:

(i) The affected party submits a request to the Commissioner in a timely manner;

(ii) The request includes the reason why additional time is needed; and

(iii) The Commissioner determines the appellant has shown good cause for such an extension and the extension would not prejudice Reclamation.

(3) *Requests for stay of the final determination pending appeal*. (i) The Commissioner will determine whether to stay a regional director's final determination within 30 days after receiving a properly filed petition for stay if the requesting party:

(A) Submits a request for stay in writing to the Commissioner, with, or in advance of, the notice of appeal, and states the grounds upon which the party requests the stay; and

(B) Demonstrates that the harm that a district or landholder would suffer if the Commissioner does not grant the stay outweighs the interest of the United States in having the final determination take effect pending appeal.

(ii) A decision, or that portion of the decision, for which a stay is not granted will become effective immediately after the Commissioner denies or partially denies the petition for stay, or fails to act within 30 days after receiving the request.

(iii) A Commissioner's decision on a petition for a stay or any other Commissioner decision is appealable.

(c) *Appeal of Commissioner's decision*—(1) *Appeal to the Office of Hearing and Appeals*. A party can appeal the Commissioner's decision to the Secretary by writing to the Director, Office of Hearings and Appeals (OHA), U.S. Department of the Interior. For an appeal to be timely, OHA must receive the appeal within 30-calendar days from the date of mailing of the Commissioner's decision.

(2) *Rules that govern appeals to OHA*. 43 CFR part 4, subpart G, and other provisions of 43 CFR Part 4, where applicable, govern the OHA appeal process, except for the accrual of underpayment interest as specified in paragraph (e) of this section.

(d) *Effective date of an appeal decision*. Reclamation will apply decisions made by the Commissioner or by OHA under paragraphs (b) and (c) of this section as

of the date of the violation or other problem that was addressed in the regional director's final determination. If, during the appeal process, irrigation water has been delivered to land subsequently found to be ineligible, for other than RRA forms submittal violations, the compensation rate may be applied to such deliveries retroactively.

(e) *Accrual of interest on underpayments during appeal.* Interest on any underpayments, as provided in § 426.21, continues to accrue during an appeal of a regional director's final determination, an appeal of the Commissioner's decision, or judicial review of final agency action. Underpayment interest accrual will continue even during a stay under paragraphs (b)(4) or (c)(3) of this section.

(f) *Status of appeals made prior to the effective date of these regulations.* (1) Appeals to the Commissioner of a regional director's final determination which were decided by the Commissioner or his or her delegate prior to the effective date of these regulations are hereby validated.

(2) Appeals to the Commissioner of final determinations made by a regional director and appeals to OHA, which are pending on appeal as of the effective date of these regulations will be processed and decided in accordance with the regulations in effect immediately prior to the effective date of these regulations.

(g) *Addresses.* All requests for stays, appeals, or other communications to the United States under this section must be addressed as follows:

(1) Commissioner, Bureau of Reclamation, Office of Policy, Attention: D–5200, P.O. Box 25007, Denver, Colorado 80225.

(2) Director, Office of Hearings and Appeals, Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

[61 FR 66805, Dec. 18, 1996, as amended at 67 FR 13702, Mar. 25, 2002]

§ 426.25 Reclamation audits.

Reclamation will conduct reviews of a district's administration and enforcement of and landholder compliance with Federal reclamation law and these regulations. These reviews may include, but are not limited to:

(a) Water district reviews;

(b) In-depth reviews; and

(c) Audits.

§ 426.26 Severability.

If any provision of these regulations or the application of these rules to any person or circumstance is held invalid, then the sections of these rules or their applications which are not held invalid will not be affected.

PART 427—WATER CONSERVATION RULES AND REGULATIONS

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 553; 16 U.S.C. 590y *et seq.;* 31 U.S.C. 9701; and 32 Stat. 388 and all acts amendatory thereof or supplementary thereto including, but not limited to, 43 U.S.C. 390b, 43 U.S.C. 390jj, 43 U.S.C. 422a *et seq.,* and 43 U.S.C. 523.

SOURCE: 61 FR 66825, Dec. 18, 1996, unless otherwise noted.

§ 427.1 Water conservation.

(a) *In general.* The Secretary shall encourage the full consideration and incorporation of prudent and responsible water conservation measures in all districts and for the operations by non-Federal recipients of irrigation and municipal and industrial (M&I) water from Federal Reclamation projects.

(b) *Development of a plan.* Districts that have entered into repayment contracts or water service contracts according to Federal reclamation law or the Water Supply Act of 1958, as amended (43 U.S.C. 390b), shall develop and submit to the Bureau of Reclamation a water conservation plan which contains definite objectives which are economically feasible and a time schedule for meeting those objectives. In the event the contractor also has provisions for the supply of M&I water under the authority of the Water Supply Act of 1958 or has invoked a provision of that act, the water conservation plan shall address both the irrigation and M&I water supply activities.

(c) *Federal assistance.* The Bureau of Reclamation will cooperate with the district, to the extent possible, in studies to identify opportunities to augment, utilize, or conserve the available water supply.

PART 428—INFORMATION REQUIREMENTS FOR CERTAIN FARM OPERATIONS IN EXCESS OF 960 ACRES AND THE ELIGIBILITY OF CERTAIN FORMERLY EXCESS LAND

Sec.

428.1 Purpose of this part.
428.2 Applicability of this part.
428.3 Definitions used in this part.
428.4 Who must submit forms under this part.
428.5 Required information.
428.6 Where to submit required forms and information.
428.7 What happens if a farm operator does not submit required forms.
428.8 What can happen if a farm operator makes false statements on the required forms.
428.9 Farm operators who are former owners of excess land.
428.10 Districts' responsibilities concerning certain formerly excess land.
428.11 Effective date.

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 553; 16 U.S.C. 590z–11; 31 U.S.C. 9701; 32 Stat. 388, as amended.

SOURCE: 65 FR 4324, Jan. 26, 2000, unless otherwise noted.

§428.1 Purpose of this part.

This part addresses Reclamation Reform Act of 1982 (RRA) forms requirements for certain farm operators and the eligibility of formerly excess land that is operated by a farm operator who was the landowner of that land when it was excess.

§428.2 Applicability of this part.

(a) This part applies to farm operators who provide services to:

(1) More than 960 acres held (directly or indirectly owned or leased) by one trust or legal entity; or

(2) The holdings of any combination of trusts and legal entities that exceed 960 acres.

(b) This part also applies to farm operators who provide services to formerly excess land held in trusts or by legal entities if the farm operator previously owned that land when the land was ineligible excess or under recordable contract.

(c) This part supplements the regulations in part 426 of this chapter.

§428.3 Definitions used in this part.

Custom service provider means an individual or legal entity that provides one specialized, farm-related service that a farm owner, lessee, sublessee, or farm operator employs for agreed-upon payments. This includes, for example, crop dusters, custom harvesters, grain haulers, and any other such services.

Farm operator means an individual or legal entity other than the owner, lessee, or sublessee that performs any portion of the farming operation. This includes farm managers, but does not include spouses, minor children, employees for whom the employer pays social security taxes, or custom service providers.

We or *us* means the Bureau of Reclamation.

You means a farm operator.

§428.4 Who must submit forms under this part.

(a) You must submit RRA forms to districts annually as specified in §428.6 if:

(1) You provide services to more than 960 nonexempt acres westwide, held by a single trust or legal entity or any combination of trusts and legal entities; or

(2) You are the ultimate parent legal entity of a wholly owned subsidiary or of a series of wholly owned subsidiaries that provide services in total to more than 960 nonexempt acres westwide, held by a single trust or legal entity or any combination of trusts and legal entities.

(b) Anyone who is the indirect owner of a legal entity that is a farm operator meeting the criteria of paragraph (a) of this section must submit forms to us annually, if any of the land to which services are being provided by that legal entity is land that the part owner formerly owned as excess land and sold or transferred at an approved price.

(c) If you must submit RRA forms due to the requirements of this section, then you may not use a verification form for your annual submittal as provided for in §426.18(l) of this chapter to meet the requirements of this section.

(d) If you must submit RRA forms solely due to the requirements of this section, then once you have met the requirement found in paragraph (a) of

this section you need not submit another RRA form during the current water year, even if you experience a change to your farm operating arrangements. Specifically, the requirements of § 426.18(k)(1) of this chapter are not applicable.

§ 428.5 Required information.

(a) We will determine which forms you must use to submit the information required by this section.

(b) You must declare all nonexempt land to which you provide services westwide.

(c) You must give us other information about your compliance with Federal reclamation law, including but not limited to:

(1) Identifier information, such as your name, address, telephone number;

(2) If you are a legal entity, information concerning your organizational structure and part owners;

(3) Information about the land to which you provide services, such as a legal description, and the number of acres;

(4) Information about whether you formerly owned, as ineligible excess land or under recordable contract, the land to which you are providing services;

(5) Information about the services you provide, such as what they are, who decides when they are needed, and how much control you have over the daily operation of the land;

(6) If you provide different services to different land parcels, a list of services that you provide to each parcel;

(7) Whether you can use your agreement with a landholder as collateral in any loan;

(8) Whether you can sue or be sued in the name of the landholding; and

(9) Whether you are authorized to apply for any Federal assistance from the United States Department of Agriculture in the name of the landholding.

§ 428.6 Where to submit required forms and information.

You must submit the appropriate completed RRA form(s) to each district westwide that is subject to the acreage limitation provisions and in which you provide services.

§ 428.7 What happens if a farm operator does not submit required forms.

(a) If you do not submit required RRA form(s) in any water year, then:

(1) The district must not deliver irrigation water before you submit the required RRA form(s); and

(2) You, the trustee, or the landholder(s) who holds the land (including to whom the land held in trust is attributed) must not accept delivery of irrigation water before you submit the required RRA form(s).

(b) After you submit all required RRA forms to the district, we will restore eligibility.

(c) If a district delivers irrigation water to land that is ineligible because you did not submit RRA forms as required by this part, we will assess administrative costs against the district as specified in § 426.20(e) of this chapter. We will determine these costs in the same manner used to determine costs for landholders under §§ 426.20(a)(1) through (3) of this chapter.

§ 428.8 What can happen if a farm operator makes false statements on the required forms.

If you make a false statement on the required RRA form(s), Reclamation can prosecute you under the following statement:

> Under the provisions of 18 U.S.C. 1001, it is a crime punishable by 5 years imprisonment or a fine of up to $10,000, or both, for any person knowingly and willfully to submit or cause to be submitted to any agency of the United States any false or fraudulent statement(s) as to any matter within the agency's jurisdiction. False statements by the farm operator will also result in loss of eligibility. Eligibility can only be regained upon the approval of the Commissioner.

§ 428.9 Farm operators who are former owners of excess land.

(a) Land held in trust or by a legal entity may not receive irrigation water if:

(1) You owned the land when the land was excess, whether or not under recordable contract;

(2) You sold or transferred the land at a price approved by Reclamation; and

(3) You are the direct or indirect farm operator of that land.

(b) This section does not apply if:

(1) The formerly excess land becomes exempt from the acreage limitations of Federal reclamation law; or

(2) The full-cost rate is paid for any irrigation water delivered to your formerly excess land that is otherwise eligible to receive irrigation water. If you are a part owner of a legal entity that is the direct or indirect farm operator of the land in question, then the full-cost rate will apply to the proportional share of the land that reflects your interest in that legal entity.

§ 428.10 Districts' responsibilities concerning certain formerly excess land.

Districts must not make irrigation water available to formerly excess land that meets the criteria under § 428.9(a), unless an exception provided in § 428.9(b) applies.

§ 428.11 Effective date.

(a) All provisions of this part apply on January 1, 2001, except:

(1) For those districts whose 2001 water year commences prior to January 1, 2001, the applicability date of §§ 428.1 through 428.8 is October 1, 2000.

(b) On January 1, 2001, this part applies to all farm operating arrangements between farm operators and trusts or legal entities that:

(1) Are then in effect; or

(2) Are initiated on, or after, January 1, 2001.

PART 429—USE OF BUREAU OF RECLAMATION LAND, FACILITIES, AND WATERBODIES

Subpart A—Purpose, Definitions, and Applicability

Sec.
429.1 What is the purpose of this part?
429.2 What definitions are used in this part?
429.3 What types of uses are subject to the requirements and processes established under this part?
429.4 What types of uses are not subject to the requirements and processes established under this part?
429.5 Who is authorized to issue use authorizations under this part?
429.6 When must water user organizations also approve use authorizations?

Subpart B—Proposed Uses Involving Reclamation Easements

429.7 Can I use land where Reclamation holds an easement?
429.8 Is there a fee for uses involving a Reclamation easement?

Subpart C—Requesting Authorization to Use Reclamation Land, Facilities, and Waterbodies

429.9 What should I do before filing an application?
429.10 What application form should I use?
429.11 Where can I get the application forms?
429.12 Where do I file my application?
429.13 How long will the application review process take?
429.14 What criteria will Reclamation consider when reviewing applications?
429.15 Is Reclamation required to issue a use authorization?

Subpart D—Application Fees and Administrative Costs

429.16 How much is the application fee and when should it be paid?
429.17 When will Reclamation collect administrative costs?
429.18 When do I have to pay the administrative costs?
429.19 What happens if the initial estimate for administrative costs is insufficient?
429.20 Can I get a detailed explanation of the administrative costs?
429.21 If I overpay Reclamation's administrative costs, can I get a refund?
429.22 Can Reclamation charge me additional administrative costs after I receive a use authorization?

Subpart E—Use Fees

429.23 How does Reclamation determine use fees?
429.24 When should I pay my use fee?
429.25 How long do I have to submit my payment for the use fee and accept the offered use authorization?

Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

429.26 When may Reclamation reduce or waive costs or fees?

Subpart G—Terms and Conditions of Use Authorizations

429.27 What general information appears in use authorizations?
429.28 What terms and conditions apply to all use authorizations?

429.29 What other terms and conditions may be included in my use authorization?
429.30 May use authorizations be transferred or assigned to others?

Subpart H—Prohibited and Unauthorized Uses of Reclamation Land, Facilities, and Waterbodies

429.31 What uses are prohibited on Reclamation land, facilities, and waterbodies?
429.32 How will Reclamation address currently authorized existing private exclusive recreational or residential uses?
429.33 What are the consequences for using Reclamation land, facilities, and waterbodies without authorization?

Subpart I—Decisions and Appeals

429.34 Who is the decisionmaker for Reclamation's final determinations?
429.35 May I appeal Reclamation's final determination?
429.36 May I appeal the Commissioner's decision?
429.37 Does interest accrue on monies owed to the United States during my appeal process?

AUTHORITY: 43 U.S.C. 373; 43 U.S.C. 373b; 43 U.S.C. 387; 43 CFR part 21; Public Law 108–447, Title VIII; 31 U.S.C. 9701, as amended.

SOURCE: 73 FR 74335, Dec. 5, 2008, unless otherwise noted.

Subpart A—Purpose, Definitions, and Applicability

§ 429.1 What is the purpose of this part?

The purpose of this part is to notify the public that any possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from Reclamation land, facilities, or waterbodies are prohibited without written authorization from Reclamation, unless excepted as listed in § 429.4. This part describes:

(a) How to apply to Reclamation for a use authorization to allow your activity on Reclamation land, facilities, and waterbodies;

(b) How Reclamation reviews and processes your application, including the criteria for approval or denial of your application;

(c) The requirement for collection of application and use fees and the recovery of administrative costs;

(d) How Reclamation determines and collects costs and fees;

(e) Prohibited uses on Reclamation land, facilities, and waterbodies;

(f) How Reclamation will address existing authorized uses which are otherwise prohibited, including the criteria for approval or denial of requests to renew these use authorizations;

(g) The process and penalties associated with resolution of unauthorized uses; and

(h) How to appeal an action or determination made under this part.

§ 429.2 What definitions are used in this part?

The following definitions are used in this part:

Administrative costs means all costs incurred by Reclamation in processing your application and all costs associated with evaluating, issuing, monitoring, and terminating your use authorization on Reclamation land, facilities, and waterbodies. Administrative costs are distinct and separate from application and use fees and typically include, but are not limited to:

(1) Determining the use fee;

(2) Evaluating and documenting environmental and cultural resources compliance;

(3) Performing engineering review;

(4) Preparation of the use authorization; and

(5) Personnel and indirect costs directly associated with these actions.

Applicant means you as any person or entity (such as a private citizen, business, non-governmental organization, public entity, Indian tribe, or foreign government) who submits an application requesting use of Reclamation land, facilities, and waterbodies.

Application means either Form 7–2540 or SF 299. The choice of application form is dependent on the type of use requested.

Application fee means a $100 nonrefundable charge, which you must submit with your application to cover the costs of our initial review of your request. Application fees are distinct and separate from administrative costs and use fees.

Commissioner means the senior executive of the Bureau of Reclamation, Department of the Interior.

Consent document means a written agreement or notification listing conditions which will prevent unreasonable interference with our easement on non-Reclamation land.

Cultural resource means any prehistoric, historic, architectural, sacred, or traditional cultural property and associated objects and documents that are of interest to archaeology, anthropology, history, or other associated disciplines. Cultural resources include archaeological resources, historic properties, traditional cultural properties, sacred sites, and cultural landscapes that are associated with human activity or occupation.

Easement refers to an interest in land that consists of the right to use or control the land for a specific purpose, but does not constitute full ownership of the land.

Environmental compliance means complying with the requirements of the National Environmental Policy Act; the Endangered Species Act; the Clean Water Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; applicable regulations associated with these statutes; and other related laws and regulations.

Form 7–2540 means the Bureau of Reclamation Right-of-Use Application form required for all proposed uses of Reclamation land, facilities, and waterbodies, except those associated with construction and/or placement of transportation, communication, and utility systems and facilities.

Grantee means you as the recipient or holder of a use authorization regardless of the contractual format.

Interior means the United States Department of the Interior.

Managing partner means a Federal or non-Federal public entity that manages land, facilities, or waterbodies through a management agreement with Reclamation entered into pursuant to the Federal Water Project Recreation Act, as amended.

Part 21 of this title means title 43 of the Code of Federal Regulations part 21, which is titled Occupancy of Cabin Sites on Public Conservation and Recreation Areas.

Part 423 of this chapter means title 43 of the Code of Federal Regulations part 423, which is titled Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies.

Possession or occupancy and possess or occupy mean to control, use, or reside on Reclamation land, facilities, or waterbodies.

Private exclusive recreational or residential use means any use that involves structures or other improvements used for recreational or residential purposes to the exclusion of public uses that are not associated with the official management of a Reclamation project. This includes, but is not limited to the following:

(1) Cabin sites and associated improvements (including those currently defined in part 21 of this title); mobile homes, residences, outbuildings, and related structures; and associated landscaping, patios, decks, and porches;

(2) Boat houses, docks, moorings, piers, and launch ramps;

(3) Floating structures or buildings, including moored vessels used as residences or unauthorized business sites;

(4) Sites for such activities as hunting, fishing, camping, and picnicking (other than transitory uses allowed under part 423 of this chapter) that attempt to exclude general public access; and

(5) Access routes to private land, facilities, or structures when other reasonable alternative means of access is available or can be obtained.

Public entity means States, political subdivisions or agencies thereof; public and quasi-governmental authorities and agencies; and agencies of the Federal Government.

Public needs mean the recreational requirements of the general public at areas where existing authorized private exclusive recreational or residential uses are present.

Reclamation means the Bureau of Reclamation, United States Department of the Interior.

Reclamation facility means any facility under our jurisdiction. The term includes, but is not limited to, buildings, canals, dams, ditches, drains, fish and wildlife facilities, laterals, powerplants, pumping plants, recreation facilities, roads, switchyards, transmission and telecommunication lines, and warehouses.

Reclamation land means any land under the jurisdiction of, or administered by, Reclamation and may include, but is not limited to, the following:

(1) All land acquired by Reclamation through purchase, condemnation, exchange, or donation for Reclamation project and water related purposes;

(2) All land withdrawn by Reclamation from the public domain for Reclamation purposes; and

(3) All interests in land acquired by Reclamation, including easements and rights exercised by the United States under the 1890 Canal Act (43 U.S.C. 945).

Reclamation law means the Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 371 *et seq.*), and all Acts which supplement or amend the 1902 Act.

Reclamation project means any land, facilities, or waterbodies used for water supply, water delivery, flood control, hydropower, or other authorized purposes including fish, wildlife, and recreation administered by Reclamation under Federal laws.

Reclamation waterbodies means any body of water situated on Reclamation land and under Reclamation jurisdiction. Examples of Reclamation waterbodies include, but are not limited to, reservoirs, lakes, and impoundments.

Regional Director means any one of the representatives of the Commissioner, or their delegates, who are responsible for managing their respective region's land, facilities, and waterbodies and for the decisions made under this part.

Standard Form (SF) 299 means the form titled Application for Transportation and Utility Systems and Facilities on Federal Lands used when requesting permission for construction and/or placement of transportation, communication, or utility systems and facilities.

Unauthorized use means use of Reclamation land, facilities, and waterbodies without proper authorization.

Use authorization means a document that defines the terms and conditions under which we will allow you to use Reclamation land, facilities, and waterbodies. Use authorizations can take the form of easements, leases, licenses, permits, and consent documents. This document is also referred to as a ''right-of-use'' in part 423 of this chapter.

Use fee means the amount due to Reclamation for the use of Federal land, facilities, or waterbodies under our jurisdiction or control. Use fees are distinct and separate from application fees and administrative costs.

Valuation means the method used to establish the fee for a use authorization by appraisal, waiver valuation, or other sound or generally accepted business practice.

Water user organization means any legal entity established under State law that has entered into a contract with the United States pursuant to the Federal reclamation laws.

We, us, or *our* mean Reclamation.

You, your, I, me, or *my,* mean an applicant, grantee, or unauthorized user.

§ 429.3 What types of uses are subject to the requirements and processes established under this part?

Possession or occupancy of, or extraction or removal of natural resources from, Reclamation land, facilities, or waterbodies require a use authorization in accordance with this part. Typical uses of or activities on Reclamation land, facilities, or waterbodies regulated by this part include, but are not limited to the following:

(a) Commercial filming and photography;

(b) Commercial guiding and outfitting;

(c) Commercial or organized sporting events;

(d) Grazing, farming, and other agricultural uses;

(e) Infrastructure, such as transportation, telecommunications, utilities, and pipelines;

(f) Organized recreational activities, public gatherings, and other special events that involve the possession or occupancy of Reclamation lands;

(g) Removal of, or exploration for, sand, gravel, and other mineral resources;

(h) Timber harvesting, or removal of commercial forest products or other vegetative resources; and

(i) Any other uses deemed appropriate by Reclamation, subject to the exclusions listed in § 429.4.

§ 429.4 What types of uses are not subject to the requirements and processes established under this part?

(a) Individual, non-commercial use of Reclamation land, facilities, or waterbodies for occasional activities such as hiking, camping for periods of 14 days or less during any period of 30 consecutive days, sightseeing, picnicking, hunting, swimming, boating, and fishing, consistent with applicable laws, regulations and policies. Public conduct associated with these activities is governed by part 423 of this chapter;

(b) Buildings and structures used by concessionaires or managing partners to facilitate their operations or that are made available by them for the general, non-exclusive use of the public. Examples include, but are not limited to the following:

(1) Boat docks available for short-term use by the public;

(2) Marina slips available for rent by the public;

(3) Publicly available boat ramps;

(4) Houseboats available for short-term rent by the public;

(5) Stores and restaurants;

(6) Employee housing; and

(7) Rental cabins, hotels, campgrounds, and other short-term lodging facilities.

(c) While not subject to other requirements and processes established under this part, the following types of uses must be in compliance with the requirements in subpart H of this part:

(1) Recreational activities at sites managed by non-Federal managing partners under Public Law 89–72, titled Federal Water Project Recreation Act, July 9, 1965;

(2) Activities managed by other Federal agencies or Interior bureaus by agreement or under other authority;

(3) Activities at sites directly managed by Reclamation where fees or fee schedules are established for general public recreation use;

(4) Uses authorized under concession contracts on Reclamation land, facilities, and waterbodies;

(5) Reclamation contracts for water supply or water operations;

(6) Authorized operation and maintenance activities on Reclamation land, facilities, and waterbodies undertaken by water user organizations, or their contractors, or by Reclamation contractors;

(7) Agreements and real property interests granted for the replacement or relocation of facilities, such as highways, railroads, telecommunication, or transmission lines or infrastructure governed by Section 14 of the Reclamation Project Act of August 4, 1939 (43 U.S.C. 389). Payments to equalize land values may still be required and administrative costs may still be recovered; and

(8) Activities specifically authorized under other Federal statutes or regulations.

§ 429.5 Who is authorized to issue use authorizations under this part?

Unless otherwise provided by law or regulation, only Reclamation or another Federal agency acting for Reclamation under delegated authority is authorized to issue use authorizations that convey an interest in Reclamation land, facilities, or waterbodies. Recreation managing partners under the Federal Water Projects Recreation Act, 16 U.S.C. 4601 *et seq.*, and water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies, and provide a copy of the use authorization to the local Reclamation office, pursuant to a contract with Reclamation may issue limited use authorizations to third parties for activities on Reclamation land, facilities, or waterbodies when all of the following apply:

(a) The recreation managing partner or water user organization is authorized to do so under its contract with Reclamation;

(b) Such limited use authorizations do not convey ownership or other interest in the Federal real property;

(c) The uses authorized are not permanent or for an indefinite period;

(d) The limited use authorization does not provide for an automatic right of renewal;

(e) The limited use authorization is fully revocable at the discretion of Reclamation; and

(f) All revenues collected for the use of Reclamation land, facilities, and waterbodies are handled in compliance with all statutory, regulatory, and policy requirements.

§ 429.6 When must water user organizations also approve use authorizations?

(a) Use authorizations for easements and rights-of-way for periods in excess of 25 years are also subject to approval from water user organizations under contract obligation for repayment of the project or division. This requirement does not apply to any other type of use authorizations.

(b) At a minimum, the appropriate water user organizations will be notified of all use authorizations prior to their issuance to avoid potential conflicts between the requested use authorization and the water user organizations' need to operate and maintain the facilities for which they have contractual responsibility.

(c) At the discretion of the responsible Regional Director, concurrence of the appropriate water user organizations not addressed in paragraph (a) of this section may be requested.

Subpart B—Proposed Uses Involving Reclamation Easements

§ 429.7 Can I use land where Reclamation holds an easement?

(a) To prevent conflicts where Reclamation holds an easement on land owned by others, you should submit an application for the proposed use. If after review of the application, Reclamation determines that your requested use would not unreasonably interfere with Reclamation's easement, a consent document may be issued to you. The consent document will contain the conditions with which you must comply to ensure that your use will not unreasonably interfere with Reclamation's use of its easement.

(b) In accordance with subpart C of this part, you should submit either SF 299 or Form 7–2540 to the local Reclamation office to request a consent document.

(c) If you are not the underlying landowner, you must also secure the permission of the landowner for your requested use of the area covered by Reclamation's easement.

§ 429.8 Is there a fee for uses involving a Reclamation easement?

Reclamation will not charge a use fee for a consent document. However, depending upon the complexity of your requested use and issues associated with it, Reclamation may charge an application fee and administrative costs, unless waived in accordance with subpart F of this part.

Subpart C—Requesting Authorization to Use Reclamation Land, Facilities, and Waterbodies

§ 429.9 What should I do before filing an application?

Before filing an application, it is important that you contact the local Reclamation office to discuss your proposed use. This discussion can help expedite your application process.

§ 429.10 What application form should I use?

You must use one of the following application forms depending on the nature of your requested use:

(a) Use SF 299 to request a use authorization for the placement, construction, and use of energy, transportation, water, or telecommunication systems and facilities on or across all Federal property including Reclamation land, facilities, or waterbodies.

Examples of such uses are:

(1) Canals;

(2) Communication towers;

(3) Fiber-optics cable;

(4) Pipelines;

(5) Roads;

(6) Telephone lines; and

(7) Utilities and utility corridors.

(b) Use Form 7–2540 to request any other type of use authorization. Examples of such uses are:

(1) Commercial filming and photography;

(2) Commercial guiding and outfitting;

(3) Commercial or organized sporting events;

(4) Grazing, farming, and other agricultural uses;

(5) Organized recreational activities, public gatherings, and other special events;

(6) Removal of, or exploration for, sand, gravel, and other mineral materials;

(7) Timber harvesting, or removal of commercial forest products or other vegetative resources; and

(8) Any other uses deemed appropriate by Reclamation.

(c) Application forms may not be required where Reclamation solicits competitive bids.

§ 429.11 Where can I get the application forms?

Both forms can be obtained from any Reclamation office or from our official internet Web site at *http://www.usbr.gov*. These forms contain specific instructions for application submission and describe information that you must furnish. However, when you submit either form to your local Reclamation office for review, the form must contain your original signature as the applicant.

§ 429.12 Where do I file my application?

File your completed and signed application, including the $100 nonrefundable application fee, with the Reclamation office having jurisdiction over the land, facility, or waterbody associated with your request. Reclamation office locations may be found on *http://www.usbr.gov*, the official Reclamation Internet Web site.

§ 429.13 How long will the application review process take?

(a) Reclamation will acknowledge in writing your completed and signed application and application fee within 30 calendar days of receipt. Reclamation may request additional information needed to process your application, such as legal land descriptions and detailed construction specifications.

(b) The processing time depends upon the complexity of your requested use, issues associated with it, and the need for additional information from you.

(c) Should your requested use be denied at any time during the review process, Reclamation will notify you in writing of the basis for the denial.

§ 429.14 What criteria will Reclamation consider when reviewing applications?

Reclamation will consider the following criteria when reviewing applications:

(a) Compatibility with authorized project purposes, project operations, safety, and security;

(b) Environmental compliance;

(c) Compatibility with public interests;

(d) Conflicts with Federal policies and initiatives;

(e) Public health and safety;

(f) Availability of other reasonable alternatives; and

(g) Best interests of the United States.

§ 429.15 Is Reclamation required to issue a use authorization?

No. The issuance of a use authorization is at Reclamation's discretion. At a minimum, the criteria listed at § 429.14 must be considered prior to issuance of any use authorizations. Not all requests will be authorized. If issued, Reclamation will provide only the least estate, right, or possessory interest needed to accommodate the approved use.

Subpart D—Application Fees and Administrative Costs

§ 429.16 How much is the application fee and when should it be paid?

You must remit a nonrefundable application fee of $100 to cover costs associated with our initial review of your application, unless the payment is waived pursuant to subpart F of this part. This initial review will determine if your requested use is appropriate for consideration and not likely to interfere with Reclamation project purposes or operations.

§ 429.17 When will Reclamation collect administrative costs?

Reclamation will collect, in advance, its administrative costs for processing your application, except as provided under subpart F of this part.

§ 429.18 When do I have to pay the administrative costs?

(a) Following the initial review, you will be notified in writing whether your application appears to be appropriate for further processing. At that time, Reclamation will give you an initial estimate of administrative costs required to continue processing your application.

(b) You must pay these initial, estimated administrative costs before Reclamation can continue to process your application, unless you are granted a waiver of administrative costs under subpart F of this part. If payment is not received within 90 days after the estimate is provided to you, Reclamation may close your file. If this occurs and you later wish to proceed, you must submit both a new application and another $100 nonrefundable application fee.

§ 429.19 What happens if the initial estimate for administrative costs is insufficient?

If the initial estimate to cover Reclamation's administrative costs is found to be insufficient, Reclamation will notify you in writing of the additional amount needed. You must pay the amount requested before Reclamation will continue processing your application.

§ 429.20 Can I get a detailed explanation of the administrative costs?

Yes, you are entitled to receive an explanation of all administrative costs relevant to your specific application. You must request this information in writing from the Reclamation office where you submitted your application.

§ 429.21 If I overpay Reclamation's administrative costs, can I get a refund?

If, in reviewing your application, Reclamation uses all the monies you have paid, you will not receive a refund regardless of whether you receive a use authorization. If the money collected from you exceeds administrative costs, a refund of the excess amount will be made to you consistent with Reclamation's financial policies.

§ 429.22 Can Reclamation charge me additional administrative costs after I receive a use authorization?

(a) After you receive your use authorization, Reclamation may charge you for additional administrative costs incurred for activities such as:

(1) Monitoring your authorized use over time to ensure compliance with the terms and conditions of your use authorization; and

(2) Periodic analysis of your long-term use to adjust your use fee to reflect current conditions.

(b) If your additional payment is not received by Reclamation within 90 days after notification to you in writing of the additional administrative costs, Reclamation may take action to terminate your use authorization.

Subpart E—Use Fees

§ 429.23 How does Reclamation determine use fees?

The use fee is based on a valuation or by competitive bidding. Use fees may be adjusted as deemed appropriate by Reclamation to reflect current conditions, as provided in the use authorization.

§ 429.24 When should I pay my use fee?

(a) If Reclamation offers you a use authorization, you must pay the use fee in advance, unless you are granted a waiver under subpart F of this part.

(b) Your use authorization will clearly state the use fee. Should periodic payments apply, your use authorization will also describe when you should pay those periodic use fees.

§ 429.25 How long do I have to submit my payment for the use fee and accept the offered use authorization?

You have 90 days to accept and return the use authorization and required fees, otherwise Reclamation may consider the offer to be rejected by you and your file may be closed. If this occurs and you later wish to proceed, you must submit a new application and another $100 nonrefundable application fee. You may not commence your use of Reclamation's land, facilities, or waterbodies until Reclamation has issued a use authorization to you. A use authorization will

only be issued upon receipt by Reclamation of all required costs and fees, and the use authorization signed by you.

Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

§ 429.26 When may Reclamation reduce or waive costs or fees?

(a) As determined appropriate and approved and documented by the applicable Regional Director, the application fees may be waived, and charges for administrative costs or use fees may be waived or reduced as indicated by a ✓ in the following table:

Situations where costs and fees may be reduced or waived	Application fee	Administrative costs	Use fee
(1) The use is a courtesy to a foreign government or if comparable fees are set on a reciprocal basis with a foreign government	✓	✓	✓
(2) The use is so minor or short term that the cost of collecting fees is equal to or greater than the value of the use	✓	✓	✓
(3) The use will benefit the general public with no specific entity or group of beneficiaries readily identifiable	✓	✓	✓
(4) Applicant is a public entity or Indian tribe	✓	✓	✓
(5) Applicant is a non-profit or educational entity and the use provides a general public benefit	✓	✓	✓
(6) Applicant is a rural electric association or municipal utility or cooperative	✓	✓	✓
(7) The use directly supports United States' programs or projects	✓	✓	✓
(8) The use secures a reciprocal land use of equal or greater value to the United States	✓	✓	✓
(9) Applicant for a consent document is the underlying owner of the property subject to Reclamation's easement	✓	✓	(1)
(10) The use is issued under competitive bidding	✓	✓	(2)

[1] Not applicable.
[2] Set by Bid.

(b) When a statute, executive order, or court order authorizes the use and requires specific treatment of administrative cost recovery and collection of use fees associated with that use, that requirement will be followed by Reclamation.

Subpart G—Terms and Conditions of Use Authorizations

§ 429.27 What general information appears in use authorizations?

Each use authorization will contain:

(a) An adequate description of the land, facilities, or waterbodies where the use will occur;

(b) A description of the specific use being authorized together with applicable restrictions or conditions that must be adhered to;

(c) The conditions under which the use authorization may be renewed, terminated, amended, assigned or transferred, and/or have the use fee adjusted; and

(d) Primary points of contact and other terms and conditions.

§ 429.28 What terms and conditions apply to all use authorizations?

(a) By accepting a use authorization under this part, you agree to comply with and be bound by the following terms and conditions during all construction, operation, maintenance, use, and termination activities:

(1) The grantee agrees to indemnify the United States for, and hold the United States and all of its representatives harmless from, all damages resulting from suits, actions, or claims of any character brought on account of any injury to any person or property arising out of any act, omission, neglect, or misconduct in the manner or method of performing any construction, care, operation, maintenance, supervision, examination, inspection, or other activities of the grantee.

(2) The United States, acting through Reclamation, Department of the Interior, reserves rights to construct, operate, and maintain public works now or hereafter authorized by the Congress without liability for termination of the use authorization or other damage to the grantee's activities or facilities.

(3) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization in the event of a natural disaster, a national emergency, a need arising from security requirements, or an immediate and overriding threat to public health and safety.

(4) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization for activities other than existing authorized private exclusive recreational or residential use as defined under § 429.2 if Reclamation determines that any of the following apply:

(i) The use has become incompatible with authorized project purposes, project operations, safety, and security;

(ii) A higher public use is identified through a public process described at § 429.32(a)(1); or

(iii) Termination is necessary for operational needs of the project.

(5) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization if Reclamation determines that the grantee has failed to use the use authorization for its intended purpose. Further, failure to construct within the timeframe specified in the terms of the use authorization may constitute a presumption of abandonment of the requested use and cause termination of the use authorization.

(6) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization if the grantee fails to comply with all applicable Federal, State, and local laws, regulations, ordinances, or terms and conditions of any use authorization, or to obtain any required permits or authorizations.

(b) The Regional Director may, upon advice of the Solicitor, modify these terms and conditions with respect to the contents of the use authorization to meet local and special conditions.

§ 429.29 What other terms and conditions may be included in my use authorization?

Reclamation may include additional terms, conditions, or requirements that address environmental law compliance, the protection of cultural and natural resources, other interests of the United States, and local laws and regulations.

§ 429.30 May use authorizations be transferred or assigned to others?

Your use authorization may not be transferred or assigned to others without prior written approval of Reclamation, unless specifically provided for in your use authorization or as provided under subpart H of this part for existing private exclusive recreational and residential uses. Should you wish to transfer or assign your use authorization to another individual or entity, you must contact the Reclamation office that issued your use authorization prior to taking such action.

Subpart H—Prohibited and Unauthorized Uses of Reclamation Land, Facilities, and Waterbodies

§ 429.31 What uses are prohibited on Reclamation land, facilities, and waterbodies?

(a) Reclamation prohibits any use that would not comply with part 423 of this chapter.

(b) Reclamation prohibits any use that would result in new private exclusive recreational or residential use of Reclamation land, facilities, or waterbodies as of the effective date of this part. Improvements that are within the terms and conditions of an existing authorization will not be considered new private exclusive recreational or residential use.

§ 429.32 How will Reclamation address currently authorized existing private exclusive recreational or residential uses?

The administration and potential renewal of use authorizations, existing as of January 1, 2008, for private exclusive recreational or residential uses of Reclamation land, facilities, and waterbodies, as defined in this part,

will be administered in accordance with the following requirements.

(a) Existing private exclusive recreational or residential uses must be compatible with public needs and with authorized project purposes, project operations, safety, and security. A review of whether existing private exclusive recreational or residential uses is compatible with public needs and authorized project purposes, project operations, safety, and security will be made at least once every 20 years, except where part 21 requires a more frequent review.

(1) Reclamation will only make final determinations regarding the compatibility of existing private exclusive recreational or residential uses with public needs or project purposes through a public process involving one or more public meetings. Examples of such public processes include resource management plan development, recreation demand analysis studies, and project feasibility studies.

(2) Reclamation will notify in writing all potentially affected holders of existing authorizations for private exclusive recreational or residential use regarding the opportunities for public participation when any action is proposed that could lead to an incompatibility determination.

(3) Determinations that existing private exclusive recreational or residential uses are not compatible with public needs will be published in the FEDERAL REGISTER.

(4) If a determination of incompatibility with public needs is made, affected use authorizations may be extended up to 5 years from the date of publication in the FEDERAL REGISTER, if the Regional Director determines that such extension is necessary to the fair and efficient administration of this part.

(b) Reclamation will conduct a compliance review of all existing private exclusive recreational or residential uses at least once every 5 years to determine if the following criteria are being met:

(1) Environmental requirements;

(2) Public health and safety requirements; and

(3) Current in financial obligations to Reclamation.

(c) Reclamation will provide the holder of the use authorization with a written report of the results of the compliance review by certified mail, return receipt requested. The report will state whether the existing use meets the required criteria listed in paragraph (b) of this section and will list any deficiencies that can be corrected. A minimum of 90 days will be provided to make corrections identified in the report. Failure to correct the deficiencies within the time provided in the report will result in termination of the use authorization.

(d) In addition to the compliance reviews described above, Reclamation will initiate a review of the existing private exclusive recreational or residential uses for compliance with the required criteria listed in paragraph (b) of this section at least 6 months prior to the expiration date of the existing use authorization. Reclamation will provide the holder of the use authorization with a written report of the results of the compliance review results by certified mail, return receipt requested. The report will state whether the existing use meets the required criteria under this section as applicable and will list any deficiencies that must be corrected prior to a renewal of the use authorization. A minimum of 90 days will be provided prior to the expiration of the permit to make corrections identified in the report. In addition, this report will serve as a reminder that it is time to seek renewal of the use authorization and provide information on the process that needs to be followed.

(e) Reclamation must be notified in advance by certified mail, return receipt requested, of any transfers of use authorizations for existing private exclusive recreational or residential uses.

(f) Any renewal of use authorizations for existing private exclusive recreational or residential uses of Reclamation land, facilities, and waterbodies will not exceed 20-year terms. Any such renewals will be subject to the periodic reviews described in paragraphs (a) and (b) of this section and these reviews could potentially result in the termination of the use agreement prior to the end of the term of years.

(g) Upon non-renewal or termination of a use authorization for an existing private exclusive recreational or residential use of Reclamation land, facilities, and waterbodies, the grantee will remove any improvements from the site within 90 days from the date of termination or non-renewal of the use authorization. The grantee will return the property as near as possible to its original undisturbed condition. Any property not removed within 90 days may be removed by Reclamation at the expense of the prior grantee.

(h) Renewal decisions of use authorizations for existing private exclusive recreational or residential uses located on Reclamation land, facilities, and waterbodies will be made by the Regional Director. If the Regional Director determines that deficiencies identified under paragraph (d) of this section cannot be corrected prior to the expiration date of the use authorization, the use authorization may be extended for a period not to exceed 6 months.

(i) Requests for the renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses that expired and were not renewed prior to the effective date of this part and were not renewed or are subsequently not renewed or terminated under the procedures of this section will be considered requests for uses prohibited under § 429.31 and will not be approved. Conversely, requests for the renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses that were in existence on the effective date of these regulations and that are in compliance with all requirements of the applicable use authorization at the time a request is made will not be considered requests for uses prohibited under § 429.31. Requests for renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses must be made by submitting Form 7–2540 as stated under § 429.10(b) and in compliance with subpart D of this part.

(j) Unauthorized existing private exclusive recreational or residential uses will be administered under §§ 429.31 and 429.33 and part 423 of this chapter.

§ 429.33 What are the consequences for using Reclamation land, facilities, and waterbodies without authorization?

(a) Reclamation may seek to collect the following:

(1) All administrative costs incurred by Reclamation in resolving the unauthorized use;

(2) All costs of removing structures, materials, improvements, or any other real or personal property;

(3) All costs of rehabilitation of the land, facilities, or waterbodies as required by Reclamation.

(4) The use fee that would have applied had your use been authorized from the date your unauthorized use began;

(5) Interest accrued on the use fee from the date your unauthorized use began as specified in paragraph (a)(4) of this section; and

(6) The interest charge rate shall be the greater of either the rate prescribed quarterly in the FEDERAL REGISTER by the Department of the Treasury for application to overdue payments or the interest rate of 0.5 percent per month. The interest charge rate will be determined as of the due date and remain fixed for the duration of the delinquent period.

(b) As an unauthorized user, you will receive a written notice in which Reclamation will outline the steps you need to perform to cease your unauthorized use.

(c) If appropriate, you will receive a final determination letter detailing the applicable costs and fees, as set forth under paragraph (a) of this section, which must be paid to Reclamation for your unauthorized use. Payment must be made within 30 days of receipt of this letter unless Reclamation extends this deadline in writing. Failure to make timely payment may result in administrative or legal action being taken against you.

(d) Reclamation may determine that issuing a use authorization to you for an existing unauthorized use is not appropriate; and may deny future use applications by you because of this behavior. As noted at § 429.15, use authorizations are always issued at Reclamation's discretion.

(e) If, however, your unauthorized use is deemed by Reclamation to be an unintentional mistake, consideration may be given to issuing a use authorization provided that you qualify and meet the criteria at §429.14; and, in addition to the normal costs, you agree to pay the following:

(1) The use fee that would have been owed from the date your unauthorized use began; and

(2) Interest accrued on the use fee from the date your unauthorized use began as specified in paragraph (f)(1) of this section.

(f) Under no circumstances will your unauthorized use or payment of monies to the United States in association with an unauthorized use either:

(1) Create any legal interest or color of title against the United States; or

(2) Establish any right or preference to continue the unauthorized use.

(g) Under part 423 of this chapter, unauthorized use of Reclamation land, facilities, or waterbodies is a trespass against the United States. You may be subject to legal action including criminal prosecution as specified under §423.71.

Subpart I—Decisions and Appeals

§429.34 Who is the decisionmaker for Reclamation's final determinations?

(a) The appropriate Regional Director, or the Regional Director's designee, makes any final determination associated with an action taken under this rule and will send that final determination in writing to you by mail.

(b) The Regional Director's final determination will take effect upon the date of the final determination letter.

§429.35 May I appeal Reclamation's final determination?

(a) Yes, if you are directly affected by a final determination, you may appeal by writing to the Commissioner within 30 calendar days after the postmark date of the Regional Director's determination letter.

(b) You have an additional 30 calendar days after the postmark of your written appeal to the Commissioner within which to submit any additional supporting information.

(c) The Regional Director's final determination will remain in effect until the Commissioner has reviewed your appeal and provided you with that decision, unless you specifically request a stay and a stay is granted by the Commissioner.

§429.36 May I appeal the Commissioner's decision?

(a) Yes, you may appeal the Commissioner's decision by writing to the Director, Office of Hearing and Appeals (OHA), U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

(b) For an appeal to be timely, OHA must receive your appeal within 30 calendar days from the date of mailing of the Commissioner's decision. Rules that govern appeals to OHA are found at part 4, subparts B and G, of this title.

(c) Notwithstanding the provisions of §4.21(a) of this title, the Commissioner's decision will take effect upon issuance and remain in effect unless you specifically request a stay and a stay is granted under §4.21(b) of this title.

§429.37 Does interest accrue on monies owed to the United States during my appeal process?

Except for any period in the appeal process during which a stay is then in effect, interest on any nonpayment or underpayment, as provided in §429.33(a), continues to accrue during an appeal of a Regional Director's final determination, an appeal of the Commissioner's decision to OHA, or during judicial review of final agency action.

PART 430—RULES FOR MANAGEMENT OF LAKE BERRYESSA

AUTHORITY: Title VII, Pub. L. 93–493, 88 Stat. 1494.

§430.1 Concessioners' appeal procedures.

The procedures detailed in title 43 CFR part 4, subpart G, are made applicable to the concessioners at Lake Berryessa, Napa County, California, as the procedure to follow in appealing decisions of the contracting officer of

the Bureau of Reclamation, Department of the Interior, or his authorized representatives on disputed questions concerning termination for default or unsatisfactory performance under the concession contracts.

[40 FR 27658, July 1, 1975]

PART 431—GENERAL REGULATIONS FOR POWER GENERATION, OPERATION, MAINTENANCE, AND REPLACEMENT AT THE BOULDER CANYON PROJECT, ARIZONA/NEVADA

Sec.
431.1 Purpose.
431.2 Scope.
431.3 Definitions.
431.4 Power generation responsibilities.
431.5 Cost data and fund requirements.
431.6 Power generation estimates.
431.7 Administration and management of the Colorado River Dam Fund.
431.8 Disputes.
431.9 Future regulations.

AUTHORITY: Reclamation Act of 1902 (32 Stat. 388), Boulder Canyon Project Act of 1928 (43 U.S.C. 617 *et seq.*), Boulder Canyon Project Adjustment Act of 1940 (43 U.S.C. 618 *et seq.*), Colorado River Storage Project Act of 1956 (43 U.S.C. 620 *et seq.*), Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 *et seq.*), and Hoover Power Plant Act of 1984 (98 Stat. 1333).

SOURCE: 51 FR 23962, July 1, 1986, unless otherwise noted.

§ 431.1 Purpose.

(a) The Secretary of the Interior (Secretary), acting through the Commissioner of Reclamation (Commissioner), is authorized and directed to operate, maintain, and replace the facilities at the Hoover Powerplant, and also to promulgate regulations as the Secretary finds necessary and appropriate in accordance with the authorities in the Reclamation Act of 1902, and all acts amendatory thereof and supplementary thereto.

(b) In accordance with the Boulder Canyon Project Act of 1928, as amended and supplemented (Project Act), the Boulder Canyon Project Adjustment Act of 1940, as amended and supplemented (Adjustment Act), and the Hoover Power Plant Act of 1984 (Hoover Power Plant Act), the Bureau of Reclamation (Reclamation) promulgates these ''General Regulations for Power Generation, Operation, Maintenance, and Replacement at the Boulder Canyon Project, Arizona/Nevada'' (General Regulations) which include procedures to be used in providing Contractors and the Western Area Power Administration (Western) with cost data and power generation estimates, a statement of the requirements for administration and management of the Colorado River Dam Fund (Fund), and methods for resolving disputes.

§ 431.2 Scope.

These General Regulations shall be effective on June 1, 1987, and shall apply to power generation, operation, maintenance, and replacement activities at the Boulder Canyon Project after May 31, 1987. ''General Regulations for the Charges for the Sale of Power from the Boulder Canyon Project'' are the subject of a separate rule, under 10 CFR part 904, by the Secretary of Energy, acting by and through the Administrator of Western. The ''General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act,'' dated May 20, 1941, and the ''General Regulations for Lease of Power,'' dated April 25, 1930, terminate May 31, 1987.

§ 431.3 Definitions.

As used in this part:

Additions and betterments shall mean such work, materials, equipment, or facilities which enhance or improve the Project and do more than restore the Project to a former good operating condition.

Colorado River Dam Fund or *Fund* shall mean that special fund established by section 2 of the Project Act and which is to be used only for the purposes specified in the Project Act, the Adjustment Act, the Colorado River Basin Project Act, and the Hoover Power Plant Act.

Contractor shall mean any entity which has a fully executed contract with Western for electric service pursuant to the Hoover Power Plant Act.

Project or *Boulder Canyon Project* shall mean all works authorized by the Project Act, the Hoover Power Plant

Act, and any future additions authorized by Congress, to be constructed and owned by the United States, but exclusive of the main canal and appurtenances authorized by the Project Act, now known as the All-American Canal.

Replacements shall mean such work, materials, equipment, or facilities as determined by the United States to be necessary to keep the Project in good operating condition, but shall not include (except where used in conjunction with the word ''emergency'' or the phrase ''however necessitated'') work, materials, equipment, or facilities made necessary by any act of God, or of the public enemy, or by any major catastrophe.

Uprating Program shall mean the program authorized by section 101(a) of the Hoover Power Plant Act for increasing the capacity of existing generating equipment and appurtenances at Hoover Powerplant, as generally described in the report of Reclamation, entitled ''Hoover Powerplant Uprating, Special Report,'' issued in May 1980, supplemented in January 1985, and further supplemented in September 1985.

§ 431.4 Power generation responsibilities.

(a) Power generation, and the associated operation, maintenance, and making of replacements, however necessitated, of facilities and equipment at the Hoover Powerplant, are the responsibilities of Reclamation.

(b) Subject to the statutory requirement that Hoover Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights mentioned in section 6 of the Project Act; and third, for power, Reclamation shall release water, make available generating capacity, and generate energy, in such quantities, and at such times, as are necessary for the delivery of the capacity and energy to which Contractors are entitled.

(c) Reclamation reserves the right to reschedule, temporarily discontinue, reduce, or increase the delivery of water for the generation of electrical energy at any time for the purpose of maintenance, repairs, and/or replacements, and for investigations and inspections necessary thereto, or to allow for changing reservoir and river conditions, or for changes in kilowatthours generation per acre-foot, or by reason of compliance with the statutory requirement as referred to in paragraph (b) of this section; *Provided, however,* That Reclamation shall, except in case of emergency, give Western reasonable notice in advance of any change in delivery of water, and that Reclamation shall make such inspections and perform such maintenance and repair work at such times and in such manner as to cause the least inconvenience possible to Contractors and that Reclamation shall prosecute such work with diligence and, without unnecessary delay, resume delivery of water as scheduled.

(d) Should a Contractor have concerns regarding power generation and related matters and request a meeting in writing, including a description of areas of concern, Reclamation shall convene such meeting within 10 days of receipt of such request and shall notify all Contractors and Western of the date and location of the meeting, and the areas of concern to be discussed.

[51 FR 23962, July 1, 1986; 51 FR 24531, July 7, 1986]

§ 431.5 Cost data and fund requirements.

Reclamation shall submit annually on or before April 15 to Western and Contractors, cost data, including one year of actual costs for the last completed fiscal year and estimated costs for the next 5 fiscal years, for operation, maintenance, replacements, additions and betterments, non-Federal funds advanced for the uprating program by non-Federal purchasers, and interest on and amortization of the Federal investment. Such cost data shall identify major items. Upon 5 days prior written notice to Reclamation, any Contractor shall have the right, subject to applicable Federal laws and regulations, to review records used to prepare such cost data at Reclamation offices during regular business hours. Contractors shall have an opportunity to present written views within 30 days of the transmittal of the cost data.

Reclamation responses to written views shall be provided within 60 days of transmittal of the cost data or 30 days after a meeting with Contractors convened pursuant to § 431.4(d), whichever is later.

§ 431.6 Power generation estimates.

Reclamation shall submit annually on or before April 15 to Western and Contractors, an estimated annual operation schedule for the Hoover Powerplant showing estimated power generation and estimated maintenance outages for review, and shall provide an opportunity to present written views within 30 days of the transmittal of the schedule. Reclamation responses to written views shall be provided within 60 days of the transmittal of the schedule or 30 days after a meeting with Contractors convened pursuant to § 431.4(d), whichever is later. The estimated annual operation schedule of Hoover Powerplant shall be subject to necessary modifications, in accordance with § 431.4(c). Upon 5 days prior written notice to Reclamation, any Contractor shall have the right, subject to applicable Federal laws and regulations, to review records used to prepare such power generation estimates at Reclamation offices during regular business hours.

§ 431.7 Administration and management of the Colorado River Dam Fund.

Reclamation is responsible for the repayment of the Project and the administration of the Colorado River Dam Fund and the Lower Colorado River Basin Development Fund.

(a) All receipts to the Project shall be deposited in the Fund along with electric service revenues deposited by Western and shall be available without further appropriation for:

(1) Defraying the costs of operation (including purchase of supplemental energy to meet temporary deficiencies in firm energy which the Secretary of Energy is obligated by contract to supply), maintenance, and replacements of all Project facilities, including emergency replacements necessary to insure continuous operations;

(2) Payment of annual interest on the unpaid investments in accordance with appropriate statutory authorities;

(3) Repayment of capital investments including amounts readvanced from the Treasury;

(4) Payments to the States of Arizona and Nevada as provided in section 2(c) of the Adjustment Act and section 403(c)(2) of the Colorado River Basin Project Act;

(5) Transfers to the Lower Colorado River Basin Development Fund and subsequent transfers to the Upper Colorado River Basin Fund, as provided in section 403(c)(2) of the Colorado River Basin Project Act and section 102(c) of the Hoover Power Plant Act, as reimbursement for the monies expended heretofore from the Upper Colorado River Basin Fund to meet deficiencies in generation at Hoover Dam during the filling period of storage units of the Colorado River Storage Project in accordance with the provisions of sections 403(g) and 502 of the Colorado River Basin Project Act, such transfers, totalling $27,591,621.25, to be effected by 17 annual payments of $1,532,868.00 beginning in 1988 and a final payment of $1,532,865.25 in 2005; and

(6) Any other purposes authorized by existing and future Federal law.

(b) Appropriations for the visitor facilities program and any other purposes authorized by existing and future Federal law advanced or readvanced to the Fund shall be disbursed from the Fund for those purposes.

(c) All funds advanced by non-Federal Contractors for the Uprating Program shall be deposited in the Fund, shall be available without further appropriation, and shall be disbursed from the Fund to accomplish the Uprating Program.

(d) The Fund shall be administered and managed in accordance with applicable Federal laws and regulations, by the Secretary acting through the Commissioner.

[51 FR 23962, July 1, 1986; 51 FR 24531, July 7, 1986]

§ 431.8 Disputes.

(a) All actions by Reclamation or the Secretary shall be binding unless and

until reversed or modified in accordance with the provisions herein.

(b) Any disputes or disagreements as to interpretation or performance of the provisions of these General Regulations under the responsibility of the Secretary shall first be presented to and decided by the Commissioner. The Commissioner shall be deemed to have denied the Contractor's contention or claim if it is not acted upon within 60 days of its having been presented. The decision of the Commissioner shall be subject to appeal to the Secretary by a notice of appeal accompanied by a statement of reasons filed with the Secretary within 30 days after such decision. The Secretary shall be deemed to have denied the appeal if it is not acted upon within 60 days of its having been presented.

(c) The decision of the Secretary shall be final unless, within 30 days from the date of such decision, a written request for arbitration is received by the Secretary. The Secretary shall have 90 days from the date of receipt of a request for arbitration either to concur in or deny in writing the request for such arbitration. Failure by the Secretary to take any action within the 90 day period shall be deemed a denial of the request for arbitration. In the event of a denial of a request for arbitration, the decision of the Secretary shall become final. Upon a decision becoming final, the disputing Contractor's remedy lies with the appropriate Federal court. Any claim that a final decision of the Secretary violates any right accorded the Contractor under the Project Act, the Adjustment Act, or title I of the Hoover Power Plant Act is barred unless suit asserting such claim is filed in a Federal court of competent jurisdiction within one year after final refusal by the Secretary to correct the action complained of, in accordance with section 105(h) of the Hoover Power Plant Act.

(d) When a timely request for arbitration is received by the Secretary and the Secretary concurs in the request, the disputing Contractor and the Secretary shall, within 30 days of receipt of such notice of concurrence, each name one arbitrator to the panel of arbitrators which will decide the dispute. All arbitrators shall be skilled and experienced in the field pertaining to the dispute. In the event there is more than one disputing Contractor in addition to the Secretary, the disputing Contractors shall collectively name one arbitrator to the panel of arbitrators. In the event of their failure collectively to name such arbitrator within 15 days after their first meeting, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the American Arbitration Association. The two arbitrators thus selected shall name a third arbitrator within 30 days of their first meeting. In the event of their failure to so name such third arbitrator, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the American Arbitration Association. The third arbitrator shall act as chairperson of the panel. The arbitration shall be governed by the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be limited to the issue submitted. The panel of arbitrators shall render a final decision in this dispute within 60 days after the date of the naming of the third arbitrator. A decision of any two of the three arbitrators named to the panel shall be final and binding on all parties involved in the dispute.

§431.9 Future regulations.

(a) Reclamation may from time to time promulgate additional or amendatory regulations deemed necessary for the administration of the Project, in accordance with applicable law; *Provided*, That no right under any contract made under the Hoover Power Plant Act shall be impaired or obligation thereunder be extended thereby.

(b) Any modification, extension, or waiver of any provision of these General Regulations granted for the benefit of any one or more Contractors shall not be denied to any other Contractor.

PARTS 432–999 [RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Table of CFR Titles and Chapters
Alphabetical List of Agencies Appearing in the CFR
List of CFR Sections Affected

Table of CFR Titles and Chapters

(Revised as of October 1, 2014)

Title 1—General Provisions

I Administrative Committee of the Federal Register (Parts 1—49)
II Office of the Federal Register (Parts 50—299)
III Administrative Conference of the United States (Parts 300—399)
IV Miscellaneous Agencies (Parts 400—500)

Title 2—Grants and Agreements

SUBTITLE A—OFFICE OF MANAGEMENT AND BUDGET GUIDANCE FOR GRANTS AND AGREEMENTS
I Office of Management and Budget Governmentwide Guidance for Grants and Agreements (Parts 2—199)
II Office of Management and Budget Guidance (Parts 200—299)
SUBTITLE B—FEDERAL AGENCY REGULATIONS FOR GRANTS AND AGREEMENTS
III Department of Health and Human Services (Parts 300—399)
IV Department of Agriculture (Parts 400—499)
VI Department of State (Parts 600—699)
VII Agency for International Development (Parts 700—799)
VIII Department of Veterans Affairs (Parts 800—899)
IX Department of Energy (Parts 900—999)
XI Department of Defense (Parts 1100—1199)
XII Department of Transportation (Parts 1200—1299)
XIII Department of Commerce (Parts 1300—1399)
XIV Department of the Interior (Parts 1400—1499)
XV Environmental Protection Agency (Parts 1500—1599)
XVIII National Aeronautics and Space Administration (Parts 1800—1899)
XX United States Nuclear Regulatory Commission (Parts 2000—2099)
XXII Corporation for National and Community Service (Parts 2200—2299)
XXIII Social Security Administration (Parts 2300—2399)
XXIV Housing and Urban Development (Parts 2400—2499)
XXV National Science Foundation (Parts 2500—2599)
XXVI National Archives and Records Administration (Parts 2600—2699)
XXVII Small Business Administration (Parts 2700—2799)
XXVIII Department of Justice (Parts 2800—2899)

Title 2—Grants and Agreements—Continued

Chap.	
XXX	Department of Homeland Security (Parts 3000—3099)
XXXI	Institute of Museum and Library Services (Parts 3100—3199)
XXXII	National Endowment for the Arts (Parts 3200—3299)
XXXIII	National Endowment for the Humanities (Parts 3300—3399)
XXXIV	Department of Education (Parts 3400—3499)
XXXV	Export-Import Bank of the United States (Parts 3500—3599)
XXXVII	Peace Corps (Parts 3700—3799)
LVIII	Election Assistance Commission (Parts 5800—5899)

Title 3—The President

I	Executive Office of the President (Parts 100—199)

Title 4—Accounts

I	Government Accountability Office (Parts 1—199)
II	Recovery Accountability and Transparency Board (Parts 200—299)

Title 5—Administrative Personnel

I	Office of Personnel Management (Parts 1—1199)
II	Merit Systems Protection Board (Parts 1200—1299)
III	Office of Management and Budget (Parts 1300—1399)
V	The International Organizations Employees Loyalty Board (Parts 1500—1599)
VI	Federal Retirement Thrift Investment Board (Parts 1600—1699)
VIII	Office of Special Counsel (Parts 1800—1899)
IX	Appalachian Regional Commission (Parts 1900—1999)
XI	Armed Forces Retirement Home (Parts 2100—2199)
XIV	Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel (Parts 2400—2499)
XV	Office of Administration, Executive Office of the President (Parts 2500—2599)
XVI	Office of Government Ethics (Parts 2600—2699)
XXI	Department of the Treasury (Parts 3100—3199)
XXII	Federal Deposit Insurance Corporation (Parts 3200—3299)
XXIII	Department of Energy (Parts 3300—3399)
XXIV	Federal Energy Regulatory Commission (Parts 3400—3499)
XXV	Department of the Interior (Parts 3500—3599)
XXVI	Department of Defense (Parts 3600—3699)
XXVIII	Department of Justice (Parts 3800—3899)
XXIX	Federal Communications Commission (Parts 3900—3999)
XXX	Farm Credit System Insurance Corporation (Parts 4000—4099)
XXXI	Farm Credit Administration (Parts 4100—4199)

Title 5—Administrative Personnel—Continued

Chap.	
XXXIII	Overseas Private Investment Corporation (Parts 4300—4399)
XXXIV	Securities and Exchange Commission (Parts 4400—4499)
XXXV	Office of Personnel Management (Parts 4500—4599)
XXXVII	Federal Election Commission (Parts 4700—4799)
XL	Interstate Commerce Commission (Parts 5000—5099)
XLI	Commodity Futures Trading Commission (Parts 5100—5199)
XLII	Department of Labor (Parts 5200—5299)
XLIII	National Science Foundation (Parts 5300—5399)
XLV	Department of Health and Human Services (Parts 5500—5599)
XLVI	Postal Rate Commission (Parts 5600—5699)
XLVII	Federal Trade Commission (Parts 5700—5799)
XLVIII	Nuclear Regulatory Commission (Parts 5800—5899)
XLIX	Federal Labor Relations Authority (Parts 5900—5999)
L	Department of Transportation (Parts 6000—6099)
LII	Export-Import Bank of the United States (Parts 6200—6299)
LIII	Department of Education (Parts 6300—6399)
LIV	Environmental Protection Agency (Parts 6400—6499)
LV	National Endowment for the Arts (Parts 6500—6599)
LVI	National Endowment for the Humanities (Parts 6600—6699)
LVII	General Services Administration (Parts 6700—6799)
LVIII	Board of Governors of the Federal Reserve System (Parts 6800—6899)
LIX	National Aeronautics and Space Administration (Parts 6900—6999)
LX	United States Postal Service (Parts 7000—7099)
LXI	National Labor Relations Board (Parts 7100—7199)
LXII	Equal Employment Opportunity Commission (Parts 7200—7299)
LXIII	Inter-American Foundation (Parts 7300—7399)
LXIV	Merit Systems Protection Board (Parts 7400—7499)
LXV	Department of Housing and Urban Development (Parts 7500—7599)
LXVI	National Archives and Records Administration (Parts 7600—7699)
LXVII	Institute of Museum and Library Services (Parts 7700—7799)
LXVIII	Commission on Civil Rights (Parts 7800—7899)
LXIX	Tennessee Valley Authority (Parts 7900—7999)
LXX	Court Services and Offender Supervision Agency for the District of Columbia (Parts 8000—8099)
LXXI	Consumer Product Safety Commission (Parts 8100—8199)
LXXIII	Department of Agriculture (Parts 8300—8399)
LXXIV	Federal Mine Safety and Health Review Commission (Parts 8400—8499)
LXXVI	Federal Retirement Thrift Investment Board (Parts 8600—8699)
LXXVII	Office of Management and Budget (Parts 8700—8799)
LXXX	Federal Housing Finance Agency (Parts 9000—9099)
LXXXIII	Special Inspector General for Afghanistan Reconstruction (Parts 9300—9399)

Title 5—Administrative Personnel—Continued

Chap.

LXXXIV Bureau of Consumer Financial Protection (Parts 9400—9499)

LXXXVI National Credit Union Administration (Parts 9600—9699)

XCVII Department of Homeland Security Human Resources Management System (Department of Homeland Security—Office of Personnel Management) (Parts 9700—9799)

XCVII Council of the Inspectors General on Integrity and Efficiency (Parts 9800—9899)

XCIX Military Compensation and Retirement Modernization Commission (Parts 9900—9999)

Title 6—Domestic Security

I Department of Homeland Security, Office of the Secretary (Parts 1—99)

X Privacy and Civil Liberties Oversight Board (Parts 1000—1099)

Title 7—Agriculture

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE (PARTS 0—26)

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

I Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture (Parts 27—209)

II Food and Nutrition Service, Department of Agriculture (Parts 210—299)

III Animal and Plant Health Inspection Service, Department of Agriculture (Parts 300—399)

IV Federal Crop Insurance Corporation, Department of Agriculture (Parts 400—499)

V Agricultural Research Service, Department of Agriculture (Parts 500—599)

VI Natural Resources Conservation Service, Department of Agriculture (Parts 600—699)

VII Farm Service Agency, Department of Agriculture (Parts 700—799)

VIII Grain Inspection, Packers and Stockyards Administration (Federal Grain Inspection Service), Department of Agriculture (Parts 800—899)

IX Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), Department of Agriculture (Parts 900—999)

X Agricultural Marketing Service (Marketing Agreements and Orders; Milk), Department of Agriculture (Parts 1000—1199)

XI Agricultural Marketing Service (Marketing Agreements and Orders; Miscellaneous Commodities), Department of Agriculture (Parts 1200—1299)

XIV Commodity Credit Corporation, Department of Agriculture (Parts 1400—1499)

XV Foreign Agricultural Service, Department of Agriculture (Parts 1500—1599)

Title 7—Agriculture—Continued

Chap.	
XVI	Rural Telephone Bank, Department of Agriculture (Parts 1600—1699)
XVII	Rural Utilities Service, Department of Agriculture (Parts 1700—1799)
XVIII	Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, Department of Agriculture (Parts 1800—2099)
XX	Local Television Loan Guarantee Board (Parts 2200—2299)
XXV	Office of Advocacy and Outreach, Department of Agriculture (Parts 2500—2599)
XXVI	Office of Inspector General, Department of Agriculture (Parts 2600—2699)
XXVII	Office of Information Resources Management, Department of Agriculture (Parts 2700—2799)
XXVIII	Office of Operations, Department of Agriculture (Parts 2800—2899)
XXIX	Office of Energy Policy and New Uses, Department of Agriculture (Parts 2900—2999)
XXX	Office of the Chief Financial Officer, Department of Agriculture (Parts 3000—3099)
XXXI	Office of Environmental Quality, Department of Agriculture (Parts 3100—3199)
XXXII	Office of Procurement and Property Management, Department of Agriculture (Parts 3200—3299)
XXXIII	Office of Transportation, Department of Agriculture (Parts 3300—3399)
XXXIV	National Institute of Food and Agriculture (Parts 3400—3499)
XXXV	Rural Housing Service, Department of Agriculture (Parts 3500—3599)
XXXVI	National Agricultural Statistics Service, Department of Agriculture (Parts 3600—3699)
XXXVII	Economic Research Service, Department of Agriculture (Parts 3700—3799)
XXXVIII	World Agricultural Outlook Board, Department of Agriculture (Parts 3800—3899)
XLI	[Reserved]
XLII	Rural Business-Cooperative Service and Rural Utilities Service, Department of Agriculture (Parts 4200—4299)

Title 8—Aliens and Nationality

I	Department of Homeland Security (Immigration and Naturalization) (Parts 1—499)
V	Executive Office for Immigration Review, Department of Justice (Parts 1000—1399)

Title 9—Animals and Animal Products

I	Animal and Plant Health Inspection Service, Department of Agriculture (Parts 1—199)

Title 9—Animals and Animal Products—Continued

Chap.

II Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), Department of Agriculture (Parts 200—299)

III Food Safety and Inspection Service, Department of Agriculture (Parts 300—599)

Title 10—Energy

I Nuclear Regulatory Commission (Parts 0—199)

II Department of Energy (Parts 200—699)

III Department of Energy (Parts 700—999)

X Department of Energy (General Provisions) (Parts 1000—1099)

XIII Nuclear Waste Technical Review Board (Parts 1300—1399)

XVII Defense Nuclear Facilities Safety Board (Parts 1700—1799)

XVIII Northeast Interstate Low-Level Radioactive Waste Commission (Parts 1800—1899)

Title 11—Federal Elections

I Federal Election Commission (Parts 1—9099)

II Election Assistance Commission (Parts 9400—9499)

Title 12—Banks and Banking

I Comptroller of the Currency, Department of the Treasury (Parts 1—199)

II Federal Reserve System (Parts 200—299)

III Federal Deposit Insurance Corporation (Parts 300—399)

IV Export-Import Bank of the United States (Parts 400—499)

V Office of Thrift Supervision, Department of the Treasury (Parts 500—599)

VI Farm Credit Administration (Parts 600—699)

VII National Credit Union Administration (Parts 700—799)

VIII Federal Financing Bank (Parts 800—899)

IX Federal Housing Finance Board (Parts 900—999)

X Bureau of Consumer Financial Protection (Parts 1000—1099)

XI Federal Financial Institutions Examination Council (Parts 1100—1199)

XII Federal Housing Finance Agency (Parts 1200—1299)

XIII Financial Stability Oversight Council (Parts 1300—1399)

XIV Farm Credit System Insurance Corporation (Parts 1400—1499)

XV Department of the Treasury (Parts 1500—1599)

XVI Office of Financial Research (Parts 1600—1699)

XVII Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development (Parts 1700—1799)

XVIII Community Development Financial Institutions Fund, Department of the Treasury (Parts 1800—1899)

Title 13—Business Credit and Assistance

Chap.

I Small Business Administration (Parts 1—199)

III Economic Development Administration, Department of Commerce (Parts 300—399)

IV Emergency Steel Guarantee Loan Board (Parts 400—499)

V Emergency Oil and Gas Guaranteed Loan Board (Parts 500—599)

Title 14—Aeronautics and Space

I Federal Aviation Administration, Department of Transportation (Parts 1—199)

II Office of the Secretary, Department of Transportation (Aviation Proceedings) (Parts 200—399)

III Commercial Space Transportation, Federal Aviation Administration, Department of Transportation (Parts 400—1199)

V National Aeronautics and Space Administration (Parts 1200—1299)

VI Air Transportation System Stabilization (Parts 1300—1399)

Title 15—Commerce and Foreign Trade

SUBTITLE A—OFFICE OF THE SECRETARY OF COMMERCE (PARTS 0—29)

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

I Bureau of the Census, Department of Commerce (Parts 30—199)

II National Institute of Standards and Technology, Department of Commerce (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV Foreign-Trade Zones Board, Department of Commerce (Parts 400—499)

VII Bureau of Industry and Security, Department of Commerce (Parts 700—799)

VIII Bureau of Economic Analysis, Department of Commerce (Parts 800—899)

IX National Oceanic and Atmospheric Administration, Department of Commerce (Parts 900—999)

XI Technology Administration, Department of Commerce (Parts 1100—1199)

XIII East-West Foreign Trade Board (Parts 1300—1399)

XIV Minority Business Development Agency (Parts 1400—1499)

SUBTITLE C—REGULATIONS RELATING TO FOREIGN TRADE AGREEMENTS

XX Office of the United States Trade Representative (Parts 2000—2099)

SUBTITLE D—REGULATIONS RELATING TO TELECOMMUNICATIONS AND INFORMATION

XXIII National Telecommunications and Information Administration, Department of Commerce (Parts 2300—2399)

Title 16—Commercial Practices

Chap.

I Federal Trade Commission (Parts 0—999)

II Consumer Product Safety Commission (Parts 1000—1799)

Title 17—Commodity and Securities Exchanges

I Commodity Futures Trading Commission (Parts 1—199)

II Securities and Exchange Commission (Parts 200—399)

IV Department of the Treasury (Parts 400—499)

Title 18—Conservation of Power and Water Resources

I Federal Energy Regulatory Commission, Department of Energy (Parts 1—399)

III Delaware River Basin Commission (Parts 400—499)

VI Water Resources Council (Parts 700—799)

VIII Susquehanna River Basin Commission (Parts 800—899)

XIII Tennessee Valley Authority (Parts 1300—1399)

Title 19—Customs Duties

I U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury (Parts 0—199)

II United States International Trade Commission (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV U.S. Immigration and Customs Enforcement, Department of Homeland Security (Parts 400—599)

Title 20—Employees' Benefits

I Office of Workers' Compensation Programs, Department of Labor (Parts 1—199)

II Railroad Retirement Board (Parts 200—399)

III Social Security Administration (Parts 400—499)

IV Employees' Compensation Appeals Board, Department of Labor (Parts 500—599)

V Employment and Training Administration, Department of Labor (Parts 600—699)

VI Office of Workers' Compensation Programs, Department of Labor (Parts 700—799)

VII Benefits Review Board, Department of Labor (Parts 800—899)

VIII Joint Board for the Enrollment of Actuaries (Parts 900—999)

IX Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 1000—1099)

Title 21—Food and Drugs

Chap.

I Food and Drug Administration, Department of Health and Human Services (Parts 1—1299)

II Drug Enforcement Administration, Department of Justice (Parts 1300—1399)

III Office of National Drug Control Policy (Parts 1400—1499)

Title 22—Foreign Relations

I Department of State (Parts 1—199)

II Agency for International Development (Parts 200—299)

III Peace Corps (Parts 300—399)

IV International Joint Commission, United States and Canada (Parts 400—499)

V Broadcasting Board of Governors (Parts 500—599)

VII Overseas Private Investment Corporation (Parts 700—799)

IX Foreign Service Grievance Board (Parts 900—999)

X Inter-American Foundation (Parts 1000—1099)

XI International Boundary and Water Commission, United States and Mexico, United States Section (Parts 1100—1199)

XII United States International Development Cooperation Agency (Parts 1200—1299)

XIII Millennium Challenge Corporation (Parts 1300—1399)

XIV Foreign Service Labor Relations Board; Federal Labor Relations Authority; General Counsel of the Federal Labor Relations Authority; and the Foreign Service Impasse Disputes Panel (Parts 1400—1499)

XV African Development Foundation (Parts 1500—1599)

XVI Japan-United States Friendship Commission (Parts 1600—1699)

XVII United States Institute of Peace (Parts 1700—1799)

Title 23—Highways

I Federal Highway Administration, Department of Transportation (Parts 1—999)

II National Highway Traffic Safety Administration and Federal Highway Administration, Department of Transportation (Parts 1200—1299)

III National Highway Traffic Safety Administration, Department of Transportation (Parts 1300—1399)

Title 24—Housing and Urban Development

SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT

I Office of Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development (Parts 100—199)

Title 24—Housing and Urban Development—Continued

Chap.

II Office of Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development (Parts 200—299)

III Government National Mortgage Association, Department of Housing and Urban Development (Parts 300—399)

IV Office of Housing and Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development (Parts 400—499)

V Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 500—599)

VI Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 600—699) [Reserved]

VII Office of the Secretary, Department of Housing and Urban Development (Housing Assistance Programs and Public and Indian Housing Programs) (Parts 700—799)

VIII Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Section 8 Housing Assistance Programs, Section 202 Direct Loan Program, Section 202 Supportive Housing for the Elderly Program and Section 811 Supportive Housing for Persons With Disabilities Program) (Parts 800—899)

IX Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Parts 900—1699)

X Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Interstate Land Sales Registration Program) (Parts 1700—1799)

XII Office of Inspector General, Department of Housing and Urban Development (Parts 2000—2099)

XV Emergency Mortgage Insurance and Loan Programs, Department of Housing and Urban Development (Parts 2700—2799) [Reserved]

XX Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 3200—3899)

XXIV Board of Directors of the HOPE for Homeowners Program (Parts 4000—4099) [Reserved]

XXV Neighborhood Reinvestment Corporation (Parts 4100—4199)

Title 25—Indians

I Bureau of Indian Affairs, Department of the Interior (Parts 1—299)

II Indian Arts and Crafts Board, Department of the Interior (Parts 300—399)

III National Indian Gaming Commission, Department of the Interior (Parts 500—599)

IV Office of Navajo and Hopi Indian Relocation (Parts 700—799)

Title 25—Indians—Continued

Chap.

V Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Part 900)

VI Office of the Assistant Secretary-Indian Affairs, Department of the Interior (Parts 1000—1199)

VII Office of the Special Trustee for American Indians, Department of the Interior (Parts 1200—1299)

Title 26—Internal Revenue

I Internal Revenue Service, Department of the Treasury (Parts 1—End)

Title 27—Alcohol, Tobacco Products and Firearms

I Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Parts 1—399)

II Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice (Parts 400—699)

Title 28—Judicial Administration

I Department of Justice (Parts 0—299)

III Federal Prison Industries, Inc., Department of Justice (Parts 300—399)

V Bureau of Prisons, Department of Justice (Parts 500—599)

VI Offices of Independent Counsel, Department of Justice (Parts 600—699)

VII Office of Independent Counsel (Parts 700—799)

VIII Court Services and Offender Supervision Agency for the District of Columbia (Parts 800—899)

IX National Crime Prevention and Privacy Compact Council (Parts 900—999)

XI Department of Justice and Department of State (Parts 1100—1199)

Title 29—Labor

SUBTITLE A—OFFICE OF THE SECRETARY OF LABOR (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO LABOR

I National Labor Relations Board (Parts 100—199)

II Office of Labor-Management Standards, Department of Labor (Parts 200—299)

III National Railroad Adjustment Board (Parts 300—399)

IV Office of Labor-Management Standards, Department of Labor (Parts 400—499)

V Wage and Hour Division, Department of Labor (Parts 500—899)

IX Construction Industry Collective Bargaining Commission (Parts 900—999)

Title 29—Labor—Continued

Chap.

X National Mediation Board (Parts 1200—1299)

XII Federal Mediation and Conciliation Service (Parts 1400—1499)

XIV Equal Employment Opportunity Commission (Parts 1600—1699)

XVII Occupational Safety and Health Administration, Department of Labor (Parts 1900—1999)

XX Occupational Safety and Health Review Commission (Parts 2200—2499)

XXV Employee Benefits Security Administration, Department of Labor (Parts 2500—2599)

XXVII Federal Mine Safety and Health Review Commission (Parts 2700—2799)

XL Pension Benefit Guaranty Corporation (Parts 4000—4999)

Title 30—Mineral Resources

I Mine Safety and Health Administration, Department of Labor (Parts 1—199)

II Bureau of Safety and Environmental Enforcement, Department of the Interior (Parts 200—299)

IV Geological Survey, Department of the Interior (Parts 400—499)

V Bureau of Ocean Energy Management, Department of the Interior (Parts 500—599)

VII Office of Surface Mining Reclamation and Enforcement, Department of the Interior (Parts 700—999)

XII Office of Natural Resources Revenue, Department of the Interior (Parts 1200—1299)

Title 31—Money and Finance: Treasury

SUBTITLE A—OFFICE OF THE SECRETARY OF THE TREASURY (PARTS 0—50)

SUBTITLE B—REGULATIONS RELATING TO MONEY AND FINANCE

I Monetary Offices, Department of the Treasury (Parts 51—199)

II Fiscal Service, Department of the Treasury (Parts 200—399)

IV Secret Service, Department of the Treasury (Parts 400—499)

V Office of Foreign Assets Control, Department of the Treasury (Parts 500—599)

VI Bureau of Engraving and Printing, Department of the Treasury (Parts 600—699)

VII Federal Law Enforcement Training Center, Department of the Treasury (Parts 700—799)

VIII Office of International Investment, Department of the Treasury (Parts 800—899)

IX Federal Claims Collection Standards (Department of the Treasury—Department of Justice) (Parts 900—999)

X Financial Crimes Enforcement Network, Department of the Treasury (Parts 1000—1099)

Title 32—National Defense

Chap.

SUBTITLE A—DEPARTMENT OF DEFENSE

I Office of the Secretary of Defense (Parts 1—399)

V Department of the Army (Parts 400—699)

VI Department of the Navy (Parts 700—799)

VII Department of the Air Force (Parts 800—1099)

SUBTITLE B—OTHER REGULATIONS RELATING TO NATIONAL DEFENSE

XII Defense Logistics Agency (Parts 1200—1299)

XVI Selective Service System (Parts 1600—1699)

XVII Office of the Director of National Intelligence (Parts 1700—1799)

XVIII National Counterintelligence Center (Parts 1800—1899)

XIX Central Intelligence Agency (Parts 1900—1999)

XX Information Security Oversight Office, National Archives and Records Administration (Parts 2000—2099)

XXI National Security Council (Parts 2100—2199)

XXIV Office of Science and Technology Policy (Parts 2400—2499)

XXVII Office for Micronesian Status Negotiations (Parts 2700—2799)

XXVIII Office of the Vice President of the United States (Parts 2800—2899)

Title 33—Navigation and Navigable Waters

I Coast Guard, Department of Homeland Security (Parts 1—199)

II Corps of Engineers, Department of the Army (Parts 200—399)

IV Saint Lawrence Seaway Development Corporation, Department of Transportation (Parts 400—499)

Title 34—Education

SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF EDUCATION (PARTS 1—99)

SUBTITLE B—REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

I Office for Civil Rights, Department of Education (Parts 100—199)

II Office of Elementary and Secondary Education, Department of Education (Parts 200—299)

III Office of Special Education and Rehabilitative Services, Department of Education (Parts 300—399)

IV Office of Vocational and Adult Education, Department of Education (Parts 400—499)

V Office of Bilingual Education and Minority Languages Affairs, Department of Education (Parts 500—599)

VI Office of Postsecondary Education, Department of Education (Parts 600—699)

VII Office of Educational Research and Improvement, Department of Education (Parts 700—799)[Reserved]

SUBTITLE C—REGULATIONS RELATING TO EDUCATION

Title 34—Education—Continued

Chap.

XI National Institute for Literacy (Parts 1100—1199)

XII National Council on Disability (Parts 1200—1299)

Title 35 [Reserved]

Title 36—Parks, Forests, and Public Property

I National Park Service, Department of the Interior (Parts 1—199)

II Forest Service, Department of Agriculture (Parts 200—299)

III Corps of Engineers, Department of the Army (Parts 300—399)

IV American Battle Monuments Commission (Parts 400—499)

V Smithsonian Institution (Parts 500—599)

VI [Reserved]

VII Library of Congress (Parts 700—799)

VIII Advisory Council on Historic Preservation (Parts 800—899)

IX Pennsylvania Avenue Development Corporation (Parts 900—999)

X Presidio Trust (Parts 1000—1099)

XI Architectural and Transportation Barriers Compliance Board (Parts 1100—1199)

XII National Archives and Records Administration (Parts 1200—1299)

XV Oklahoma City National Memorial Trust (Parts 1500—1599)

XVI Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation (Parts 1600—1699)

Title 37—Patents, Trademarks, and Copyrights

I United States Patent and Trademark Office, Department of Commerce (Parts 1—199)

II U.S. Copyright Office, Library of Congress (Parts 200—299)

III Copyright Royalty Board, Library of Congress (Parts 300—399)

IV Assistant Secretary for Technology Policy, Department of Commerce (Parts 400—599)

Title 38—Pensions, Bonuses, and Veterans' Relief

I Department of Veterans Affairs (Parts 0—199)

II Armed Forces Retirement Home (Parts 200—299)

Title 39—Postal Service

I United States Postal Service (Parts 1—999)

III Postal Regulatory Commission (Parts 3000—3099)

Title 40—Protection of Environment

I Environmental Protection Agency (Parts 1—1099)

Title 40—Protection of Environment—Continued

Chap.

IV Environmental Protection Agency and Department of Justice (Parts 1400—1499)

V Council on Environmental Quality (Parts 1500—1599)

VI Chemical Safety and Hazard Investigation Board (Parts 1600—1699)

VII Environmental Protection Agency and Department of Defense; Uniform National Discharge Standards for Vessels of the Armed Forces (Parts 1700—1799)

VIII Gulf Coast Ecosystem Restoration Council (Parts 1800—1899)

Title 41—Public Contracts and Property Management

SUBTITLE A—FEDERAL PROCUREMENT REGULATIONS SYSTEM [NOTE]

SUBTITLE B—OTHER PROVISIONS RELATING TO PUBLIC CONTRACTS

50 Public Contracts, Department of Labor (Parts 50–1—50–999)

51 Committee for Purchase From People Who Are Blind or Severely Disabled (Parts 51–1—51–99)

60 Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Parts 60–1—60–999)

61 Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 61–1—61–999)

62—100 [Reserved]

SUBTITLE C—FEDERAL PROPERTY MANAGEMENT REGULATIONS SYSTEM

101 Federal Property Management Regulations (Parts 101–1—101–99)

102 Federal Management Regulation (Parts 102–1—102–299)

103—104 [Reserved]

105 General Services Administration (Parts 105–1—105–999)

109 Department of Energy Property Management Regulations (Parts 109–1—109–99)

114 Department of the Interior (Parts 114–1—114–99)

115 Environmental Protection Agency (Parts 115–1—115–99)

128 Department of Justice (Parts 128–1—128–99)

129—200 [Reserved]

SUBTITLE D—OTHER PROVISIONS RELATING TO PROPERTY MANAGEMENT [RESERVED]

SUBTITLE E—FEDERAL INFORMATION RESOURCES MANAGEMENT REGULATIONS SYSTEM [RESERVED]

SUBTITLE F—FEDERAL TRAVEL REGULATION SYSTEM

300 General (Parts 300–1—300–99)

301 Temporary Duty (TDY) Travel Allowances (Parts 301–1—301–99)

302 Relocation Allowances (Parts 302–1—302–99)

303 Payment of Expenses Connected with the Death of Certain Employees (Part 303–1—303–99)

304 Payment of Travel Expenses from a Non-Federal Source (Parts 304–1—304–99)

Title 42—Public Health

Chap.

I Public Health Service, Department of Health and Human Services (Parts 1—199)

IV Centers for Medicare & Medicaid Services, Department of Health and Human Services (Parts 400—599)

V Office of Inspector General-Health Care, Department of Health and Human Services (Parts 1000—1999)

Title 43—Public Lands: Interior

SUBTITLE A—OFFICE OF THE SECRETARY OF THE INTERIOR (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC LANDS

I Bureau of Reclamation, Department of the Interior (Parts 400—999)

II Bureau of Land Management, Department of the Interior (Parts 1000—9999)

III Utah Reclamation Mitigation and Conservation Commission (Parts 10000—10099)

Title 44—Emergency Management and Assistance

I Federal Emergency Management Agency, Department of Homeland Security (Parts 0—399)

IV Department of Commerce and Department of Transportation (Parts 400—499)

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC WELFARE

II Office of Family Assistance (Assistance Programs), Administration for Children and Families, Department of Health and Human Services (Parts 200—299)

III Office of Child Support Enforcement (Child Support Enforcement Program), Administration for Children and Families, Department of Health and Human Services (Parts 300—399)

IV Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services (Parts 400—499)

V Foreign Claims Settlement Commission of the United States, Department of Justice (Parts 500—599)

VI National Science Foundation (Parts 600—699)

VII Commission on Civil Rights (Parts 700—799)

VIII Office of Personnel Management (Parts 800—899)

X Office of Community Services, Administration for Children and Families, Department of Health and Human Services (Parts 1000—1099)

XI National Foundation on the Arts and the Humanities (Parts 1100—1199)

Title 45—Public Welfare—Continued

Chap.

XII Corporation for National and Community Service (Parts 1200—1299)

XIII Office of Human Development Services, Department of Health and Human Services (Parts 1300—1399)

XVI Legal Services Corporation (Parts 1600—1699)

XVII National Commission on Libraries and Information Science (Parts 1700—1799)

XVIII Harry S. Truman Scholarship Foundation (Parts 1800—1899)

XXI Commission on Fine Arts (Parts 2100—2199)

XXIII Arctic Research Commission (Part 2301)

XXIV James Madison Memorial Fellowship Foundation (Parts 2400—2499)

XXV Corporation for National and Community Service (Parts 2500—2599)

Title 46—Shipping

I Coast Guard, Department of Homeland Security (Parts 1—199)

II Maritime Administration, Department of Transportation (Parts 200—399)

III Coast Guard (Great Lakes Pilotage), Department of Homeland Security (Parts 400—499)

IV Federal Maritime Commission (Parts 500—599)

Title 47—Telecommunication

I Federal Communications Commission (Parts 0—199)

II Office of Science and Technology Policy and National Security Council (Parts 200—299)

III National Telecommunications and Information Administration, Department of Commerce (Parts 300—399)

IV National Telecommunications and Information Administration, Department of Commerce, and National Highway Traffic Safety Administration, Department of Transportation (Parts 400—499)

Title 48—Federal Acquisition Regulations System

1 Federal Acquisition Regulation (Parts 1—99)

2 Defense Acquisition Regulations System, Department of Defense (Parts 200—299)

3 Health and Human Services (Parts 300—399)

4 Department of Agriculture (Parts 400—499)

5 General Services Administration (Parts 500—599)

6 Department of State (Parts 600—699)

7 Agency for International Development (Parts 700—799)

8 Department of Veterans Affairs (Parts 800—899)

9 Department of Energy (Parts 900—999)

Chap.

10 Department of the Treasury (Parts 1000—1099)

12 Department of Transportation (Parts 1200—1299)

13 Department of Commerce (Parts 1300—1399)

14 Department of the Interior (Parts 1400—1499)

15 Environmental Protection Agency (Parts 1500—1599)

16 Office of Personnel Management, Federal Employees Health Benefits Acquisition Regulation (Parts 1600—1699)

17 Office of Personnel Management (Parts 1700—1799)

18 National Aeronautics and Space Administration (Parts 1800—1899)

19 Broadcasting Board of Governors (Parts 1900—1999)

20 Nuclear Regulatory Commission (Parts 2000—2099)

21 Office of Personnel Management, Federal Employees Group Life Insurance Federal Acquisition Regulation (Parts 2100—2199)

23 Social Security Administration (Parts 2300—2399)

24 Department of Housing and Urban Development (Parts 2400—2499)

25 National Science Foundation (Parts 2500—2599)

28 Department of Justice (Parts 2800—2899)

29 Department of Labor (Parts 2900—2999)

30 Department of Homeland Security, Homeland Security Acquisition Regulation (HSAR) (Parts 3000—3099)

34 Department of Education Acquisition Regulation (Parts 3400—3499)

51 Department of the Army Acquisition Regulations (Parts 5100—5199)

52 Department of the Navy Acquisition Regulations (Parts 5200—5299)

53 Department of the Air Force Federal Acquisition Regulation Supplement (Parts 5300—5399) [Reserved]

54 Defense Logistics Agency, Department of Defense (Parts 5400—5499)

57 African Development Foundation (Parts 5700—5799)

61 Civilian Board of Contract Appeals, General Services Administration (Parts 6100—6199)

63 Department of Transportation Board of Contract Appeals (Parts 6300—6399)

99 Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget (Parts 9900—9999)

Title 49—Transportation

SUBTITLE A—OFFICE OF THE SECRETARY OF TRANSPORTATION (PARTS 1—99)

SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION

I Pipeline and Hazardous Materials Safety Administration, Department of Transportation (Parts 100—199)

Title 49—Transportation—Continued

Chap.

II Federal Railroad Administration, Department of Transportation (Parts 200—299)

III Federal Motor Carrier Safety Administration, Department of Transportation (Parts 300—399)

IV Coast Guard, Department of Homeland Security (Parts 400—499)

V National Highway Traffic Safety Administration, Department of Transportation (Parts 500—599)

VI Federal Transit Administration, Department of Transportation (Parts 600—699)

VII National Railroad Passenger Corporation (AMTRAK) (Parts 700—799)

VIII National Transportation Safety Board (Parts 800—999)

X Surface Transportation Board, Department of Transportation (Parts 1000—1399)

XI Research and Innovative Technology Administration, Department of Transportation (Parts 1400—1499) [Reserved]

XII Transportation Security Administration, Department of Homeland Security (Parts 1500—1699)

Title 50—Wildlife and Fisheries

I United States Fish and Wildlife Service, Department of the Interior (Parts 1—199)

II National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 200—299)

III International Fishing and Related Activities (Parts 300—399)

IV Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations (Parts 400—499)

V Marine Mammal Commission (Parts 500—599)

VI Fishery Conservation and Management, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 600—699)

Alphabetical List of Agencies Appearing in the CFR

(Revised as of October 1, 2014)

Agency	CFR Title, Subtitle or Chapter
Administrative Committee of the Federal Register	1, I
Administrative Conference of the United States	1, III
Advisory Council on Historic Preservation	36, VIII
Advocacy and Outreach, Office of	7, XXV
Afghanistan Reconstruction, Special Inspector General for	22, LXXXIII
African Development Foundation	22, XV
Federal Acquisition Regulation	48, 57
Agency for International Development	2, VII; 22, II
Federal Acquisition Regulation	48, 7
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Agriculture Department	2, IV; 5, LXXIII
Advocacy and Outreach, Office of	7, XXV
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Animal and Plant Health Inspection Service	7, III; 9, I
Chief Financial Officer, Office of	7, XXX
Commodity Credit Corporation	7, XIV
Economic Research Service	7, XXXVII
Energy Policy and New Uses, Office of	2, IX; 7, XXIX
Environmental Quality, Office of	7, XXXI
Farm Service Agency	7, VII, XVIII
Federal Acquisition Regulation	48, 4
Federal Crop Insurance Corporation	7, IV
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Forest Service	36, II
Grain Inspection, Packers and Stockyards Administration	7, VIII; 9, II
Information Resources Management, Office of	7, XXVII
Inspector General, Office of	7, XXVI
National Agricultural Library	7, XLI
National Agricultural Statistics Service	7, XXXVI
National Institute of Food and Agriculture	7, XXXIV
Natural Resources Conservation Service	7, VI
Operations, Office of	7, XXVIII
Procurement and Property Management, Office of	7, XXXII
Rural Business-Cooperative Service	7, XVIII, XLII, L
Rural Development Administration	7, XLII
Rural Housing Service	7, XVIII, XXXV, L
Rural Telephone Bank	7, XVI
Rural Utilities Service	7, XVII, XVIII, XLII, L
Secretary of Agriculture, Office of	7, Subtitle A
Transportation, Office of	7, XXXIII
World Agricultural Outlook Board	7, XXXVIII
Air Force Department	32, VII
Federal Acquisition Regulation Supplement	48, 53
Air Transportation Stabilization Board	14, VI
Alcohol and Tobacco Tax and Trade Bureau	27, I
Alcohol, Tobacco, Firearms, and Explosives, Bureau of	27, II
AMTRAK	49, VII
American Battle Monuments Commission	36, IV
American Indians, Office of the Special Trustee	25, VII

Agency	CFR Title, Subtitle or Chapter
Animal and Plant Health Inspection Service	7, III; 9, I
Appalachian Regional Commission	5, IX
Architectural and Transportation Barriers Compliance Board	36, XI
Arctic Research Commission	45, XXIII
Armed Forces Retirement Home	5, XI
Army Department	32, V
Engineers, Corps of	33, II; 36, III
Federal Acquisition Regulation	48, 51
Bilingual Education and Minority Languages Affairs, Office of	34, V
Blind or Severely Disabled, Committee for Purchase from People Who Are	41, 51
Broadcasting Board of Governors	22, V
Federal Acquisition Regulation	48, 19
Bureau of Ocean Energy Management, Regulation, and Enforcement	30, II
Census Bureau	15, I
Centers for Medicare & Medicaid Services	42, IV
Central Intelligence Agency	32, XIX
Chemical Safety and Hazardous Investigation Board	40, VI
Chief Financial Officer, Office of	7, XXX
Child Support Enforcement, Office of	45, III
Children and Families, Administration for	45, II, III, IV, X
Civil Rights, Commission on	5, LXVIII; 45, VII
Civil Rights, Office for	34, I
Council of the Inspectors General on Integrity and Efficiency	5, XCVIII
Court Services and Offender Supervision Agency for the District of Columbia	5, LXX
Coast Guard	33, I; 46, I; 49, IV
Coast Guard (Great Lakes Pilotage)	46, III
Commerce Department	2, XIII; 44, IV; 50, VI
Census Bureau	15, I
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Emergency Management and Assistance	44, IV
Federal Acquisition Regulation	48, 13
Foreign-Trade Zones Board	15, IV
Industry and Security, Bureau of	15, VII
International Trade Administration	15, III; 19, III
National Institute of Standards and Technology	15, II
National Marine Fisheries Service	50, II, IV
National Oceanic and Atmospheric Administration	15, IX; 50, II, III, IV, VI
National Telecommunications and Information Administration	15, XXIII; 47, III, IV
National Weather Service	15, IX
Patent and Trademark Office, United States	37, I
Productivity, Technology and Innovation, Assistant Secretary for	37, IV
Secretary of Commerce, Office of	15, Subtitle A
Technology Administration	15, XI
Technology Policy, Assistant Secretary for	37, IV
Commercial Space Transportation	14, III
Commodity Credit Corporation	7, XIV
Commodity Futures Trading Commission	5, XLI; 17, I
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Community Services, Office of	45, X
Comptroller of the Currency	12, I
Construction Industry Collective Bargaining Commission	29, IX
Consumer Financial Protection Bureau	5, LXXXIV; 12, X
Consumer Product Safety Commission	5, LXXI; 16, II
Copyright Royalty Board	37, III
Corporation for National and Community Service	2, XXII; 45, XII, XXV
Cost Accounting Standards Board	48, 99
Council on Environmental Quality	40, V
Court Services and Offender Supervision Agency for the District of Columbia	5, LXX; 28, VIII
Customs and Border Protection	19, I

Agency	CFR Title, Subtitle or Chapter
Defense Contract Audit Agency	32, I
Defense Department	2, XI; 5, XXVI; 32, Subtitle A; 40, VII
Advanced Research Projects Agency	32, I
Air Force Department	32, VII
Army Department	32, V; 33, II; 36, III, 48, 51
Defense Acquisition Regulations System	48, 2
Defense Intelligence Agency	32, I
Defense Logistics Agency	32, I, XII; 48, 54
Engineers, Corps of	33, II; 36, III
National Imagery and Mapping Agency	32, I
Navy Department	32, VI; 48, 52
Secretary of Defense, Office of	2, XI; 32, I
Defense Contract Audit Agency	32, I
Defense Intelligence Agency	32, I
Defense Logistics Agency	32, XII; 48, 54
Defense Nuclear Facilities Safety Board	10, XVII
Delaware River Basin Commission	18, III
District of Columbia, Court Services and Offender Supervision Agency for the	5, LXX; 28, VIII
Drug Enforcement Administration	21, II
East-West Foreign Trade Board	15, XIII
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Economic Research Service	7, XXXVII
Education, Department of	2, XXXIV; 5, LIII
Bilingual Education and Minority Languages Affairs, Office of	34, V
Civil Rights, Office for	34, I
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
Federal Acquisition Regulation	48, 34
Postsecondary Education, Office of	34, VI
Secretary of Education, Office of	34, Subtitle A
Special Education and Rehabilitative Services, Office of	34, III
Vocational and Adult Education, Office of	34, IV
Educational Research and Improvement, Office of	34, VII
Election Assistance Commission	2, LVIII; 11, II
Elementary and Secondary Education, Office of	34, II
Emergency Oil and Gas Guaranteed Loan Board	13, V
Emergency Steel Guarantee Loan Board	13, IV
Employee Benefits Security Administration	29, XXV
Employees' Compensation Appeals Board	20, IV
Employees Loyalty Board	5, V
Employment and Training Administration	20, V
Employment Standards Administration	20, VI
Endangered Species Committee	50, IV
Energy, Department of	2, IX; 5, XXIII; 10, II, III, X
Federal Acquisition Regulation	48, 9
Federal Energy Regulatory Commission	5, XXIV; 18, I
Property Management Regulations	41, 109
Energy, Office of	7, XXIX
Engineers, Corps of	33, II; 36, III
Engraving and Printing, Bureau of	31, VI
Environmental Protection Agency	2, XV; 5, LIV; 40, I, IV, VII
Federal Acquisition Regulation	48, 15
Property Management Regulations	41, 115
Environmental Quality, Office of	7, XXXI
Equal Employment Opportunity Commission	5, LXII; 29, XIV
Equal Opportunity, Office of Assistant Secretary for	24, I
Executive Office of the President	3, I
Administration, Office of	5, XV
Environmental Quality, Council on	40, V
Management and Budget, Office of	2, Subtitle A; 5, III, LXXVII; 14, VI; 48, 99

Agency	CFR Title, Subtitle or Chapter
National Drug Control Policy, Office of	21, III
National Security Council	32, XXI; 47, 2
Presidential Documents	3
Science and Technology Policy, Office of	32, XXIV; 47, II
Trade Representative, Office of the United States	15, XX
Export-Import Bank of the United States	2, XXXV; 5, LII; 12, IV
Family Assistance, Office of	45, II
Farm Credit Administration	5, XXXI; 12, VI
Farm Credit System Insurance Corporation	5, XXX; 12, XIV
Farm Service Agency	7, VII, XVIII
Federal Acquisition Regulation	48, 1
Federal Aviation Administration	14, I
Commercial Space Transportation	14, III
Federal Claims Collection Standards	31, IX
Federal Communications Commission	5, XXIX; 47, I
Federal Contract Compliance Programs, Office of	41, 60
Federal Crop Insurance Corporation	7, IV
Federal Deposit Insurance Corporation	5, XXII; 12, III
Federal Election Commission	5, XXXVII; 11, I
Federal Emergency Management Agency	44, I
Federal Employees Group Life Insurance Federal Acquisition Regulation	48, 21
Federal Employees Health Benefits Acquisition Regulation	48, 16
Federal Energy Regulatory Commission	5, XXIV; 18, I
Federal Financial Institutions Examination Council	12, XI
Federal Financing Bank	12, VIII
Federal Highway Administration	23, I, II
Federal Home Loan Mortgage Corporation	1, IV
Federal Housing Enterprise Oversight Office	12, XVII
Federal Housing Finance Agency	5, LXXX; 12, XII
Federal Housing Finance Board	12, IX
Federal Labor Relations Authority	5, XIV, XLIX; 22, XIV
Federal Law Enforcement Training Center	31, VII
Federal Management Regulation	41, 102
Federal Maritime Commission	46, IV
Federal Mediation and Conciliation Service	29, XII
Federal Mine Safety and Health Review Commission	5, LXXIV; 29, XXVII
Federal Motor Carrier Safety Administration	49, III
Federal Prison Industries, Inc.	28, III
Federal Procurement Policy Office	48, 99
Federal Property Management Regulations	41, 101
Federal Railroad Administration	49, II
Federal Register, Administrative Committee of	1, I
Federal Register, Office of	1, II
Federal Reserve System	12, II
Board of Governors	5, LVIII
Federal Retirement Thrift Investment Board	5, VI, LXXVI
Federal Service Impasses Panel	5, XIV
Federal Trade Commission	5, XLVII; 16, I
Federal Transit Administration	49, VI
Federal Travel Regulation System	41, Subtitle F
Financial Crimes Enforcement Network	31, X
Financial Research Office	12, XVI
Financial Stability Oversight Council	12, XIII
Fine Arts, Commission on	45, XXI
Fiscal Service	31, II
Fish and Wildlife Service, United States	50, I, IV
Food and Drug Administration	21, I
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Foreign Assets Control, Office of	31, V
Foreign Claims Settlement Commission of the United States	45, V
Foreign Service Grievance Board	22, IX
Foreign Service Impasse Disputes Panel	22, XIV
Foreign Service Labor Relations Board	22, XIV
Foreign-Trade Zones Board	15, IV

Agency	CFR Title, Subtitle or Chapter
Forest Service	36, II
General Services Administration	5, LVII; 41, 105
Contract Appeals, Board of	48, 61
Federal Acquisition Regulation	48, 5
Federal Management Regulation	41, 102
Federal Property Management Regulations	41, 101
Federal Travel Regulation System	41, Subtitle F
General	41, 300
Payment From a Non-Federal Source for Travel Expenses	41, 304
Payment of Expenses Connected With the Death of Certain Employees	41, 303
Relocation Allowances	41, 302
Temporary Duty (TDY) Travel Allowances	41, 301
Geological Survey	30, IV
Government Accountability Office	4, I
Government Ethics, Office of	5, XVI
Government National Mortgage Association	24, III
Grain Inspection, Packers and Stockyards Administration	7, VIII; 9, II
Gulf Coast Ecosystem Restoration Council	40, VIII
Harry S. Truman Scholarship Foundation	45, XVIII
Health and Human Services, Department of	2, III; 5, XLV; 45, Subtitle A,
Centers for Medicare & Medicaid Services	42, IV
Child Support Enforcement, Office of	45, III
Children and Families, Administration for	45, II, III, IV, X
Community Services, Office of	45, X
Family Assistance, Office of	45, II
Federal Acquisition Regulation	48, 3
Food and Drug Administration	21, I
Human Development Services, Office of	45, XIII
Indian Health Service	25, V
Inspector General (Health Care), Office of	42, V
Public Health Service	42, I
Refugee Resettlement, Office of	45, IV
Homeland Security, Department of	2, XXX; 6, I; 8, I
Coast Guard	33, I; 46, I; 49, IV
Coast Guard (Great Lakes Pilotage)	46, III
Customs and Border Protection	19, I
Federal Emergency Management Agency	44, I
Human Resources Management and Labor Relations Systems	5, XCVII
Immigration and Customs Enforcement Bureau	19, IV
Transportation Security Administration	49, XII
HOPE for Homeowners Program, Board of Directors of	24, XXIV
Housing and Urban Development, Department of	2, XXIV; 5, LXV; 24, Subtitle B
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Equal Opportunity, Office of Assistant Secretary for	24, I
Federal Acquisition Regulation	48, 24
Federal Housing Enterprise Oversight, Office of	12, XVII
Government National Mortgage Association	24, III
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, VIII, X, XX
Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of	24, IV
Inspector General, Office of	24, XII
Public and Indian Housing, Office of Assistant Secretary for	24, IX
Secretary, Office of	24, Subtitle A, VII
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, VIII, X, XX
Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of	24, IV
Human Development Services, Office of	45, XIII
Immigration and Customs Enforcement Bureau	19, IV
Immigration Review, Executive Office for	8, V
Independent Counsel, Office of	28, VII

Agency	CFR Title, Subtitle or Chapter
Indian Affairs, Bureau of	25, I, V
Indian Affairs, Office of the Assistant Secretary	25, VI
Indian Arts and Crafts Board	25, II
Indian Health Service	25, V
Industry and Security, Bureau of	15, VII
Information Resources Management, Office of	7, XXVII
Information Security Oversight Office, National Archives and Records Administration	32, XX
Inspector General	
Agriculture Department	7, XXVI
Health and Human Services Department	42, V
Housing and Urban Development Department	24, XII, XV
Institute of Peace, United States	22, XVII
Inter-American Foundation	5, LXIII; 22, X
Interior Department	2, XIV
American Indians, Office of the Special Trustee	25, VII
Bureau of Ocean Energy Management, Regulation, and Enforcement	30, II
Endangered Species Committee	50, IV
Federal Acquisition Regulation	48, 14
Federal Property Management Regulations System	41, 114
Fish and Wildlife Service, United States	50, I, IV
Geological Survey	30, IV
Indian Affairs, Bureau of	25, I, V
Indian Affairs, Office of the Assistant Secretary	25, VI
Indian Arts and Crafts Board	25, II
Land Management, Bureau of	43, II
National Indian Gaming Commission	25, III
National Park Service	36, I
Natural Resource Revenue, Office of	30, XII
Ocean Energy Management, Bureau of	30, V
Reclamation, Bureau of	43, I
Secretary of the Interior, Office of	2, XIV; 43, Subtitle A
Surface Mining Reclamation and Enforcement, Office of	30, VII
Internal Revenue Service	26, I
International Boundary and Water Commission, United States and Mexico, United States Section	22, XI
International Development, United States Agency for	22, II
Federal Acquisition Regulation	48, 7
International Development Cooperation Agency, United States	22, XII
International Joint Commission, United States and Canada	22, IV
International Organizations Employees Loyalty Board	5, V
International Trade Administration	15, III; 19, III
International Trade Commission, United States	19, II
Interstate Commerce Commission	5, XL
Investment Security, Office of	31, VIII
James Madison Memorial Fellowship Foundation	45, XXIV
Japan–United States Friendship Commission	22, XVI
Joint Board for the Enrollment of Actuaries	20, VIII
Justice Department	2, XXVIII; 5, XXVIII; 28, I, XI; 40, IV
Alcohol, Tobacco, Firearms, and Explosives, Bureau of	27, II
Drug Enforcement Administration	21, II
Federal Acquisition Regulation	48, 28
Federal Claims Collection Standards	31, IX
Federal Prison Industries, Inc.	28, III
Foreign Claims Settlement Commission of the United States	45, V
Immigration Review, Executive Office for	8, V
Offices of Independent Counsel	28, VI
Prisons, Bureau of	28, V
Property Management Regulations	41, 128
Labor Department	5, XLII
Employee Benefits Security Administration	29, XXV
Employees' Compensation Appeals Board	20, IV
Employment and Training Administration	20, V

Agency	CFR Title, Subtitle or Chapter
Employment Standards Administration	20, VI
Federal Acquisition Regulation	48, 29
Federal Contract Compliance Programs, Office of	41, 60
Federal Procurement Regulations System	41, 50
Labor-Management Standards, Office of	29, II, IV
Mine Safety and Health Administration	30, I
Occupational Safety and Health Administration	29, XVII
Office of Workers' Compensation Programs	20, VII
Public Contracts	41, 50
Secretary of Labor, Office of	29, Subtitle A
Veterans' Employment and Training Service, Office of the Assistant Secretary for	41, 61; 20, IX
Wage and Hour Division	29, V
Workers' Compensation Programs, Office of	20, I
Labor-Management Standards, Office of	29, II, IV
Land Management, Bureau of	43, II
Legal Services Corporation	45, XVI
Library of Congress	36, VII
Copyright Royalty Board	37, III
U.S. Copyright Office	37, II
Local Television Loan Guarantee Board	7, XX
Management and Budget, Office of	5, III, LXXVII; 14, VI; 48, 99
Marine Mammal Commission	50, V
Maritime Administration	46, II
Merit Systems Protection Board	5, II, LXIV
Micronesian Status Negotiations, Office for	32, XXVII
Military Compensation and Retirement Modernization Commission	5, XCIX
Millennium Challenge Corporation	22, XIII
Mine Safety and Health Administration	30, I
Minority Business Development Agency	15, XIV
Miscellaneous Agencies	1, IV
Monetary Offices	31, I
Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation	36, XVI
Museum and Library Services, Institute of	2, XXXI
National Aeronautics and Space Administration	2, XVIII; 5, LIX; 14, V
Federal Acquisition Regulation	48, 18
National Agricultural Library	7, XLI
National Agricultural Statistics Service	7, XXXVI
National and Community Service, Corporation for	2, XXII; 45, XII, XXV
National Archives and Records Administration	2, XXVI; 5, LXVI; 36, XII
Information Security Oversight Office	32, XX
National Capital Planning Commission	1, IV
National Commission for Employment Policy	1, IV
National Commission on Libraries and Information Science	45, XVII
National Council on Disability	34, XII
National Counterintelligence Center	32, XVIII
National Credit Union Administration	5, LXXXVI; 12, VII
National Crime Prevention and Privacy Compact Council	28, IX
National Drug Control Policy, Office of	21, III
National Endowment for the Arts	2, XXXII
National Endowment for the Humanities	2, XXXIII
National Foundation on the Arts and the Humanities	45, XI
National Highway Traffic Safety Administration	23, II, III; 47, VI; 49, V
National Imagery and Mapping Agency	32, I
National Indian Gaming Commission	25, III
National Institute for Literacy	34, XI
National Institute of Food and Agriculture	7, XXXIV
National Institute of Standards and Technology	15, II
National Intelligence, Office of Director of	32, XVII
National Labor Relations Board	5, LXI; 29, I
National Marine Fisheries Service	50, II, IV
National Mediation Board	29, X
National Oceanic and Atmospheric Administration	15, IX; 50, II, III, IV, VI

Agency	CFR Title, Subtitle or Chapter
National Park Service	36, I
National Railroad Adjustment Board	29, III
National Railroad Passenger Corporation (AMTRAK)	49, VII
National Science Foundation	2, XXV; 5, XLIII; 45, VI
Federal Acquisition Regulation	48, 25
National Security Council	32, XXI
National Security Council and Office of Science and Technology Policy	47, II
National Telecommunications and Information Administration	15, XXIII; 47, III, IV
National Transportation Safety Board	49, VIII
Natural Resources Conservation Service	7, VI
Natural Resource Revenue, Office of	30, XII
Navajo and Hopi Indian Relocation, Office of	25, IV
Navy Department	32, VI
Federal Acquisition Regulation	48, 52
Neighborhood Reinvestment Corporation	24, XXV
Northeast Interstate Low-Level Radioactive Waste Commission	10, XVIII
Nuclear Regulatory Commission	2, XX; 5, XLVIII; 10, I
Federal Acquisition Regulation	48, 20
Occupational Safety and Health Administration	29, XVII
Occupational Safety and Health Review Commission	29, XX
Ocean Energy Management, Bureau of	30, V
Offices of Independent Counsel	28, VI
Office of Workers' Compensation Programs	20, VII
Oklahoma City National Memorial Trust	36, XV
Operations Office	7, XXVIII
Overseas Private Investment Corporation	5, XXXIII; 22, VII
Patent and Trademark Office, United States	37, I
Payment From a Non-Federal Source for Travel Expenses	41, 304
Payment of Expenses Connected With the Death of Certain Employees	41, 303
Peace Corps	2, XXXVII; 22, III
Pennsylvania Avenue Development Corporation	36, IX
Pension Benefit Guaranty Corporation	29, XL
Personnel Management, Office of	5, I, XXXV; 45, VIII
Human Resources Management and Labor Relations Systems, Department of Homeland Security	5, XCVII
Federal Acquisition Regulation	48, 17
Federal Employees Group Life Insurance Federal Acquisition Regulation	48, 21
Federal Employees Health Benefits Acquisition Regulation	48, 16
Pipeline and Hazardous Materials Safety Administration	49, I
Postal Regulatory Commission	5, XLVI; 39, III
Postal Service, United States	5, LX; 39, I
Postsecondary Education, Office of	34, VI
President's Commission on White House Fellowships	1, IV
Presidential Documents	3
Presidio Trust	36, X
Prisons, Bureau of	28, V
Privacy and Civil Liberties Oversight Board	6, X
Procurement and Property Management, Office of	7, XXXII
Productivity, Technology and Innovation, Assistant Secretary	37, IV
Public Contracts, Department of Labor	41, 50
Public and Indian Housing, Office of Assistant Secretary for	24, IX
Public Health Service	42, I
Railroad Retirement Board	20, II
Reclamation, Bureau of	43, I
Recovery Accountability and Transparency Board	4, II
Refugee Resettlement, Office of	45, IV
Relocation Allowances	41, 302
Research and Innovative Technology Administration	49, XI
Rural Business-Cooperative Service	7, XVIII, XLII, L
Rural Development Administration	7, XLII
Rural Housing Service	7, XVIII, XXXV, L

Agency	CFR Title, Subtitle or Chapter
Rural Telephone Bank	7, XVI
Rural Utilities Service	7, XVII, XVIII, XLII, L
Saint Lawrence Seaway Development Corporation	33, IV
Science and Technology Policy, Office of	32, XXIV
Science and Technology Policy, Office of, and National Security Council	47, II
Secret Service	31, IV
Securities and Exchange Commission	5, XXXIV; 17, II
Selective Service System	32, XVI
Small Business Administration	2, XXVII; 13, I
Smithsonian Institution	36, V
Social Security Administration	2, XXIII; 20, III; 48, 23
Soldiers' and Airmen's Home, United States	5, XI
Special Counsel, Office of	5, VIII
Special Education and Rehabilitative Services, Office of	34, III
State Department	2, VI; 22, I; 28, XI
Federal Acquisition Regulation	48, 6
Surface Mining Reclamation and Enforcement, Office of	30, VII
Surface Transportation Board	49, X
Susquehanna River Basin Commission	18, VIII
Technology Administration	15, XI
Technology Policy, Assistant Secretary for	37, IV
Tennessee Valley Authority	5, LXIX; 18, XIII
Thrift Supervision Office, Department of the Treasury	12, V
Trade Representative, United States, Office of	15, XX
Transportation, Department of	2, XII; 5, L
Commercial Space Transportation	14, III
Contract Appeals, Board of	48, 63
Emergency Management and Assistance	44, IV
Federal Acquisition Regulation	48, 12
Federal Aviation Administration	14, I
Federal Highway Administration	23, I, II
Federal Motor Carrier Safety Administration	49, III
Federal Railroad Administration	49, II
Federal Transit Administration	49, VI
Maritime Administration	46, II
National Highway Traffic Safety Administration	23, II, III; 47, IV; 49, V
Pipeline and Hazardous Materials Safety Administration	49, I
Saint Lawrence Seaway Development Corporation	33, IV
Secretary of Transportation, Office of	14, II; 49, Subtitle A
Surface Transportation Board	49, X
Transportation Statistics Bureau	49, XI
Transportation, Office of	7, XXXIII
Transportation Security Administration	49, XII
Transportation Statistics Bureau	49, XI
Travel Allowances, Temporary Duty (TDY)	41, 301
Treasury Department	5, XXI; 12, XV; 17, IV; 31, IX
Alcohol and Tobacco Tax and Trade Bureau	27, I
Community Development Financial Institutions Fund	12, XVIII
Comptroller of the Currency	12, I
Customs and Border Protection	19, I
Engraving and Printing, Bureau of	31, VI
Federal Acquisition Regulation	48, 10
Federal Claims Collection Standards	31, IX
Federal Law Enforcement Training Center	31, VII
Financial Crimes Enforcement Network	31, X
Fiscal Service	31, II
Foreign Assets Control, Office of	31, V
Internal Revenue Service	26, I
Investment Security, Office of	31, VIII
Monetary Offices	31, I
Secret Service	31, IV
Secretary of the Treasury, Office of	31, Subtitle A
Thrift Supervision, Office of	12, V
Truman, Harry S. Scholarship Foundation	45, XVIII
United States and Canada, International Joint Commission	22, IV

Agency	CFR Title, Subtitle or Chapter
United States and Mexico, International Boundary and Water Commission, United States Section	22, XI
U.S. Copyright Office	37, II
Utah Reclamation Mitigation and Conservation Commission	43, III
Veterans Affairs Department	2, VIII; 38, I
Federal Acquisition Regulation	48, 8
Veterans' Employment and Training Service, Office of the Assistant Secretary for	41, 61; 20, IX
Vice President of the United States, Office of	32, XXVIII
Vocational and Adult Education, Office of	34, IV
Wage and Hour Division	29, V
Water Resources Council	18, VI
Workers' Compensation Programs, Office of	20, I
World Agricultural Outlook Board	7, XXXVIII

List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations (CFR) that were made by documents published in the FEDERAL REGISTER since January 1, 2009 are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to FEDERAL REGISTER pages. The user should consult the entries for chapters, parts and subparts as well as sections for revisions.

For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.fdsys.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.fdsys.gov*.

2009

43 CFR

74 FR Page

Subtitle A

2.3 (i), (k) and (r) revised 17091
2.12 (c) added 17092
2.14 (a) revised 17092
2.21 (d)(6) revised 17092
2.22 (a) revised 17092
2.26 Revised 17092
2.29 Revised 17092
2.30 (b) revised 17092
2 Appendix A revised 17093

2010

43 CFR

75 FR Page

Subtitle A

4.1 Introductory text and (a) revised; (b)(1) removed; (b)(2), (3) and (4) redesignated as (b)(1), (2) and (3); new (b)(1)(ii) amended 64663
4.21 (b)(3) and (4) amended 64663
4.22 (a) revised 64663
4.100—4.128 (Subpart C) Removed 64663
4.400—4.480 (Subpart E) Authority citation revised 64663
4.400 Revised 64663
Corrected 68704
4.401 (c) revised; (d) added 64664
4.403 Revised 64664
4.404 Added 64665
4.405 Added 64665

43 CFR—Continued

75 FR Page

Subtitle A—Continued

4.406 Added 64665
4.407 Added 64665
4.410 (a) introductory text and (c) introductory text revised 64665
4.411 (a) and (b) revised; (d) added 64665
4.412 Heading and (a) revised; (d) and (e) added 64666
4.413 Revised 64666
4.414 Revised 64666
4.415 Revised 64666
4.421 Revised 64667
4.422 (c) and (d) revised 64667
4.430 Amended 64668
4.431 Amended 64668
4.432 Amended 64668
4.433 Revised 64668
4.434 Revised 64668
4.436 Amended 64668
4.437 Revised 64668
4.438 Removed; new 4.438 redesignated from 4.439 and revised 64669
4.439 Redesignated as 4.438 and revised 64669
4.452–8 Heading revised; (c) removed 64669
4.476 (d) revised 64669
4.477 Revised 64669
4.478 (a) revised 64669
4.1108 (g) added 64669
4.1109 (a)(2)(i) revised 64669
4.1117 Added 64669
4.1270 (f) revised 64669
4.1276 Removed 64669

43 CFR—Continued

75 FR Page

Subtitle A—Continued

4.1286 Revised 64669
4.1287 Added 64670
4.1392 (a) and (d) revised; (e) added 64670
10 Authority citation revised 64670
10.1 Heading and (b)(3) revised; (c) added 12402
10.2 (e) revised; (g)(5) added 12403
10.9 (e)(2), (5) and (6) revised 12403
10.11 Added 12403
10.12 (b)(1)(ii), (iii) and (iv) revised; (b)(1)(ix) added 12404
(j) introductory text, (k)(1) and (3) amended 64670
10.15 (c) revised 12405
43 Removed 71012

2011

43 CFR

76 FR Page

Subtitle A

4.320 Revised; interim 7505
Regulation at 76 FR 7505 confirmed 45198
4.324 Revised; interim 7505
Regulation at 76 FR 7505 confirmed 45198
10.2 (b)(2) removed; interim 39009
30.100 (a) revised; interim 7506
Regulation at 76 FR 7506 confirmed 45198
30.101 Amended; interim 7506
Regulation at 76 FR 7506 confirmed 45198
30.102 Revised; interim 7506
Regulation at 76 FR 7506 confirmed 45198
30.110 Revised; interim 7506
Regulation at 76 FR 7506 confirmed 45198
30.128 Introductory text and (a) revised; interim 7506
Regulation at 76 FR 7506 confirmed 45198
30.140 Introductory text revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.142 Revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.143 (b)(1) revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.151 Introductory text, (a) and (b) revised; interim 7507

43 CFR—Continued

76 FR Page

Subtitle A—Continued

Regulation at 76 FR 7507 confirmed 45198
30.160 Introductory text revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.163 Revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.167 (a) revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.170 (c) revised; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.236 Redesignated as 30.237; new 30.236 added; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.237 Redesignated as 30.238; new 30.237 redesignated from 30.236; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.238 Redesignated as 30.239; new 30.238 redesignated from 30.237; interim 7507
(a) revised; interim 7508
Regulation at 76 FR 7507 and 7508 confirmed 45198
30.239 Redesignated as 30.240; new 30.239 redesignated from 30.238; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.240 Redesignated as 30.241; new 30.240 redesignated from 30.239; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.241 Redesignated as 30.242; new 30.241 redesignated from 30.240; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.242 Redesignated as 30.243; new 30.242 redesignated from 30.241; interim 7507
Regulation at 76 FR 7507 confirmed 45198
30.243 Redesignated as 30.244; new 30.243 redesignated from 30.242; interim 7507
Second (a)(2) redesignated as (a)(3); interim 7508

43 CFR—Continued

76 FR Page

Subtitle A—Continued
Reg. at 76 FR 7507 and 7508 confirmed 45198
30.244 Redesignated as 30.245; new 30.244 redesignated from 30.243; interim 7507
Reg. at 76 FR 7507 confirmed 45198
30.245 Redesignated as 30.246; new 30.245 redesignated from 30.244; interim 7507
Reg. at 76 FR 7507 confirmed 45198
30.246 Redesignated from 30.245; interim 7507
Reg. at 76 FR 7507 confirmed 45198
30.262 (a)(1) revised; interim 7508
Reg. at 76 FR 7508 confirmed 45198
30.266 (b)(3) revised; interim 7508
Reg. at 76 FR 7508 confirmed 45198

2012

43 CFR

77 FR Page

Subtitle A
2 Heading and authority citation revised 76902
2.1—2.2 (Subpart A) Revised 76902
2.3—2.11 (Subpart B) Revised 76902
2.12—2.13 (Subpart C) Revised 76902
2.14—2.20 (Subpart D) Revised 76902
2.21—2.25 (Subpart E) Revised 76902
2.26—2.36 (Subpart F) Added 76906
2.37—2.56 (Subpart G) Added 76906
2.41 (Subpart F) Redesignated as Subpart J 76902
2.41 (Subpart J) Redesignated from Subpart F 76902
2.45—2.79 (Subpart G) Redesignated as Subpart K 76902
2.45—2.79 (Subpart K) Redesignated from Subpart G 76902
2.57—2.64 (Subpart H) Added 76906
2.65—2.70 (Subpart I) Added 76906
2.80—2.90 (Subpart H) Redesignated as Subpart L 76902
2.80—2.90 (Subpart L) Redesignated from Subpart H 76902
2 Appendices A and B removed; Appendix C redesignated as new Appendix A and revised 76914
Appendices D and E removed; Appendix F redesignated as new Appendix B 76915

2013

43 CFR

78 FR Page

Subtitle A
2.5 (d) corrected 6216
2.13 (h) corrected 6216
2.51 (b)(1) corrected 6216
2.41 (Subpart F) Correctly redesignated as 2.200 (Subpart J) 6216
2.45—2.79 (Subpart G) Correctly redesignated as 2.220—2.254 (Subpart K) 6216
2.80—2.90 (Subpart H) Correctly redesignated as 2.280—2.290 (Subpart L) 6216
2.200 (Subpart J) Correctly redesignated from 2.41 (Subpart F) 6216
2.220—2.254 (Subpart K) Correctly redesignated from 2.45—2.79 (Subpart G) 6216
2.280—2.290 (Subpart L) Correctly redesignated from 2.80—2.90 (Subpart H) 6216
5 Revised 52095
10.2 (c)(1) and (3) revised 27082
10.4 (d)(1)(iii) revised 27082
10.5 (b)(1)(i) revised 27083
10.6 (a)(2) intro text and (iii)(B) revised 27083
10.8 (e) intro text revised 27083
10.10 (a)(1)(ii)(B), (b)(1)(ii)(B), (c)(2) and (g) revised 27083
10.11 (b)(2)(ii) revised 27083
10.12 (c), (i)(3), (j)(1), (6)(i), (k)(1) and (3) revised; (j) intro text and (6) intro text added 27083
10.13 (c)(2) revised 27084
10.15 (c)(1) revised 27084
10 Appendices A and B removed 27084

2014

(Regulations published from January 1, 2014, through October 1, 2014)

43 CFR

79 FR Page

Subtitle A
2.254 (b)(14) and (c)(4) added 49014
(a) intro text and (b) intro text revised; (a)(5) and (b)(15) added; eff. 10-2-14 51917
10.2 Reg. at 76 FR 39009 confirmed 33483