

**MANAGING ALTERNATIVE DISPUTE RESOLUTION  
IN THE BUREAU OF LAND MANAGEMENT:**

**CASES BEFORE THE  
INTERIOR BOARD OF LAND APPEALS**

Office of the Assistant Director, Renewable Resources and Planning  
Collaborative Stakeholder Engagement and Appropriate Dispute Resolution Program  
Washington Office



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## EXECUTIVE SUMMARY

### What is the purpose of this document?

This document establishes specific procedures and clarifies issues related to Bureau of Land Management (BLM or Bureau) use of collaborative stakeholder engagement and alternative dispute resolution (ADR) processes in cases on appeal before the Interior Board of Land Appeals (IBLA or the Board). In the Bureau, collaborative stakeholder engagement and ADR processes include both assisted and unassisted negotiations between parties, as well as mediations and other conflict prevention and conflict management processes. This guidance addresses three different circumstances: (1) where the Bureau wishes to initiate collaborative stakeholder engagement or ADR processes with an appellant to resolve issues in an appeal, (2) where an appellant wishes to initiate these processes, and (3) where the Board orders the Bureau to enter into ADR with an appellant.

### Who needs to know the guidance procedures, and why?

BLM managers and staff who deal with appeals before the IBLA or who work with solicitors on the appeals should be familiar with this guidance. In addition, managers and staff who provide strategic direction to the field regarding matters that can be appealed to the IBLA should become familiar with this guidance, to ensure consistent direction and support from State Offices and the Washington Office to the Field.

### Highlights of the guidance

Bureau policy strongly encourages the use of collaborative stakeholder engagement and ADR, except under unusual conditions such as when constrained by law, regulation, or other mandates or when it is important to obtain an IBLA decision to establish new, or reaffirm existing, precedent. In appeals before the IBLA, the BLM may communicate with appellants and attempt to resolve appeals through direct negotiations or other processes. Such contacts are **not** *ex parte* contacts (see 1.8, “Bureau communication with appellants”). The BLM also can reach agreements with an appellant to resolve an appeal. After an agreement is reached and the IBLA has dismissed or otherwise disposed of the appeal, the BLM can implement the agreement. These BLM actions should be done in coordination with the responsible solicitor’s office.

To promote the use of ADR in the IBLA, the Board established an ADR Case Referral Program, designed to educate parties about ADR, and refer selected cases to ADR. Under this program, the IBLA has sent an “ADR Referral Data Sheet” with most docketing notices. This notice has informed parties that ADR can be used in appeals but has not required the parties to use ADR. The IBLA has selected a limited number of appeals in which it has issued ADR case referral orders, which require the BLM or responsible solicitor to, at a minimum, contact the appellant and discuss the possibility of settling the case. Appellants or the Bureau also may request ADR. The IBLA does not require that the parties settle. If an appeal settles, then the IBLA can dismiss the appeal so that the BLM can implement the settlement agreement. If the case does not settle, then the IBLA will decide the appeal through standard adjudicative procedures.

When the BLM receives an ADR case referral order or an ADR request from an appellant, the authorized officer (AO), in coordination with the responsible solicitor, should first determine whether there are unusual conditions, or constraints imposed by law, regulation or other mandate, that do not allow for ADR. This determination assists as the BLM contacts the appellant, as required under the IBLA order or appellant request. If conditions do not allow for ADR, then the BLM can discuss this conclusion with the appellant and can notify the IBLA that ADR will not be pursued further. Otherwise, the BLM and appellant proceed with ADR.

**In all cases where an attorney representing an appellant contacts a Bureau employee in connection with an appeal of a BLM administrative decision to the IBLA, such employee shall state (at the beginning of any conversation with appellant’s counsel) that they will consult**

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**with the Department's Office of the Solicitor and that (whoever may be) the responsible solicitor will discuss the case with the attorney. Similarly, requests received from appellants for ADR shall be coordinated with the Solicitor's Office before commitments are made. Further, upon receipt of an order from the IBLA to enter into an ADR process with the appellant, the Bureau must consult with the Solicitor's Office about the Bureau's options and response. Thus, while the Bureau strongly supports the use of ADR in most cases, the Solicitor's Office shall be involved in a decision to agree to, or reject, any request for ADR.**

In addition, this guidance also addresses such topics as the use of third-party neutrals, settlement agreements, records and summaries, Natural Resources ADR Advisor roles, and more.

**Background**

In December of 2004, the IBLA published a *Federal Register* Notice establishing the IBLA ADR Case Referral Pilot (69 FR 25804). As BLM offices began receiving ADR Case Referral Orders, many field offices had questions regarding these orders. Also, experience with ADR and with collaborative stakeholder engagement varied among BLM offices. This guidance was prepared to clarify certain points pertaining to collaborative stakeholder engagement and ADR processes and to increase the capacity of managers and staff to more effectively utilize these processes in appeals before the IBLA. The IBLA continues to evolve its ADR program. The online *Frequently Asked Questions* (FAQs) on the BLM's Collaborative Stakeholder Engagement and ADR Program's (ADR Program) website ([www.blm.gov/adr](http://www.blm.gov/adr)) will provide up-to-date guidance as these changes occur.

## PART I

### PROCEDURES FOR MANAGING ADR IN IBLA APPEALS

The following procedures and guidelines establish the minimum standards related to collaborative stakeholder engagement and alternative dispute resolution (ADR) to which BLM offices must adhere in appeals before the Interior Board of Land Appeals (IBLA). The BLM States may develop additional procedures that do not conflict with this guidance. Procedures for records and reporting (Section 8 below) should be uniformly implemented throughout the BLM within a State.

This guidance is not intended to provide skills and techniques training, which can be found in other publications, guidance, and training sponsored by the Collaborative Stakeholder Engagement and ADR Program (ADR Program) in the Washington Office (WO).

**The Online FAQs:** The IBLA continues to evolve its ADR program, seeking the best methods for implementing ADR for cases on appeal before the IBLA. To ensure that the BLM has up-to-date information and guidance on the IBLA ADR Program, the BLM's ADR Program maintains a set of online *Frequently Asked Questions* (FAQs) that provide additional information on ADR associated with IBLA appeals, and reflect any changes in the IBLA ADR Program as they occur.

The online FAQs, as well as other resources for ADR in the IBLA, are available on the ADR Program's website at [www.blm.gov/adr](http://www.blm.gov/adr).

**PART I: PROCEDURES FOR MANAGING ADR IN IBLA APPEALS****1. DEFINITIONS AND CLARIFICATIONS****1.1. Authorized officer (AO):**

1.1.1. As used in this document, the AO is the BLM official, or the official's designee, delegated the authority to:

1.1.1.1. Decide whether an appealed case is appropriate for collaborative stakeholder engagement or ADR and, if so, determine the processes and strategies appropriate for the case;

1.1.1.2. Enter into agreements with appellants that fully or partially resolve an appeal;

1.1.1.3. Decide when a process is no longer viable for a particular appealed case, decide if another process should be pursued, and decide if the BLM should request that an appealed case be decided through the IBLA's regular adjudicative process.

1.1.2. When the BLM is represented in an appeal by an attorney from a Field, Regional, or Headquarters Solicitor's Office, the functions outlined in Paragraph 1.1.1 above should be carried out in coordination with that attorney, as appropriate.

1.1.3. Except for the functions listed in paragraph 1.1.1 above, and as otherwise noted, activities and functions of the AO may be carried out by the responsible solicitor, where appropriate and approved by the AO.

1.2. **Responsible solicitor:** As used in this document, responsible solicitor refers to the attorney from a Field, Regional, or Headquarters Solicitor's Office who represents the BLM before the IBLA in a given appeal. Except as otherwise arranged by the responsible solicitor and the AO, BLM's communications with an appellant's attorney should be made by, or in the presence of, the responsible solicitor.

1.3. **Collaborative stakeholder engagement:** As used in this document, the term collaborative stakeholder engagement includes processes generally used to mitigate impacts or resolve issues involved in an appeal. The processes associated with collaborative stakeholder engagement are typically less formal than those involved with ADR. In cases on appeal before the IBLA, these processes include contact with an appellant as early as possible, using communication media such as telephone, e-mail, internet, face-to-face meetings, or other forms of outreach.

**1.4. Alternative Dispute Resolution (ADR):**

1.4.1. As used in this document, the term ADR refers to more traditional conflict management and dispute resolution processes, such as mediation, negotiation, and facilitation. These processes often use the assistance of a third-party neutral. In the IBLA, the term ADR includes unassisted negotiation. Direct, unassisted negotiation is the primary ADR process ordered by the IBLA.

1.4.2. The BLM's ADR Program uses the acronym "ADR" to stand for "Appropriate" Dispute Resolution. The substitution of "appropriate" in more recent scholarly literature addresses various differences in connotation and, in the BLM, reflects Bureau involvement in a broader

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spectrum of conflict resolution processes than is included in the traditional understanding of “alternative dispute resolution.” However, the processes discussed in this document do fall within the concept of “alternative dispute resolution,” and this is also reflected in the literature of the IBLA. As such, ADR in this document is used to mean Alternative Dispute Resolution, as defined above.

- 1.5. **IBLA ADR Referral Data Sheet:** As used in this document, the IBLA ADR Referral Data Sheet is a single page informational insert that the IBLA sends with docketing notices. The insert explains that the IBLA encourages the use of ADR to resolve appeals in some cases, and that the IBLA independently refers some cases to ADR based on a screening process. It also provides a point of contact for parties who wish to learn more about using an ADR process in an appeal. A copy of this data sheet is available on the ADR Program website ([www.blm.gov/adr](http://www.blm.gov/adr)).
- 1.6. **IBLA ADR case referral order:** As used in this document, IBLA ADR case referral order refers to any order from the IBLA requiring the BLM to contact the appellant and discuss the possibility of resolving the appeal through ADR. These referrals order the parties to attempt direct, unassisted negotiations, and encourage the use of other processes if negotiations cannot resolve the issues on appeal. While IBLA case referral orders may require that parties communicate with each other, they do *not* require that the parties settle or reach agreement.
- 1.7. **Appellant Request for ADR:** As used in this document, an appellant request for ADR includes anytime an appellant to an appeal asks the BLM to engage in an ADR process, such as direct negotiations or assisted negotiations, or asks the IBLA to refer the case to ADR. The appellant may make the request by directly contacting the responsible BLM office, by contacting another relevant BLM office or the Washington Office (WO) ADR Program, or by contacting the Interior Department’s Office of Collaborative Action and Dispute Resolution (CADR). The appellant also may file a formal request with the IBLA that the case be referred to ADR or that proceedings be stayed pending the outcome of ADR.
- 1.8. **Bureau communication with appellants:** Some Field staff and AOs have been reluctant to contact or discuss informal resolution with appellants in IBLA cases based on a concern about making improper “*ex parte* communications;” such concerns are unwarranted. Statutes and regulations prohibiting *ex parte* communications are meant to prevent undue influence and preclude any party from discussing the appeal with the Administrative Judge while not on the public record or in the presence of the other parties. These rules do not prevent the parties from contacting or seeking negotiated agreements with one another, whether or not the parties have been ordered to attempt ADR.

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**2. WHAT TO DO AFTER RECEIVING A DOCKETING NOTICE FROM THE IBLA**

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- 2.1. **IBLA ADR Referral Data Sheet:** The IBLA includes an “ADR Referral Data Sheet” with each docketing notice it sends.<sup>1</sup> This sheet is not an IBLA ADR case

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<sup>1</sup> As an exception, the IBLA generally does not send out ADR Referral Data sheets in IBLA appeals involving mining claim maintenance fees or mining claim recordation. These two areas have been deemed unsuitable for ADR based on statutory limitations.

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referral order, and does not require the parties to enter into ADR. It merely informs them that ADR is a possible means for resolving IBLA appeals. Further information on docketing notices may be found in paragraph 1.5 above, and online at [www.blm.gov/adr](http://www.blm.gov/adr).

- 2.2. **Consider ADR:** The BLM’s policy is to seek to use collaborative stakeholder engagement and ADR except under unusual conditions such as when constrained by law, regulation, or other mandates or when it is important to obtain an IBLA decision to establish new, or reaffirm existing, precedent. The AO is encouraged upon receiving a docketing notice with an ADR Referral Data Sheet, and throughout the life of the appeal, to proactively consider utilizing collaborative stakeholder engagement and ADR processes in the appeal. The AO may wish to refer to Part II, “BLM’s ADR Suitability Worksheet for IBLA Appeals,” for guidance in considering whether unusual conditions would not allow for ADR in a particular appeal. As appropriate, the AO should coordinate with the responsible solicitor in making this decision. The AO, in coordination with the responsible solicitor, also may want to contact the appellant to discuss whether to engage in ADR in the appeal and what process might be appropriate.
- 2.3. **Proceed with ADR if appropriate:** If the AO decides to utilize some form of discussion, direct negotiation, or other process with the appellant, the AO, in coordination with the responsible solicitor as appropriate, should contact the appellant and proceed with ADR (see Section 5 “Proceeding with ADR,” below). Approval or referral from the IBLA is not needed for the Bureau to engage in collaborative stakeholder engagement or ADR processes with an appellant.<sup>2</sup>
- 2.4. **Requesting that the IBLA refer the case to ADR:** The AO may file a formal request with the IBLA that the case be referred to ADR.<sup>3</sup> Confidential and informal requests from either the appellant or the BLM also have been allowed; please contact the BLM’s Bureau Dispute Resolution Manager in the WO ADR Program for further information on how to make a confidential request. IBLA referrals do not require the parties to settle.
- 2.5. **When ADR will not be utilized at this stage of the appeal:** If the AO decides not to use ADR at this stage of the appeal, then no other action is required except those actions normally required under standard IBLA procedures (e.g., sending the case file to the IBLA, responding to the appellant’s statement of reasons, etc.). As a general rule, the AO does not need to notify the IBLA of a determination that the appeal is unsuitable at this time for ADR (see Question 30 of the online FAQs, available on the “ADR in the IBLA” section of the BLM ADR Program’s website ([www.blm.gov/adr](http://www.blm.gov/adr))).

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<sup>2</sup> For more information on the BLM’s authority to use ADR in an IBLA appeal, see Section 2 of the online FAQs, available on the “ADR in the IBLA” section of the ADR Program’s website ([www.blm.gov/adr](http://www.blm.gov/adr)).

<sup>3</sup> For a discussion of why the BLM may want to request an IBLA ADR case referral order, see Questions 28 and 29 of the online FAQs, available on the “ADR in the IBLA” section of the BLM ADR Program website ([www.blm.gov/adr](http://www.blm.gov/adr)).

**PART I: PROCEDURES FOR MANAGING ADR IN IBLA APPEALS****3. WHAT TO DO AFTER RECEIVING AN IBLA ADR CASE REFERRAL ORDER**

In some appeals, the IBLA sends out an *ADR case referral order*. This order directs “BLM or its counsel to contact appellant and arrange a meeting between necessary BLM personnel and appellant to attempt to settle [the] matter through direct negotiations.” Occasionally the IBLA may refer the parties to another ADR process other than direct negotiations.<sup>4</sup>

See Section 4, below, for procedures in appeals where an appellant requests ADR.

When the BLM receives an IBLA ADR case referral order, the AO shall take the following actions within the timeframe established in the order for submitting the first status report. This timeframe has been 90 days from the date of the IBLA order.

**3.1. Notify State Natural Resources ADR Advisor:** As soon as feasible after receiving an IBLA ADR case referral order, the AO, using appropriate channels as determined by the State Office, shall ensure that the State Natural Resources ADR Advisor (designated by each BLM State and appropriate Center) is notified of the appeal and of the ADR case referral order.

3.1.1. The notification should include the appeal’s IBLA docket number.

3.1.2. If an AO is uncertain who their Natural Resources ADR Advisor is, the AO may contact the ADR Program staff at [adr@blm.gov](mailto:adr@blm.gov).

**3.2. Determine whether unusual conditions do not allow for ADR:** After appropriately notifying the State Natural Resources ADR Advisor of the ADR case referral order, the AO, in coordination with the responsible solicitor, shall determine whether there are unusual conditions that do not allow for ADR.

3.2.1. The AO, in coordination with the responsible solicitor, should use the “ADR Suitability Worksheet for IBLA Appeals,” (Part II, below) to assist in determining whether there are unusual conditions that do not allow for ADR.

3.2.2. The AO is encouraged to coordinate with the State Natural Resources ADR Advisor or ADR-Manager Advisor and with a member of the WO ADR Program staff while making this determination, and must coordinate if denying the order.

**3.3. Contact the appellant:** IBLA has explained the language in an ADR case referral order as requiring the BLM to at least make contact with the appellant regarding the possibility of resolving the appeal, regardless of the AO’s internal suitability determination. This applies except in limited cases (outlined below in paragraph 3.3.4.). Accordingly, in coordination with the responsible solicitor, the AO or responsible solicitor should make reasonable efforts to contact the appellant according to the guidelines below:

*When conditions allow ADR*

3.3.1. In coordination with the responsible solicitor, the AO or the responsible solicitor should proceed to contact the appellant, acknowledge receipt of

<sup>4</sup> For more information on IBLA ADR case referral orders, see Question 6 of the online FAQs, available on the “ADR in the IBLA” section of the BLM ADR Program’s website ([www.blm.gov/adr](http://www.blm.gov/adr)).

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the IBLA order, and discuss the situation. One of three results will likely follow from such a conversation:

- 3.3.1.1. *Follow-up ADR is necessary:* The discussion with appellant may not lead to an immediate resolution, but indicate that the BLM and appellant are willing to continue further discussions. The AO or responsible solicitor should work cooperatively with the appellant to agree on how to proceed with ADR. Section 5 below, "Proceeding with ADR," provides additional guidance and considerations in such situations.
- 3.3.1.2. *No resolution; additional ADR will not be pursued:* The discussion with the appellant may not lead to resolution of the appeal, and either the BLM or the appellant (or both) may not wish to continue discussions. The AO or responsible solicitor should provide the IBLA with a status report indicating that no resolution could be reached (see Section 6 below, "Status reports," for further guidance).
- 3.3.1.3. *Resolution reached:* The discussion with the appellant may result in an immediate resolution such that further substantive discussions are not necessary. If the resolution involves an agreement between the BLM and the appellant, the BLM, in coordination with the responsible solicitor, should document the agreement and obtain proper internal approvals (the AO or responsible solicitor should inform the appellant if final agreement is contingent on BLM internal approvals). Section 7 below, "Concluding ADR and moving forward," provides additional guidance on agreements and obtaining IBLA disposition of appeals.

*When unusual conditions do NOT allow for ADR*

- 3.3.2. In an appeal where the IBLA has issued an order for ADR, even if the BLM identifies unusual conditions that do not allow for ADR, the BLM or the responsible solicitor *must still contact the appellant* unless the conditions meet the exception outlined in paragraph 3.3.4 below. This contact should be in good faith, but need not involve an extended conversation unless conditions warrant. The AO may wish to do the following in the conversation with the appellant:
  - 3.3.2.1. Acknowledge receipt of the IBLA's ADR case referral order.
  - 3.3.2.2. Identify any misunderstandings or miscommunication associated with the BLM's decision and the appeal that can be easily clarified. Clarify and discuss them.
  - 3.3.2.3. Explain that the BLM has given the referral and the appeal full consideration, and has determined that the circumstances in the appeal are not appropriate for ADR.

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- 3.3.2.4. Give the appellant an opportunity to respond to and discuss this determination and to express concerns or issues. Express empathy where appropriate.<sup>5</sup>
- 3.3.2.5. Explore whether there are other previously unidentified factors that suggest conditions do allow for ADR.
- 3.3.2.6. If no additional considerations come to light that suggest conditions do allow for ADR, then inform the appellant that the BLM will notify the IBLA of its determination. (see Section 6 below, “Status reports,” for more information on notifying the IBLA).

*Method of contact:*

- 3.3.3. Because collaborative stakeholder engagement and ADR generally work best when kept informal, contact by phone or in person is preferred except under unusual conditions.

*Exceptions to the appellant contact policy:*

- 3.3.4. In limited situations, it may not be necessary to contact the appellant. This exception applies in either of the following circumstances:
  - 3.3.4.1. The case falls within one of the automatic exclusions outlined in “BLM’s ADR Suitability Worksheet for IBLA Appeals,” (Part II, below); or
  - 3.3.4.2. After receiving the ADR Case Referral Order, the BLM has made reasonable attempts to contact the appellant, but the appellant has not responded.
- 3.4. **Respond to the IBLA:** Within the time frame established in the IBLA ADR case referral order,<sup>6</sup> the AO or responsible solicitor shall file a status report with the IBLA, as outlined in Section 6 below, “Status reports.”
  - 3.4.1. *If the exception to the appellant contact requirement applies.* If paragraph 3.3.4 above applies, the AO or responsible solicitor should notify the IBLA that the BLM will not be contacting the appellant because unusual conditions do not allow for ADR. The notice should include a brief explanation of why the appeal is not appropriate for ADR. The notice also must be served on the appellant.
- 3.5. **Inform State Natural Resources ADR Advisor and ADR Program of determination:** Using appropriate channels, the AO shall ensure the State Natural Resources ADR Advisor is informed of the determination to proceed or not proceed with ADR, with a copy or “cc” to the Bureau Dispute Resolution Manager in the WO ADR Program.

<sup>5</sup> Allowing the appellant to express concerns or issues, or “vent,” can improve the long-term relationship with the appellant and may de-escalate the conflict and improve BLM credibility, even if it does not lead to actual resolution in the appeal.

<sup>6</sup> The IBLA has generally established a timeframe of 90 days in its orders.

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**4. WHAT TO DO AFTER RECEIVING AN APPELLANT REQUEST FOR ADR.**

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- 4.1. **Appellant requests:** In some instances, an appellant may contact the BLM directly and request ADR even though the IBLA has not issued an order referring the appeal to ADR. In other instances, an appellant may contact CADR pursuant to contact information that may be included in the ADR referral data sheet sent with the appeal's docketing notice. When an appellant contacts CADR, staff at CADR will then contact the BLM Bureau Dispute Resolution Manager in the WO ADR Program for follow through and to confer with the appropriate field office.
- 4.2. **Coordinating with the responsible solicitor:** In all cases where an attorney representing an appellant contacts a Bureau employee in connection with an appeal before the IBLA, such employee shall state (at the beginning of any conversation with appellant's counsel) that they will consult with the Department's Office of the Solicitor and that the responsible solicitor will discuss the case with the attorney. Similarly, requests received from appellants for ADR shall be coordinated with the Solicitor's office before commitments are made.
- 4.3. **Responding to appellant request:** In appeals where an appellant has requested ADR, whether directly through the responsible BLM office or through another relevant BLM office, the BLM ADR Program, or the CADR office, the request should be treated the same as an IBLA ADR case referral order. While status reports to the IBLA are not technically required unless the IBLA also has issued an ADR case referral order, it is recommended that the AO or responsible solicitor notify the IBLA if ADR is pursued (see paragraph 6.1.4 below and in Question 30 and 31 of the online FAQs<sup>7</sup>). The AO shall provide the information and reports required in Sections 3 and 8 to the State Natural Resources ADR Advisor, with a copy to the Bureau Dispute Resolution Manager in the WO ADR Program.

**5. PROCEEDING WITH ADR**

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These procedures apply once an AO has determined that the BLM will pursue collaborative stakeholder engagement or ADR processes in an appeal.

A key to success in collaborative stakeholder engagement or ADR processes is personal contact with the appellant by the BLM. Phone calls and face-to-face meetings can be critical. The AO, in coordination with the responsible solicitor, should work together with the appellant to craft the right process for jointly addressing the issues in the appeal. This process could consist simply of continued telephone conversations, or a series of meetings for direct negotiations. Alternatively, the process could be more structured, such as mediation with a third-party neutral. The AO, in consultation with the responsible solicitor and the State Natural Resources ADR Advisor, should use his or her best professional judgment to determine how to best proceed in each instance. A few considerations in this planning include the following:

- 5.1. **Preparation and ADR plans:** AOs, in coordination with the responsible solicitor, should properly prepare for a collaborative stakeholder engagement or ADR process. Proper preparation includes assessing likely areas of agreement and disagreement, identifying the Best Alternative to a Negotiated Agreement (BATNA) for the BLM

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<sup>7</sup> Available on the "ADR in the IBLA" section of the BLM ADR Program's website ([www.blm.gov/adr](http://www.blm.gov/adr))

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and the appellant, and employing appropriate strategies and options (including creative options that might include additional parties), and so forth. The AO and responsible solicitor may wish to document these assessments as an ADR plan in a privileged attorney-client memorandum. For additional guidance on proper preparation, AOs and responsible solicitors may find the National Training Center training video “Fundamentals of Negotiation” (Course Number 1610-25) to be a useful resource. This three-hour course, sponsored by the BLM ADR Program, is available for viewing at anytime through the Knowledge Resource Center on the NTC website

(<http://www.ntc.blm.gov/krc/uploads/68/NegotiationForNaturalResourceConflicts.html>).<sup>8</sup>

- 5.2. **The ADR process must be agreed upon:** The appellant and the BLM must both agree upon the specific collaborative stakeholder engagement or ADR process to be used. If the appellant and the AO cannot agree upon an approach, then resolution of the appeal must proceed through standard IBLA adjudication procedures. If the IBLA had referred the appeal to ADR, then the AO should follow the procedures in paragraph 6.1.1.3 below for notifying the IBLA that the BLM will not pursue ADR in the appeal.
- 5.3. **Situation assessments:** In some cases, a formal situation assessment may be useful in determining what process to use, or whether to proceed with collaborative stakeholder engagement or ADR at all. This is particularly likely in cases that are complex or involve multiple parties. While the BLM may proceed unilaterally with a situation assessment, it is generally more desirable to proceed jointly with the appellants. When proceeding jointly, the BLM and the appellants should agree on who will conduct the situation assessment, how that person will be selected, and on any specific procedures or standards to be used.<sup>9</sup>
- 5.4. **Selection and expenses of a third-party neutral:** When a third-party neutral (such as a mediator or facilitator) is utilized in an ADR process, the AO shall ensure that selection of the third-party neutral is a cooperative effort between the BLM and the appellant. The parties also should agree upon responsibilities for third-party neutral costs. See Questions 22 through 24 of the online FAQs for further information.<sup>10</sup>
- 5.5. **Required disclosures and best practices:**
  - 5.5.1. *BLM participation* in a collaborative stakeholder engagement or ADR process shall include making reasonable attempts to reach agreements that address the Bureau’s needs and respond to the appellant’s interests. Best practices also suggest that whenever possible, the AO negotiating or attending an ADR session shall be granted sufficient authority to reach agreements with the parties and settle on behalf of the BLM.

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<sup>8</sup> To receive credit on your BLM transcript for taking this course, please contact [david\\_oaks@blm.gov](mailto:david_oaks@blm.gov) after you complete the course and let him know you would like to be added to the roster (be sure to include the course name and number).

<sup>9</sup> Situation assessments are an ADR-based process where a person (or a team)—who is often a disinterested, third-party neutral—investigates the background, relationships, and issues involved in a dispute to provide the primary parties with an assessment of opportunities, challenges, and prospects for ADR. For additional information on situation assessments, please see Question 10 of the online FAQs, available at [www.blm.gov/adr](http://www.blm.gov/adr).

<sup>10</sup> Available on the “ADR in the IBLA” section of the BLM ADR Program’s website ([www.blm.gov/adr](http://www.blm.gov/adr))

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5.5.2. *Disclosures:* When participating in a collaborative stakeholder engagement or ADR process, the BLM shall disclose any limitations within which the Bureau must operate. At a minimum, those disclosures include:

5.5.2.1. Informing other participants when additional review of an agreement by upper management, the Solicitor's Office, or another office will be necessary. The BLM should disclose this early in the process to avoid unrealistic expectations.

5.5.2.2. Informing other participants that the BLM is free to discuss and make agreements while the case is on appeal, but is not free to implement or effect an agreement until the IBLA has dismissed the case or vacated and remanded the BLM's original decision. (See Questions 11 to 13 and 16 to 19 of the online FAQs<sup>11</sup>).

5.5.2.3. Informing other participants of the risk, when the appeal has not been referred to ADR, that the IBLA could decide the appeal before the process has been concluded. This risk can be avoided by simply notifying the IBLA that the parties are engaged in a collaborative stakeholder engagement or ADR process. (See Questions 28 and 30 of the online FAQs).

5.6. **Confidentiality:** The BLM's policy on confidentiality in IBLA appeals conforms to the Department of the Interior's policy on confidentiality in ADR. For more information, see Question 33 of the online FAQs.

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**6. STATUS REPORTS**

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**6.1. Status reports to the IBLA:**

6.1.1. **When the IBLA has issued an ADR case referral order:** In appeals where IBLA has issued an ADR case referral order, the BLM or the responsible solicitor is responsible for submitting status reports to the IBLA. The IBLA has required that status reports be submitted at the following junctures of the ADR process:

6.1.1.1. *Within the first 90 days:* The IBLA has usually required a *joint* status report be provided within 90 days of the referral to ADR. A joint status report is a single status report to which both parties agree. Agreement may be shown by having one party write and file the report, indicating in the report that the other party has seen and concurs in the report, or by having both parties sign the report. Like all other filings, the party filing the report must still serve a copy on all parties.

6.1.1.2. *Every subsequent 60 days:* If ADR continues past the first 90 days, the IBLA has required a *joint* status every 60 days until ADR is concluded.

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<sup>11</sup> Available at [www.blm.gov/adr](http://www.blm.gov/adr)

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**PART I: PROCEDURES FOR MANAGING ADR IN IBLA APPEALS**

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- 6.1.1.3. *Upon BLM's determination that it will not or cannot reach a negotiated agreement with the appellant:* The IBLA has preferred joint status reports. However, if the BLM determines it is unwilling to continue further discussions or other ADR processes, the BLM can unilaterally notify the IBLA that discussions were attempted but unsuccessful, and that further ADR would not be beneficial. This status report should include a request that the IBLA return the appeal to the standard docket and proceed under the standard process.
- 6.1.1.4. *Upon reaching a negotiated agreement:* If the parties reach and sign a negotiated agreement, the BLM should notify the IBLA (after signatures are finalized) and take appropriate steps to allow the IBLA to properly dispose of or decide the appeal. This status report can be provided in a motion to dispose of the appeal. See Paragraph 7.2 below
- 6.1.1.5. *As required by the IBLA:* The IBLA may require status reports at other points during the ADR process. The BLM should respond to these requests promptly.
- 6.1.2. **Distribution of status reports:** Status reports must be served on the appellant as well as filed with the IBLA.
- 6.1.3. **Content of status reports:** As a general rule, status reports should not detail the substance of negotiations, but rather should provide procedural information (such as the date and attendance of ADR sessions and whether an agreement has been reached). This ensures that proper confidentiality is maintained.
- 6.1.4. **Status reports in appeals the IBLA has not referred to ADR:** The IBLA does not require status reports when the IBLA has not referred the appeal to ADR. However, apprising the IBLA when an agreement is imminent or very likely may encourage the IBLA to withhold a decision pending the outcome of a collaborative stakeholder engagement or ADR process. If the IBLA later refers the appeal to ADR, the BLM must then begin providing status reports as outlined in paragraph 6.1.1 above.
- 6.2. **Status Reports in appellant requests for ADR:** In cases where the appellant has requested ADR by contacting the BLM ADR Program or CADR, the AO or the responsible solicitor should provide the BLM Bureau Dispute Resolution Manager, in the WO ADR Program, with regular updates on the status of ADR in the case.

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**7. CONCLUDING ADR AND MOVING FORWARD**

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A collaborative stakeholder engagement or ADR process generally results in one of three outcomes: full resolution, partial resolution, or discontinuation of the process without an agreement. In each scenario, the BLM must take separate steps to move forward in the matter.

**PART I: PROCEDURES FOR MANAGING ADR IN IBLA APPEALS****7.1. Negotiated Agreements:**

- 7.1.1. If the BLM reaches an agreement with one or more parties that fully or partially resolves the appeal, the agreement should be in writing. Following appropriate BLM management and attorney review, the agreement should be signed by the parties before the IBLA is notified of the agreement.
- 7.1.2. Negotiated agreements should include appropriate enforceability provisions.
- 7.1.3. Because a decision cannot be implemented until the IBLA returns jurisdiction of the matter to the BLM, the agreement should be conditioned upon the appellant withdrawing the appeal within 30 days and the IBLA dismissing the appeal or otherwise returning authority to the BLM.
- 7.1.4. Agreements are generally not provided to the IBLA. The IBLA generally will dismiss or otherwise close the case on a motion from the appellant, or a joint motion, without seeing the actual agreement.<sup>12</sup> Agreements do not establish IBLA precedent.
- 7.1.5. All agreements shall include language stating that the agreement is limited to the immediate matter and does not create or imply creation of a precedent for future BLM actions or decisions, either with this party or with other entities not party to the agreement. As appropriate, this language might highlight circumstances unique to the situation. Also, agreements should generally be structured so that they do not set unworkable parameters or standards for future cases.

**7.2. Regaining BLM authority to implement actions in the matter:** Once an agreement is reached, the IBLA must dispose of an appeal (such as dismiss the appeal or remand and vacate the decision) before the BLM can implement the agreement.

- 7.2.1. *Negotiated agreement fully resolves appeal:* When a negotiated agreement fully resolves an appeal, then the BLM should seek final disposition of the case. Possible methods for seeking final disposition include:
  - 7.2.1.1. *Motion for dismissal:* Ideally, the appellant should promptly submit a motion withdrawing the appeal to the IBLA, and request that the case be dismissed. If, however, the appellant does not move expeditiously, the BLM may draft a joint motion for dismissal, obtain the appellant's concurrence or signature, and then file the motion with the IBLA.
  - 7.2.1.2. *Motion to vacate and remand:* The BLM can unilaterally request that the decision under appeal be vacated, and remanded to the Agency. Vacating the decision grants the

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<sup>12</sup> In some instances, it may be necessary for the BLM to provide the IBLA with a copy of the signed agreement to prove that the appellant agreed to withdraw the appeal.

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BLM authority to issue a new decision in the case, which should be in accordance with the agreement with the appellant.

7.2.1.3. *Bureau considerations:* A primary consideration in choosing not to wait for the appellant to withdraw the appeal should be BLM's interest in having assurance that the appeal will be disposed of in a timely fashion. Experience has shown that in some cases, if the appellant is left with the sole responsibility for moving the IBLA to properly dispose of the case (e.g., dismiss, etc.), the BLM increases its risk that no motion is filed or that the filing is delayed. This leaves the BLM without authority to act on the agreement until the motion is filed or the IBLA moves on its own accord.

7.2.2. *Negotiated agreement partially resolves appeal:* When a negotiated agreement resolves only some of the issues in an appeal, the parties should notify the IBLA of which issues they have resolved and should request that the IBLA return the appeal to the standard adjudicative docket. The IBLA will proceed under the standard appeal adjudication process to decide the remaining issues on appeal. A joint motion is one way of ensuring the parties have the same understanding of which issues the agreement has resolved.

7.3. **When an ADR process is discontinued without full resolution of the appeal:** If the collaborative stakeholder engagement or ADR process used does not result in an agreement that fully resolves an appeal, the AO should consider whether to pursue another process (such as mediation) or whether to request that the IBLA return the appeal to the standard adjudicate docket. The AO may wish to consult with the State Natural Resources ADR Advisor or with the Bureau Dispute Resolution Manager in the WO ADR Program in assessing other options.

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**8. RECORDS, TRACKING, AND REPORTING:**

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8.1. **Required records:** For every appeal in which the BLM pursues a collaborative stakeholder engagement or ADR process (including direct negotiations) or which the IBLA refers to ADR, the office responding to the appeal shall keep the following records accessible for review:

- 8.1.1. The appellant's statement of reasons.
- 8.1.2. The BLM's answer (if any).
- 8.1.3. The IBLA's referral to ADR (if any).
- 8.1.4. All status updates provided to the IBLA (if any).
- 8.1.5. A copy of any agreements between the BLM and other parties.
- 8.1.6. The IBLA's final order or disposition of the appeal.
- 8.1.7. The completed Appeal ADR summary (as outlined in paragraph 8.2 below).

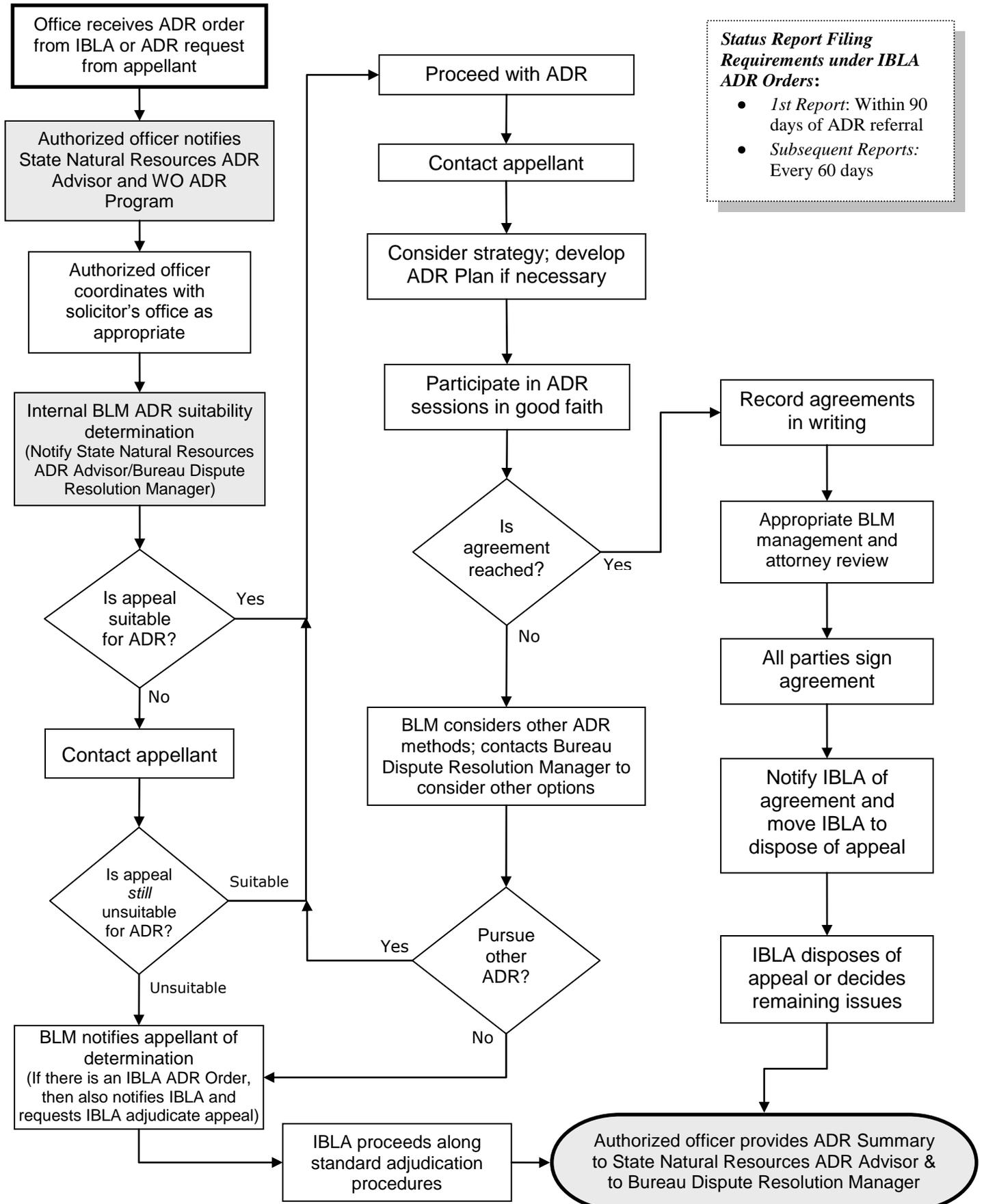
**PART I: PROCEDURES FOR MANAGING ADR IN IBLA APPEALS**

- 8.2. **Appeal ADR Summary:** Following resolution of an appeal for which records must be kept under paragraph 8.1, the AO is responsible for ensuring that the one-page “IBLA Appeal ADR Summary” template (Attachment 2 to the transmitting IM)<sup>13</sup> is filled out and that copies are sent to the State Natural Resources ADR Advisor and to the Bureau Dispute Resolution Manager in the WO ADR Program. The AO may wish to request assistance from the responsible solicitor to fill out this template.
- 8.3. **Natural Resource ADR Advisor reporting duties.** For each appeal in which a collaborative stakeholder engagement or ADR process is involved, the State Natural Resources ADR Advisor (or other person designated within the state) shall forward a copy of the completed IBLA Appeal ADR Summary to the Bureau Dispute Resolution Manager in the WO ADR Program.

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<sup>13</sup> This form is also available online at [www.blm.gov/adr](http://www.blm.gov/adr).

**PART I: PROCEDURES FOR MANAGING ADR IN IBLA APPEALS**



**Status Report Filing Requirements under IBLA ADR Orders:**

- *1st Report:* Within 90 days of ADR referral
- *Subsequent Reports:* Every 60 days

## **PART II**

### **BLM'S ADR SUITABILITY WORKSHEET FOR IBLA APPEALS**

This worksheet is intended to assist BLM managers and staff, in coordination with the responsible solicitor, to determine whether utilizing a collaborative stakeholder engagement or ADR process in an individual IBLA appeal is appropriate. It provides a list of factors that automatically exclude the use of collaborative stakeholder engagement or ADR processes in an appeal, as well as a list of factors that favor or do not favor the use of these processes.

This worksheet should be considered in coordination with the attorney from a Field, Regional, or Headquarters Solicitor's Office who is representing the BLM in the appeal.

**PART II: BLM'S ADR SUITABILITY WORKSHEET FOR IBLA APPEALS****FACTORS THAT AUTOMATICALLY EXCLUDE ADR PROCESSES**

If any of the following factors apply, collaborative stakeholder engagement or ADR is not appropriate for resolving the appeal, and paragraphs 3.3.4 and 3.4.1 of Part I, above, apply.

- The appeal involves a mining claim maintenance fee.
- The appeal involves a mining claim recordation.
- The appeal involves termination of an animal adoption agreement under the Wild Free-Roaming Horses and Burros Act (16 U.S.C. § 1331 *et seq.*) where the appellant has been separately convicted of criminal animal cruelty or mistreatment.
- Another legal restraint in statute or regulation, or a judicial or administrative order precludes BLM discretion in the matter, thereby making collaborative stakeholder engagement or ADR processes inappropriate.

**FACTORS FAVORING ADR OR NOT FAVORING ADR**

In coordination with the responsible solicitor in an appeal, the AO can use the following factors to help determine if collaborative stakeholder engagement or ADR is appropriate. These factors are intended to be used in combination—no single factor is determinative of whether the BLM should proceed with collaborative stakeholder engagement or ADR. Nor does application of the factors mandate a specific decision to proceed or not proceed with direct negotiations or other processes. However, Bureau policy is to seek to use collaborative stakeholder engagement or ADR as standard operating practice, creating a strong presumption toward attempting these processes.

As an example, an AO, in coordination (where appropriate) with the responsible attorney, may determine that while there is a strong probability that the IBLA will uphold a BLM decision on appeal, the BLM will proceed with ADR because it will present opportunities to strengthen the BLM's relationship with the appellant or to improve goodwill within the community.

After determining which factors are applicable in this case, the AO should consider any other unique factors not listed here, weigh the factors against each other, and using his or her best professional judgment, and in coordination with the responsible solicitor, determine whether to pursue ADR in this particular appeal.

**ADR SUITABILITY WORKSHEET****Factors Favoring ADR**

- Establishment of IBLA precedent is not necessary or is of little value in this case.
- Costs to defend the appeal before the IBLA are high and will likely exceed available time and resources.

**Factors Not Favoring ADR**

- Establishment of IBLA precedent will significantly clarify BLM obligations and necessary activities for future cases or will substantially assist in refining BLM policy.

**PART II: BLM'S ADR SUITABILITY WORKSHEET FOR IBLA APPEALS****Factors Favoring ADR**

- A decision by the IBLA may indirectly impact parties who are not directly named in the appeal, but who could be included in an ADR process. A decision not including some of these parties may invite further litigation from these parties.
- Additional parties not directly named in the appeal (such as affected permittees, lessees, purchasers, etc.; local or state governments; community groups; or others) can be brought in to add options, value, or benefits to negotiations.
- The facts of the situation are not all clear. (ADR can allow parties to clarify and agree upon certain facts or identify information gaps).
- There is scientific uncertainty that could be addressed through joint fact-finding processes or joint studies.
- The parties have an ongoing relationship.
- The public is interested in the case, or has a heightened awareness of how the BLM will proceed or interact with the appellants.
- There is an opportunity to build goodwill with the public by reducing the adversarial nature of the conflict generated by the BLM's decision or by showing openness to discussion and negotiation.
- A ruling from the IBLA or the IBLA process is likely to harm the relationship with the appellant.
- There has been miscommunication, misunderstanding, or hostile communication in the past which may be clarified through an ADR process.

**Factors Not Favoring ADR**

- Costs or time required to pursue ADR exceed the available resources, *and* a decision by the IBLA is likely to be less costly or require less time.
- Effective ADR would require a third-party neutral (such as a mediator or facilitator), but funds are not available, and appellants are unwilling to share or bear the costs (this factor would not apply if direct negotiation is considered).
- The IBLA is substantially likely to rule in favor of the BLM (as determined in consultation with the responsible solicitor).
- A combination of circumstances and considerations unique to the case suggest that the results of an IBLA decision, regardless of the decision, will be more beneficial to the public than the best possible negotiated agreement.
- Circumstances unique to the situation generate a strong possibility that a negotiated agreement will establish informal or tacit precedent that poses a strong risk of limiting future BLM actions (This factor is often dependent on the outcome of a final agreement—agreements can be crafted to mitigate the weight of this factor).
- Multiple, repeated, good-faith attempts at ADR have been made in the past, and have not been successful.
- Appellants or other critical parties have refused to participate in ADR despite persistent, good-faith invitations to participate.

**PART II: BLM'S ADR SUITABILITY WORKSHEET FOR IBLA APPEALS****Factors Favoring ADR**

- The appellant appears to misunderstand the nature or consequences of the underlying BLM decision, and may require clarification other than written form letters.
- A third-party neutral could help enhance communication or improve long-term relationships among the parties.
- There are indications of potentially creative solutions that will resolve the appeal and also may provide additional benefits to the BLM.
- There are, or appear to be, underlying issues driving the appeal but which lie outside of the IBLA's jurisdiction in the appeal (e.g., the parties are appealing a procedural matter, but really have concerns with an underlying substantive resource issue).
- Communication and negotiation with the appellants may provide opportunities to prevent future conflict, or to establish or clarify future expectations, patterns or actions, even if agreement fully resolving the appeal is not reached.
- There is a high risk the IBLA will rule against the BLM (as determined in consultation with the responsible solicitor).
- There is significant uncertainty as to how the IBLA will rule, and establishment of IBLA precedent is valuable only if the precedent is favorable to the BLM.
- There is a possibility of reaching agreement that resolves some of the issues in the case, and this partial resolution will streamline the appeal process for the remaining issues, or will provide other benefits to the BLM or public.

**Factors Not Favoring ADR**

## WHERE CAN I GO FOR MORE INFORMATION?

Readers are encouraged to refer to the **online FAQs** (available at [www.blm.gov/adr](http://www.blm.gov/adr)) for up-to-date information about the IBLA ADR Program.

The following additional resources also may be useful:

### **BLM's ADR Advisory Council:**

Natural Resources ADR Advisors and ADR Manager-Advisors in each State and appropriate Center

BLM managers and staff are encouraged to contact their State's ADR Advisors for additional information and guidance.

To find the names of your ADR Advisors, please refer to the attached contact list, or contact the staff of the ADR Program in the Washington Office for up-to-date information.

### **The Collaborative Stakeholder Engagement and Appropriate Dispute Resolution Program (ADR Program) in the Washington Office**

Email: [adr@blm.gov](mailto:adr@blm.gov)

Phone: 202-254-3325 (Paul Politzer, Bureau Dispute Resolution Manager)

Website: [www.blm.gov/adr](http://www.blm.gov/adr)

Please check the website for updates and additional information and guidance for the BLM on ADR in the IBLA.

### **DOI Office of Collaborative Action and Dispute Resolution (CADR)**

Phone: 202-327-5383 (Elena Gonzalez, Director, CADR)

Website: [www.doi.gov/cadr](http://www.doi.gov/cadr)

Email: [CADR@ios.doi.gov](mailto:CADR@ios.doi.gov)

### **Senior Counsel for Collaborative Action and Dispute Resolution in the Office of the Solicitor**

Phone: 202-208-7950 (Shayla Simmons)

Email: [shayla.simmons@sol.doi.gov](mailto:shayla.simmons@sol.doi.gov)

### **IBLA Documentation on its ADR Case Referral Program**

Available at: [www.blm.gov/adr](http://www.blm.gov/adr)