

## **Attachment 1. Timber Sale Procedures: Administrative Remedies and Department Hearings and Appeals Procedures as per 43 CFR Subpart 5003 and 43 CFR Part 4.**

### **Timber Sale Decisions**

*Initial Timber Sale Decisions* - The BLM issues forest management decisions in accordance with the regulations at 43 CFR Subpart 5003. Forest management decisions include a variety of actions, most frequently advertised timber sales. Districts may issue other non-timber sale forest management decisions under 43 CFR Subpart 5003, including silvicultural, habitat restoration or fuels management projects. The direction contained in this IM is specific to timber sales, although it may generally apply to other activities issued under 43 CFR Subpart 5003. When issuing decisions under the Healthy Forest Initiative/Healthy Forest Restoration Act authorities, districts should follow the direction set forth in the corresponding *Interim Field Guide for Implementation* (February 2004) and subsequent BLM policy.

The BLM implements advertised timber sale decisions through the publication of a notice of sale in a newspaper of general circulation (43 CFR § 5003.2(a)). The sale advertisement itself constitutes the notice of decision (43 CFR § 5003.2(b)) and the date of first publication constitutes the implementation date of the project.<sup>1</sup> Newspaper advertisement language for forest management decisions, both timber sale and non-timber sale, is included in Attachment 2.

The Decision Record for any forest management decision, if it is to be published as specified in 43 CFR § 5003.2, must include information regarding the appropriate administrative remedy, including what BLM requires as a permissible format for submitting protests. Protest procedure language for timber sale decisions is included in Attachment 3.

Districts should hold timber sale auctions no sooner than two weeks, but no later than four weeks, following publication of the timber sale advertisement (OR/WA Timber Sale Handbook H-5430-1). For advertised timber sales of more than 500 MBF, the sale advertisement must be published once a week for two weeks. For advertised timber sales less than 500 MBF the sale advertisement may be published only once (43 CFR 5430.0-6).

National Environmental Policy Act (NEPA) documents, such as environmental assessments (EA), that analyze several actions at a large spatial scale (e.g. watershed) and/or temporal scale (e.g. multi-year projects) may generate several individual projects. In such instances, districts should clearly articulate which actions analyzed in the EA are implemented by the Decision Rationale/Finding of No Significant Impact (DR/FONSI), and which will be implemented by subsequent timber sale advertisements. This clear articulation will establish what the decision is and when that decision is protestable.

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<sup>1</sup> As formally established in the *Record of Decision and Standards and Guidelines for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines* (January 2001, pp. 17-18).

It is the policy of OR/WA BLM that districts plan their protest and appeal response work in order to complete the administrative review process in such time as to be able to award a timber sale within 90 days after its purchase. Districts should make every effort to distribute their annual sale plan evenly throughout the fiscal year to spread out the protest/appeal response workload. A standard administrative review timeframe is included in Attachment 4. The timeframes provided throughout this IM correspond with the standardized timeframe such that a sale could be awarded within 90 days. However, multiple factors may impact both the district and OSO ability to adhere to the standard administrative review timeframe (e.g., litigation and workload based on the number and complexity of protest and appeals). If award of a timber sale contract is not feasible within the 90-day bid acceptance period, consult with applicable direction or the District Forestry Lead and OR-931 for guidance on how to proceed, which will address high bidder notification and return of bid deposits.

*Secondary Timber Sale Decisions and the Doctrine of Administrative Finality* – Under certain circumstances, a district may need to issue a second or subsequent decision for a timber sale, for example, a second timber sale advertisement after the sale went no-bid; or after a default and cancellation; or where the BLM did additional NEPA, and made a new project decision for a sale already sold. In such circumstances, the doctrine of administrative finality may apply, whereby those issues which have already been raised and ruled on may not be brought a second time. Language related to administrative finality is included in Attachment 5. In such circumstances, districts should consult with the OSO Forest Management Advisor on a case-by-case basis for specific guidance related to the administrative review, and with OR-933 for specific guidance related to NEPA.

### **Administrative Review – Protest Process**

*Protest Period* - The first publication of a timber sale advertisement initiates a 15-day protest period. During this time, members of the public may file a protest with the authorized officer (i.e., the decision maker) that contains a written statement of reasons for protesting the project decision (43 CFR § 5003.3(a)(b)). The 15-day protest period begins (i.e., day one) the first full day after the first publication of the sale advertisement or notice of decision in the local newspaper of general circulation and ends close-of-business on the 15<sup>th</sup> day. If the 15<sup>th</sup> day is a Saturday, Sunday, or Federal holiday, then the protest period closes on the next business day (43 CFR § 4.803). This standard applies to all timeframes<sup>2</sup> throughout the regulations.

*Receiving a Protest* – As directed in WO-IM-2008-149 *Proper Format for the Submission of Forest Management Decision Protests*, the BLM interpretation of 43 CFR § 5003.3(b) that a protest “...shall contain a written statement of reasons...” means that BLM will accept only a hardcopy with original signature(s)<sup>3</sup> of the protesting party or parties. BLM will not accept

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<sup>2</sup> Timeframes given in regulations are based on calendar days as opposed to working days.

<sup>3</sup> Although BLM interprets the regulations as requiring an original signature on a protest, this requirement is not specifically stated in 43 CFR 5003. Respond to an unsigned protest as any other, making note that the protest lacked a signature. The requirement for signature generates from 43 CFR § 4.401(c)(2) and § 4.411(a). The IBLA may consider and rule on the issue of holographic signature in the context of a properly filed appeal.

electronic mail or facsimile protests. BLM regards any materials submitted through electronic means (email) or facsimile (fax) as comments on the decision, but not as a formal protest of the project decision. Original signed protests must be hand delivered or received at the district office by the close of business of the 15<sup>th</sup> day of the protest period to be accepted.<sup>4</sup> When districts receive a protest on a timber sale decision, they will forward immediately either a hardcopy or scan of the protest to the OSO Forest Management Advisor (OR-931). Forwarding protests to the OSO allows the OSO Forest Management Advisor to track protest activity and developing or recurring issues across all districts.

For advertised timber sales, the district must disclose receipt of a protest to prospective bidders at the auction prior to the start of oral bidding. The high bidder must then sign a form acknowledging notice of the protest immediately following the auction. Language for the protest acknowledgement is included in Attachment 6.

*Drafting the Protest Decision* - Upon timely filing of a protest, the authorized officer shall reconsider the project decision in light of the statement of reasons and other pertinent information available to him/her (43 CFR § 5003.3(d)). The authorized officer shall, at the conclusion of the review, prepare a protest decision and serve<sup>5</sup> it in writing on the protester(s) (43 CFR § 5003.3(e)).

The protest decision is the last opportunity the district has to clarify or explain its position on a given issue. Additional clarification beyond the scope of the issues addressed in the protest decision should not be necessary during the appeal process. Therefore, the district should draft a thorough and defensible protest decision that summarizes and references supporting rationale found in the NEPA document, including properly referenced or tiered supporting documents, and DR/FONSI.

The regulations do not establish a timeframe for rendering the decision to grant or deny the protest. Districts should begin drafting their protest decisions immediately upon receipt of the protest. OR/WA BLM policy directs that protest decisions be resolved in a timely fashion so as to be able to award a timber sale within 90 days after receipt of the high bid.

All timber sale protest decisions, except those granting a protest, must include information regarding appeal procedures. Language for appeal procedures is included in Attachment 7,

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<sup>4</sup> 43 CFR § 5003.3(c) specifically states, "Protests received more than 15 days after the publication of the notice of decision or the notice of sale are not timely filed and shall not be considered."

<sup>5</sup> Regulations at 43 CFR § 4.401(c) state that service can be made by personal delivery or registered or certified mail, return receipt requested. Retain documentation as part of the project record as to when documents were sent and received by the BLM, as well as protester/appellant parties. The IBLA will review and rule on any dispute regarding timeliness of filing an appeal. For this purpose, the IBLA specifically requests that the BLM provide them with the original notice of appeal, including the original date stamped envelope as part of the case file. Maintain copies in the project file.

which refers to required BLM Form 1842-1 Information on Taking Appeals to the Board of Land Appeals.<sup>6</sup>

*Review of the Protest Decision* – Each field office shall designate the staff member responsible for drafting the protest decision and coordinating review within the district. The designated staff member will submit draft protest decisions to the OSO Forest Management Advisor for consideration within five days after the sale date. The draft protest response should contain sufficient detail to adequately address each protest issue(s). The role of the OSO Forest Management Advisor is to review these responses and to coordinate development of responses to common issues drawing on the expertise of the Solicitor’s Office and personnel in the OSO. The Advisor’s role is neither to be the author crafting the initial response draft nor to be the technical writer/editor. The OSO Forest Management Advisor may request an electronic copy of the project EA and DR/FONSI to use as a reference during review of the protest decision. The OSO Forest Management Advisor already has a copy of the protest.

The district should bring new issues or new approaches to recurring issues to the attention of the OSO Forest Management Advisor. The depth of review at the OSO level will depend on the potential of new issues/approaches to establish precedence, thoroughness of the protest decision, and other workload considerations.

The OSO Forest Management Advisor will coordinate with the Office of the Regional Solicitor to ensure protest decisions receive the proper review in light of current litigation trends. The OSO Forest Management Advisor will return the draft protest decision with comments to the district for finalization within ten days after the sale date. The OSO Forest Management Advisor will address protest review on a priority basis in coordination with the districts.

Within five days of receiving the OSO comments (15 days after the sale date), the district will transmit the final protest decision to: the protester(s), with proof of service, and send copies to the high bidder, the Association of Oregon & California (O&C) Counties<sup>7</sup>, the Office of the Regional Solicitor, and the OSO Forest Management Advisor.

*Granting a Protest* - If the protest raises issues that the district cannot address in a defensible manner (i.e., the protest has merit), then the authorized officer should grant the protest, in whole or in part, in order to take corrective action. Action may include revising the project itself, the NEPA documentation, and/or the project decision authorizing the action. Depending upon the nature and extent of the revisions, the district may need to publish a revised EA and/or DR/FONSI. Contact the OSO Forest Management Advisor immediately to help evaluate how best to proceed based on project-specific circumstances.

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<sup>6</sup> Form 1842-1 Information on Taking Appeals to the Board of Land Appeals was last issued in September 2006 and can be found at <http://web.blm.gov/blmforms/>.

<sup>7</sup> Copy is provided to the high bidder and Association of O&C Counties as adversely impacted parties to provide them with status information, as well as the opportunity to file a motion with the IBLA to be party to the case as intervenors.

*Denying a Protest* - If all issues raised in the protest can be addressed in a defensible manner (i.e. the protest does not have merit), then the authorized officer should deny the protest. The protest decision must inform the protester(s) of the rationale for denying each protest point they raise and of their rights to appeal.

*Full Force and Effect* – Upon denial of a protest, the authorized officer may proceed with implementation of the project decision (43 CFR § 5003.3(f)), typically referred to as “full force and effect”. However, OR/WA BLM policy directs that districts do not implement timber sale decisions until the Interior Board of Land Appeals (IBLA) has an opportunity to review any stay request and BLM’s response. Under 43 CFR § 4.21 (b)(4), the IBLA shall grant or deny a request for stay within 45 calendar days of the expiration of the time for filing a notice of appeal. For advertised timber sales where the protest decision is appealed, plan to award the contract 45 days after the time for filing a notice of appeal has closed.

Districts may request in writing that the State Director waive the OR/WA BLM policy in circumstances where the District must begin the project as early as conditions allow to meet time critical resource objectives. The requesting memorandum should contain sufficient description of the circumstances of the project and the rationale for a full force and effect decision. The OSO will consider the request and make recommendation to the State Director based on information the district provides about the project description, public involvement, primary protest issues, and supporting rationale for why immediate implementation is essential. Delays caused by internal resolution processes or inefficiencies will not support a full force and effect waiver request.

The State Director may respond by a memorandum to the District Manager waiving the internal policy and giving full force and effect for the project immediately upon denial of a protest, as authorized by 43 CFR § 5003.3 (f). Any decision denying a protest to which the district applies such waiver shall state the decision maker’s intention to give full force and effect and proceed with immediate award of the contract. Language for full force and effect in protest decisions is included in Attachment 8. Districts may not proceed with project implementation prior to receipt of the State Director waiver. For this reason, early communication with the OSO regarding intended use of full force and effect is encouraged. Such communication would be most helpful prior to the District’s preparation of a formal request for a full force and effect waiver.

Full force and effect policy for other BLM programs may vary according to other specific regulation and policy.

### **Administrative Review – Appeal Process**

*Appeal Period* – Any protester seeking appeal must file a notice of appeal within 30 days<sup>8</sup> (43 CFR § 4.411(a)) after the protest decision was served to them. If the appellant chooses to file a stay request, it must accompany their notice of appeal and provide justification based on standards as outlined in the regulations (43 CFR § 4.21(b)(1)) (see Attachment 7). The district is

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<sup>8</sup> Regulations at 43 CFR § 4.401 (a) identify a 10 grace period to allow for mail delivery of documents. Retain original postmarked envelopes in the project record as proof of the date of filing an appeal.

required to transmit its response to any request for stay to the IBLA within 10 days from the receipt of the stay request (43 CFR 4.21 (b)(3)).

The notice of appeal may include, but is not required to include, a statement of reasons (43 CFR § 4.411(b)). If the notice of appeal did not include a statement of reasons for the appeal, the appellant must file a statement of reasons within 30 days after filing the notice of appeal (43 CFR § 4.412(a)). The appellant may file additional statements of reasons, written arguments, or briefs within 30 days after the notice of appeal was filed (43 CFR § 4.412(a)).

No extension of time will be granted for filing the notice of appeal (43 CFR § 4.411(c)). If no notice of appeal is filed against the protest decision, then the authorized officer should award the timber sale as soon as possible.

If a district receives an appeal of its protest decision, the district should forward a copy of the appeal to the OSO Forest Management Advisor (hardcopy or scanned).

*Transmittal Notice to the IBLA* – Districts should transmit the original notice of appeal, including the original date stamped envelope that contained the notice of appeal, to the IBLA. The transmittal should include a paragraph regarding sale status and BLM’s intent regarding implementation. This could include when the sale will be awarded if the IBLA denies or does not rule on the stay request, or, in the alternative, if the District has already initiated full force and effect authority and awarded the contract, when operations are expected to begin. Language for award of the contract is included in Attachment 9. Districts should transmit the notice of appeal with the project case file and the response to any request for stay (described below) together within 10 days from receipt of the notice of appeal. A district may also choose to transmit the notice of appeal immediately upon receipt, in a separate communication to the IBLA, with the project case file and response to any request for stay to follow within the 10 day response timeframe.

*Case File* – Upon receipt of a notice of appeal, the district should begin compiling a complete and indexed case file from the administrative record maintained on district, for submission to the IBLA. Present individual documents in reverse chronological order. Documents should be numbered sequentially beginning “Exhibit 001”. A sample case file index is included as Attachment 10. The IBLA requests single sided copies for non-bound documents.

In addition to the hard copies provided, the IBLA requires that the BLM submit electronic copies of the project NEPA documents, DR/FONSI, ESA consultation documents, and the protest and protest decision on CD-ROM (Adobe PDF format).<sup>9</sup> CD-ROM format allows the IBLA to

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<sup>9</sup> At the IBLA’s request, the OSO previously submitted hard copy and electronic form of the Westside districts’ 1994 Resource Management Plans (RMP) and accompanying NEPA, as well as the corresponding 1995 Records of Decision (ROD). It is not necessary for the districts to include the RMP/ROD documents in the case file of each implementing project that is appealed. Districts should consider if there are any recent RMP evaluations or amendments to be included in the case file.

efficiently search for and copy text that may be relevant to the supporting discussion in their subsequent rulings.

Submit a letter, signed by the authorized officer, with the CD-ROM attesting to the accuracy of the contents of the CD-ROM, specifically that the electronic versions provided are the final versions. Language for the attestation letter is included in Attachment 11.

After the appeal is resolved, the IBLA will send the original case file to the OSO, who will, in turn, forward the case file to the district for retention.

*Response to Appellant's Request for Stay* – In the event the protest decision is appealed, and a stay is requested, the BLM response to the stay request must be transmitted to the IBLA within 10 days from the receipt of the stay request (43 CFR § 4.21(b)(3)). Each field office shall designate the staff member responsible for drafting the response to a request for stay and for coordinating review at the district level and with the OSO Forest Management Advisor.

The district must also send a copy of the BLM response to the request for stay to the appellant(s), with proof of service; the high bidder; the Association of Oregon & California (O&C) Counties; the Office of the Regional Solicitor; and the OSO Forest Management Advisor.

If no stay is requested, the authorized officer should immediately verify that no other issues indicate award should be delayed, consult with OR-931 if necessary, and award the timber sale.

*Response to Appellant's Statement of Reasons* – Draft responses to the statement of reasons will be handled in a similar manner to draft protest decisions. The BLM response to the statement of reasons must outline the reasons why the IBLA should affirm the protest decision (43 CFR § 4.414). Where issues are repeated in the appeal, the Solicitor recommends summarizing the rationale from the district's protest decision in the response to the statement of reasons. Appellants should not, in theory, be allowed to raise issues they haven't raised in protest. However, BLM has noted that the IBLA is more likely to rule that the appellant has not timely raised the issue if the BLM has also demonstrated that there is no merit in the appeal. BLM therefore recommends that districts add responses to any new issues surfaced by the appeal, noting the issue as new. The designated staff at the district is responsible for drafting the response to the statement of reasons and coordinating review at the district and with the OSO Forest Management Advisor. The OSO Forest Management Advisor will review responses to any new issues on the merits, as well as any response regarding procedural issues.<sup>10</sup>

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<sup>10</sup> Procedural issues are those that pertain to following process, specifically as outlined in pertinent regulation(s). Procedural issues for a protest and/or appeal may include details related to 1) how the document is presented (i.e. timeliness, holographic signature), 2) if opposing parties participated in decision making (i.e. raising issues throughout the process via EA comments or a protest), and 3) actual content of the protest/appeal document (i.e. demonstrating standing to bring appeal or showing error in BLM's project or protest decisions). Bringing an issue forward for the first time in an appeal is an example of a procedural issue.

Circumstances may exist (e.g., untimely appeal), such that the BLM may choose to file a motion to dismiss that raises relevant jurisdiction issues, instead of filing its response to the statement of reasons.

In all cases, the response to the statement of reasons should state the authorized officer's intention to proceed with the award of the sale on a specified date. For advertised timber sales, plan to award the contract 45 days after the time for filing a notice of appeal has closed to allow the IBLA opportunity to rule on any pending stay request unless utilizing full force and effect authority.

The BLM must transmit its response to the statement of reasons to the IBLA within 30 days from receipt of the statement of reasons. However, districts may choose to file their response to the statement of reasons when they file their response to the stay request. If the response to the statement of reasons is not filed and served within 30 days, then the IBLA may decide the appeal on the record without benefit of the BLM's response (43 CFR § 4.414).

A copy of the response to the statement of reasons must be sent to the appellant(s) with proof of service, the high bidder, the Association of Oregon & California (O&C) Counties, the Office of the Regional Solicitor and the OSO Forest Management Advisor.

If, during the appeal process, the authorized officer determines that a change in the protest decision is desirable, contact the OSO Forest Management Advisor immediately.

*Status Updates to the IBLA* – This section pertains to timber sales that have been appealed, and after 45 days have passed IBLA has not ruled on the appeal. As pertinent activities occur or are completed on a project, notify the IBLA through a status update letter. Such activities may include sale award, completion of harvest operations, or project termination. In some circumstances, such activities may trigger BLM to make a motion to dismiss the pending appeal to the IBLA as moot.

Notify the IBLA regarding ongoing litigation pertaining to specific projects under appeal. Include information on how litigation may or may not impact the project under current review in a status update letter, attaching any relevant court orders. In some circumstances, litigation may trigger BLM to make a motion to the IBLA regarding action on the pending appeal.

Districts should consult with the OSO Forest Management Advisor on a case-by-case basis for specific guidance when preparing follow up communication with the IBLA, particularly when the status may be affected by litigation.

In any communication with the IBLA, include copy to the appellant parties, the high bidder, the Association of O&C Counties, the OSO Forest Management Advisor, and the Office of the Regional Solicitor.

*IBLA Rulings* – In cases appealing a BLM protest decision, the IBLA generally makes two rulings. First, they will either grant or deny any request for stay made by the appellant to stop project implementation in the short term. Applicable regulations direct IBLA to rule on a stay request within 45 calendar days of the expiration of the time for filing a notice of appeal (43 CFR § 4.21(b)(4)). Upon receipt of an IBLA ruling on a stay request, or in the absence of a ruling within the 45 day timeframe, contact the OSO Forest Management Advisor to discuss potential circumstances and appropriate next steps. General scenarios are included in Attachment 13.

Second, the IBLA will rule on the merits of the issues brought on appeal as stated in the appellant’s statement of reasons and any subsequent BLM response. In ruling on the merits, the IBLA will either affirm the protest decision in favor of the BLM, or reverse the protest decision in favor of the appellant. With affirmation of the BLM’s protest decision, the district may continue project implementation to completion. In reversing the BLM’s protest decision, the IBLA may remand the project back to the BLM for reconsideration or further specified action. Once a project is remanded, it returns to the district’s jurisdiction for future reconsideration and potential subsequent action.

The IBLA may also rule on procedural issues raised by the BLM in a motion to dismiss or make minor decisions on motions brought by the involved parties. The IBLA may request information from the parties, usually in the form of an order to show cause.

Contact the OSO Forest Management Advisor with information regarding rulings issued as the OSO does not directly receive communications initiated by the IBLA.

The procedures described in the preceding pages for the timber sale decisions, protests, and appeals are depicted schematically in Attachments 12 and 13.

### **Litigation**

Ongoing and/or new litigation, court orders, and rulings from the District Courts or the Ninth Circuit Court of Appeals have the potential to alter the defensibility of protest decisions and responses to statements of reasons. The guidance and timeframes, as stated in this IM, are subject to modification for individual projects depending on how current litigation trends interact with the specific circumstances of the project.

Forestry Leads and Planning & Environmental Coordinators should, in coordination with the OSO, strive to stay current with developing litigation and how that litigation may influence projects for which that they are responsible.

### **Roles & Responsibilities**

BLM accomplishes work through internal communication and collaboration. Collaboration includes interaction between staff in field offices and district offices, neighboring districts, and

the districts and the OSO. The expectations and roles of key staff who are generally involved with administrative remedy for timber sale decisions are outlined below:

- District Office

Each district should agree internally upon what approach it expects the field offices to follow and clearly articulate that expectation within the district office and with the OSO.

- *District Staff Member* – As delegated, a district staff member will prepare the DR/FONSI for the deciding official's review and authorization, forward all protests to the OSO Forest Management Advisor, and ensure that protest and appeal responses are consistent.

In order to provide greater consistency and efficiency throughout the administrative review process, the OSO strongly recommends that the preparer of the DR also be given the responsibility for preparing the protest decision, response to the stay request, and response to the statement of reasons for any appeals that may follow.

- *Forestry Lead or Designated District Staff*– The Forestry Lead, or other designated district staff (i.e., Planning & Environmental Coordinator) is responsible to ensure that consistent responses on protests and appeals are issued from field offices within the district.

- OSO

- *Forest Management Advisor* – The OSO Forest Management Advisor is responsible for ensuring that responses on protests and appeals issued from districts are consistent within OR/WA BLM. The OSO Forest Management Advisor consults the Solicitors in creating protest response language responsive to emerging litigation circumstances and disseminating that information to the districts.

In a coordinated manner through the designated district staff member and the Forestry Lead, districts should raise issues and questions regarding the administrative review process or the interpretation of federal laws and regulations as they pertain to forestry management decisions to the OSO Forest Management Advisor. If the OSO Forest Management Advisor is unable to resolve the question raised directly, he/she has regular contact with the Solicitors and can arrange with district staff for the appropriate level of interaction to bring closure to the issue.

- Office of the Regional Solicitor

- *Solicitors* – Solicitors facilitate forest management by providing information on new developments from court cases and rulings that may have applicability for OR/WA forest management decisions.
- The Solicitor may offer informal or formal opinions regarding resolution of protests, appeals, and litigation. In seeking Solicitor input, district staff will coordinate sequentially with the appropriate program or designated lead in the district and OSO. If districts anticipate a project will be controversial or litigated, the district should begin communicating with the OSO early in the decision making process to determine the level of Solicitor involvement and make agreements regarding communication and coordination. Refer to OR/WA IM-2008-078 *Communication and Coordination between Districts, the State Office, and the Office of the Regional Solicitor* for additional detail.