

FREQUENTLY ASKED QUESTIONS

Scope of the IBLA Pilot Program

- ***Will both pending and new cases be eligible for the pilot?***

No. At the present time, the pilot affects only new cases.

- ***Does the IBLA pilot affect cases now before ALJs in the Hearings Division?***

No, although if the decisions in such cases are appealed to IBLA, they would then be eligible for the pilot.

- ***How does the IBLA pilot relate to the Hearings Division's ADR program?***

The OHA Hearings Division has its own ADR program, which is presently under review. Both the Hearings Division and IBLA programs encourage the parties to resolve their differences through negotiation, if possible; and both programs provide that a judge may order the parties' representatives to discuss the prospects for settlement and report back to the judge. Both also provide a means for the parties to participate in assisted negotiation, if they so choose.

Selection of Cases for the IBLA Pilot Program

- ***Will ADR referrals be limited to requests by the parties?***

No. IBLA will welcome requests by any party that a case be referred for ADR, and information about the IBLA pilot will be sent to all parties when an appeal is filed. But IBLA will also actively encourage ADR by suggesting that the parties try to resolve the issues in appropriate cases.

- ***Why might a party ask that a request for ADR remain confidential?***

There are a variety of appropriate reasons why a party may request confidentiality. For example, the party may be concerned that its interest in ADR may be interpreted as a concession that its case is weak. In order to encourage the use of ADR, IBLA will respect a party's request for confidentiality.

- ***How will IBLA assess whether a case should be referred for ADR?***

In most cases, IBLA will independently assess whether a case appears suitable for ADR, without first consulting the parties. Ideally, each party will do its own assessments in considering whether to ask that the case be referred for ADR. If IBLA decides that a case appears suitable for ADR, the OHA Dispute Resolution Specialist will ask the parties whether they want to proceed before the case is placed in the ADR docket. The parties are the ones who decide whether ADR will be utilized to resolve the dispute.

In some cases, if IBLA has insufficient information to assess an appeal's suitability for ADR, the OHA Dispute Resolution Specialist may request that the parties provide the needed information or may refer the case to the advanced case assessment process if appropriate.

- ***Will the ADR data sheet sent to the parties with the docketing letter include detailed lists of cases that are potentially suitable or automatically excluded from the pilot?***

No. The ADR Data Sheet is intended to be a quick overview and notice to parties that IBLA has an ADR program. The four-page Information Sheet contains more detailed information about types of cases suitable and not suitable for ADR, among other things, and will be sent to parties who request more information about the ADR program.

- ***Are cases that had ALJ hearings excluded from the pilot?***

No. There is no reason to exclude these cases. A comparable situation exists in the federal courts of appeals, which have active ADR programs for cases that have been tried in federal district court.

- ***Do Administrative Judges and the OHA Dispute Resolution Specialist have discretion to determine whether cases will be referred for ADR?***

Yes. Administrative Judges and the OHA Dispute Resolution Specialist will have discretion as to whether cases assigned for adjudication will be referred for ADR. Not all cases are suitable for referral. Moreover, unless the parties request ADR, if the judge is in the process of deciding the case, he or she will usually not consider referral appropriate. The parties ultimately decide whether ADR will be utilized.

- ***If ADR is a voluntary process, why does the pilot authorize IBLA to issue an order requesting parties to attempt direct negotiation?***

The voluntary nature of direct negotiation is not affected by the issuance of an order requesting the parties' representatives to discuss settlement and report back to the Administrative Judge. The order does not direct the parties to settle, but rather to confer in an attempt to settle. If the parties are unable or unwilling to resolve the issues through direct negotiation, the case will be returned to the normal decision making process or, if the parties request, referred for another form of ADR.

Initiation of the ADR Process

- ***If IBLA determines that an appeal is suitable for ADR, will the underlying bureau decision be stayed pending completion of the ADR process?***

IBLA will not stay the underlying bureau decision merely because the appeal is referred for ADR. However, if an appellant filed a petition for a stay, IBLA would consider it under the normally applicable criteria. Moreover, as part of their agreement to mediate, the

parties could negotiate what effect the bureau decision will have during the ADR process.

- ***Who will determine what type of ADR is appropriate in a given case?***

Generally, the ADR method will be determined by the parties with the assistance of the third party neutral. The method can change as the process progresses. For example, the parties could start with mediation, switch to joint fact-finding to narrow their area of disagreement, and then resume mediation using what they learned from the joint fact-finding.

- ***What happens if the parties cannot agree on the choice of a neutral?***

IBLA will be available to provide assistance in identifying potential mediators or other neutrals for an ADR process, but the parties will have the final say in the selection of the mediator. If the parties cannot agree on a mediator, then the mediation process cannot be initiated.

- ***Who establishes the roles and responsibilities of the third-party neutral?***

Roles and responsibilities are established by the parties, taking into account applicable ethical rules, regulations, and statutes relating to mediator activities.

- ***Will IBLA fund third-party neutrals to assist the parties with ADR processes?***

IBLA does not have the resources to fund outside neutrals. However, DOI is in the process of developing a roster of well-trained and experienced internal neutrals, who will not charge a fee for their ADR services.

- ***When do the parties discuss budgetary issues relating to ADR costs?***

The parties should address any budgetary issues when determining whether or not to participate in ADR. For example, an agreement to split the costs of an outside neutral could be negotiated as part of an agreement to mediate.

Settlement Negotiations and Agreements

- ***Can a DOI bureau negotiate a settlement agreement even though it no longer has jurisdiction of the subject matter of an appeal?***

Yes. While a bureau cannot take unilateral action with regard to the underlying decision that is on appeal, it can always discuss possible resolution of disputed issues with the affected parties. If an agreement is reached, the appeal will be dismissed at the request of the parties, and the bureau can then take any action consistent with the settlement agreement. This is already common practice in IBLA cases.

- ***How will existing precedent affect an appeal that is being negotiated?***

Since the parties negotiate the resolution of the appeal, it will be up to them to consider existing precedent that is relevant to the issues being negotiated.

- ***Will a negotiated settlement affect existing IBLA or judicial precedent?***

A negotiated settlement agreement has no effect on existing IBLA or judicial precedent, nor does it establish precedent for other cases before IBLA. However, the parties can agree between themselves on the effect that the negotiated settlement will have on future disputes that may arise between them.

- ***Who will draft settlement agreements at the end of an ADR process?***

The parties usually draft the agreement together, with the mediator serving as the scribe; but parties can agree to other procedures as part of the mediation process.

- ***What will be the effect of dismissal of an appeal based on a successful ADR process?***

The settlement agreement will govern the future actions of the parties following dismissal of the appeal.

- ***Can negotiated agreements be enforced?***

Negotiated agreements generally are binding on parties as a contract. The parties can negotiate enforcement provisions as part of the settlement agreement.

- ***How will payment of attorney fees be handled in an ADR process?***

Payment of attorney fees can be negotiated by the parties. Otherwise, relevant statutes (e.g., the Equal Access to Justice Act or the Surface Mining Control and Reclamation Act) would control.

- ***When is an ADR process completed?***

An ADR process is completed when a full or partial agreement is reached or the parties stop negotiations. The appeal is then fully or partially dismissed and/or returned to normal decision making process, as appropriate.

- ***How is ADR confidentiality handled when parties return to the normal administrative appeals process?***

The Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574, governs the confidentiality of communications made during assisted negotiation/mediation. The parties can agree beforehand that factual information generated during an ADR process can be used if the case returns to the normal administrative appeals process. The

parties can agree to hold other information confidential among themselves, but this additional information may not be protected from disclosure pursuant to other statutes such as the Freedom of Information Act.

- ***Will confidentiality lead to the discontinuation of recorded decisions?***

IBLA will not issue a decision where the parties have reached a full settlement, but will simply issue an order dismissing the appeal. Under the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574, a mediated agreement is not confidential.

Case Evaluation Process

- ***What is the purpose of the case evaluation process and how will the information be used?***

Once the ADR process has been completed, whether or not a settlement has been reached, the parties and the neutral will be asked to complete evaluation forms concerning their experience. The information provided is for IBLA's internal use and will not play any part in the normal decision making process, should further proceedings be required in the case. Since this is a pilot ADR program, the information will be used for internal analysis and evaluation of whether changes are needed before a permanent ADR program is adopted by IBLA.