

For example, some commenters were concerned that the proposed amendments to § 4.21 could be misinterpreted to change the current effective date provisions for BLM decisions involving mining operations under 43 CFR subpart 3809, BIA decisions appealable under 25 CFR part 2, or other bureau decisions in unanticipated contexts. In addition, some commenters were concerned that proposed § 4.22 did not make as clear as the existing § 4.21(a) that some bureau decisions may be effective immediately, *i.e.*, during the period when an appeal of the decision may be filed, pursuant to another regulation, *e.g.*, 43 CFR 4160.3(f) or 3809.803. Another commenter questioned whether proposed § 4.22 was as clear as existing § 4.21 that, absent another regulation or petition for a stay, a bureau decision would become effective on the day after the expiration of the time an appeal could be filed. Further, some commenters were concerned about the effect of the proposed rule on the many existing regulations that cross reference § 4.21, prior to the Department's updating those regulations with references to the new sections in the proposed rule.

In light of these questions and concerns, we have decided to defer action on the proposed amendments to 43 CFR 4.21 and consider further the questions raised about those proposed amendments. For this reason, we will limit our responses to comments that related to the proposed amendments (1) extending authority to ALJs to decide petitions for a stay of BLM grazing decisions and (2) providing for appeals of ALJ decisions on such petitions.

One comment suggested that proposed § 4.471(a) be amended to allow the filing of a petition for a stay any time one can satisfy the requirements of proposed § 4.471(d), rather than limiting the time to the 30 days allowed for filing an appeal. The commenter observed that the harm from a BLM decision may not become apparent for some time and that, if an appeal was still pending before an ALJ, there would be no reason the ALJ could not consider the appropriateness of a stay if that time came later. If the decision had already been substantially implemented, that could be taken into consideration in determining the relative harm to the parties. The number of stay petitions might be reduced if the regulations did not force an appellant to decide within 30 days whether a decision was going to cause immediate and irreparable harm, the commenter suggested.

We agree that in some cases the effect of a BLM decision might not become apparent until after 30 days, and we do not wish to encourage the filing of petitions for a stay that may not be necessary. However, under existing IBLA decisions, petitions for a stay may be filed after the 30-day period for filing an appeal has expired. In *Robert E. Oriskovich*, 128 IBLA 69, 70 (1993), IBLA noted that, while the failure to timely file a petition for stay results in the decision being appealed becoming effective on the day following the expiration of the appeal period, nothing in the regulations precludes the filing of a subsequent petition for stay that the Board may, in its discretion, entertain. *See also Western Shoshone National Council*, 130 IBLA 69, 72 (1994) ("Nothing in the regulations at 43 CFR part 4 precludes appellant from filing a petition or request for a stay at any time during a proceeding before the Board. \* \* \*") Because an administrative law judge would have general jurisdiction over an appeal from a BLM grazing decision, he or she could entertain a petition for a stay that was filed with the Hearings Division at any time the appeal was still pending. Therefore, it is not necessary to amend the regulation in order to allow the filing of a petition for a stay after the appeal period has expired, as the commenter suggested.

Another comment suggested that proposed § 4.478(a) be amended to allow a person adversely affected by the decision of an ALJ on a petition for a stay to appeal to IBLA even if the person was not a "party to the case" as defined in § 4.410(b). For example, if a person had not objected to a proposed BLM decision that became final because he or she agreed with it, the person would not have a right to appeal the BLM decision under § 4.410 since he or she was not adversely affected by the decision and had not previously participated in the decision-making process. *See* 68 FR 33794, 33803 (June 5, 2003). However, if another party appealed the BLM decision and the ALJ granted a stay, the person could be adversely affected by the stay. In that situation, the commenter argued, the person should be allowed to appeal the stay to IBLA.

The commenter is correct that, if the person was not a "party to the case" as defined in § 4.410(b), he or she would not have a right to appeal the ALJ's stay decision to IBLA. Under that regulation, a "party to the case" is

One who has taken the 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 an application for use of

public lands, by commenting on an environmental document, or by filing a protest to a proposed action.

Other ways a person in the situation described in the comment could have previously participated in the decision-making process might include commenting on the proposed BLM decision or intervening in the case before the ALJ to oppose the stay petition.

We are not persuaded that a requirement of previous participation in the case is unduly burdensome or should be waived in the situation posited by the commenter. As explained in the preamble to the June 5, 2003, final rule amending § 4.410, this is a codification of longstanding IBLA precedent on who has standing to appeal a decision. 68 FR 33794. We have therefore retained the reference to § 4.410 in final § 4.478(a).

A commenter suggested that, if an appellant sought IBLA review of an ALJ decision on a petition for a stay under proposed § 4.478(a) but the Board did not "expeditiously issue a decision on the appeal" as provided in proposed § 4.478(c), then the appellant should be allowed to abandon that appeal and instead go to federal court under proposed § 4.478(b). The commenter expressed concern that the Board might not quickly decide such appeals, despite the statement in proposed § 4.478(c).

The commenter's concern for timely decisions must be balanced against the significant benefits that inure to both the Department and the courts from the requirement that appellants exhaust their administrative remedies before seeking judicial review. Given the commitment that OHA is making in adopting § 4.478(c), we disagree with the commenter that there is a risk of substantial delay in IBLA's review process sufficient to warrant forgoing those benefits. Of course, if the BLM decision is in effect, one may seek judicial review at any time. *See Darby v. Cisneros*, 509 U.S. 137, 153–54, 113 S. Ct. 2539, 2547–48 (1993).

Other commenters thought the proposed rule was arbitrary in providing that a party could seek immediate judicial review of an ALJ order denying a stay but not of an ALJ order granting a stay; the latter would first have to be appealed to IBLA.

We disagree with the commenters that this result is arbitrary. Under both the proposed and final rule, an appeal to IBLA is available in either situation. However, if a stay is denied, the BLM decision is operative, and judicial review is available under the APA as an alternative to an IBLA appeal. *See* 5 U.S.C. 704; *Darby, supra*. The rule