

Kansas Administrative Regulations

Mined-Land Conservation and Reclamation (KDHE)

Article 4.—Public Hearings

47-4-15. Administrative hearings; discovery.

Discovery shall be permitted to the extent allowed by the presiding officer or as agreed to by the parties. (a) Requests for discovery shall be made in writing to the presiding officer, and a copy of each request for discovery shall be served on the party or person against whom discovery is sought. The presiding officer may specify the times during which the parties may pursue discovery and respond to discovery requests. The presiding officer may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure.

(b) Subpoenas issued by the presiding officer shall be served by a person designated by the presiding officer or any other person who is not a party and is not less than 18 years of age. Service shall be in person and at the expense of the requesting party. Proof of service shall be shown by affidavit.

(c) Subpoenas and orders issued by the presiding officer shall be enforced pursuant to the provisions of the act for judicial review and civil enforcement of agency actions pursuant to K.S.A. 77-601 *et seq.*, as amended.

(d) Discovery methods. Parties may obtain discovery by one or more of the following methods:

- (1) depositions upon oral examination or upon written interrogatories;
- (2) written interrogatories;
- (3) production of documents or items, or permission to enter upon land or other property for inspection and other purposes; and
- (4) requests for admission.

(e) Time for discovery. Following the initiation of a proceeding, the parties may initiate discovery at any time so long as it does not interfere with the conduct of the hearing.

(f) Scope of discovery.

(1) Unless otherwise limited by order of the presiding officer in accordance with these regulations, the parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible items, and the identity and location of persons having knowledge of any discoverable matter.

(2) It shall not be grounds for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(3) A party may obtain discovery of documents and tangible items otherwise discoverable under subsection (f)(1) of this regulation and prepared in anticipation of or for the hearing by or for another party's representative, including a party's attorney, consultant, surety, indemnitor, insurer, or agent. This discovery shall occur only upon a showing that the party seeking discovery has substantial need of the materials for the preparation of a party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(g) Protective order. Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) the discovery not be had;

(2) the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) the discovery may be had only by a method of discovery other than the method selected by the party seeking discovery;

(4) certain matters not relevant may not be inquired into, or the scope of discovery be limited to certain matters;

(5) discovery be conducted with no one present except persons designated by the presiding officer; or

(6) a trade secret or other confidential research, development, or commercial information may not be disclosed or may be disclosed only in a designated way.

(h) Sequence and timing of discovery. Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence. The fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(i) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's response to include information thereafter acquired, except as follows.

(1) A party shall be under a duty to timely supplement the party's response with respect to any question directly addressed to the following:

(A) the identity and location of persons having knowledge of discoverable matters; or

(B) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the expert witness is expected to testify, and the substance of the expert's testimony.

(2) A party shall timely amend a prior response if the party later obtains information upon the basis of which either condition applies:

(A) the party knows the response was incorrect when made; or

(B) the party knows that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or agreement of the parties.

(j) Motion to compel discovery.

(1) If a deponent fails to answer a question propounded, or if a party upon whom a request is made pursuant to subsection (d)(3) of this regulation or a party upon whom answers to interrogatories are served fails to adequately respond or objects to the

request, or any part thereof, or fails to permit inspection as requested, the discovering party may move the presiding officer for an order compelling a response or inspection in accordance with the request.

(2) The motion shall set forth the following:

(A) the nature of the questions or request;

(B) the response or objection of the party upon whom the request was served; and

(C) arguments in support of the motion.

(3) For purposes of this section, an evasive answer or an incomplete answer or response shall be treated as a failure to answer or respond.

(4) In ruling on a motion made pursuant to this section, the presiding officer may make such protective orders as the presiding officer is authorized to make on a motion made pursuant to K.A.R. 47-4-15(g).

(k) Failure to comply with orders compelling discovery. If a party or an officer, director, or other agent of a party fails to obey an order to provide or permit discovery, the presiding officer before whom the action is pending may make such orders in regard to the failure as are just, including the following:

(1) an order that the matters sought to be discovered or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence; or

(3) an order striking out pleadings or parts of pleadings, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of the action or proceeding, or rendering a judgment by default against the disobedient party.

(l) Depositions upon oral examination or upon written questions.

(1) Any party desiring to take the testimony of any other party or other person by deposition upon oral examination or written questions shall, without leave of the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer, of the following:

(A) the proposed time and place of taking the deposition;

(B) the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify the person or the particular group or class to which the person belongs;

(C) the matter upon which each person will be examined; and

(D) the name or descriptive title and address of the officer before whom the deposition is to be taken.

(2) A deposition may be taken before any officer authorized to administer oaths by the laws of the United States or by those of the place where the examination is held.

(3) The actual taking of the deposition shall proceed as follows.

(A) The deposition shall be on the record.

(B) The officer before whom the deposition is to be taken shall put the witness under oath or affirmation.

(C) Examination and cross-examination shall proceed as at a hearing.

(D) Each objection made at the time of the examination shall be noted by the officer.

(E) The officer shall not rule on objections to the evidence, but evidence objected to shall be taken subject to the objections.

(4) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature, unless examination and signature are waived by the deponent. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign.

(5) When the deposition is to be taken on written questions, the party taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer the questions, and the name, description, title, and address of the officer before whom the questions are to be taken. Within 30 days after service, any other party may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, as in the case of a deposition on oral examination.

(6) A deposition shall not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts.

(7) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose request the deposition is taken.

(8) The deponent may be accompanied, represented, and advised by legal counsel.

(m) Use of depositions. At the hearing, any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition, or who had reasonable notice of the deposition, in accordance with any of the following provisions.

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated to testify on behalf of a public or private corporation, partnership, or association or governmental agency that is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by a party for any purpose if the presiding officer finds that any of these conditions occur:

(A) the witness is dead;

(B) the witness is at a distance greater than 100 miles from the place of hearing, or is outside the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;

(C) the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be used.

(n) Written interrogatories to parties.

(1) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish the requested information that is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on the presiding officer and upon all parties to the proceeding.

(2) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answer and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 30 days after service of the interrogatories, or within a shorter or longer period that the presiding officer may allow.

(3) Interrogatories may relate to any matters that can be inquired into under subsection (f) of this regulation. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. However, the presiding officer may order that such an interrogatory need not be answered until after the completion of designated discovery or until a prehearing conference or other later time.

(o) Production of documents and items, and entry upon land for inspection and other purposes.

(1) Any party may serve on any other party a request to perform the following:

(A) produce and permit the party making the request, or a person acting on the party's behalf, to inspect and copy any designated document, or to inspect and copy, test, or sample any tangible items within the scope of subsection (f) above of this regulation, that are in the possession, custody, or control of the party upon whom the request is served; or

(B) permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property, including the

air, water, and soil, or any designated object or operation on the land, within the scope of subsection (f) of this regulation.

(2) The request may be served on any party without leave of the presiding officer.

(3) The request shall fulfill these requirements:

(A) set forth the items to be inspected either by individual item or by category;

(B) describe each item or category with reasonable particularity; and

(C) specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(4) The party upon whom the request is served shall serve a written response on the party submitting the request within 30 days after service of the request.

(5) The response shall state the following, with respect to each item or category:

(A) that inspection and related activities will be permitted as requested; or

(B) that objection is made in whole or in part, in which case the reasons for objection shall be stated.

(p) Request for admissions.

(1) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(2) Each matter of which an admission is requested shall be admitted unless, within 30 days after service of the request or shorter or longer time that the presiding officer may allow, the party to whom the request is directed serves on the requesting party the following:

(A) a sworn statement denying specifically the relevant matters of which an admission is requested;

(B) a sworn statement setting forth in detail the reasons why the party can neither truthfully admit nor deny the matters; or

(C) written objections on the grounds that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(3) An answering party shall not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable

inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

(4) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the presiding officer determines that an objection is justified, the presiding officer shall order that an answer be served. If the presiding officer determines that an answer does not comply with the requirements of this section, the presiding officer may order either that the matter is admitted or that an amended answer be served. The presiding officer may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time before hearing.

(5) Any matter admitted under this section shall be conclusively established unless the presiding officer on motion permits withdrawal or amendment of the admission.

(6) Any admission made by a party under this section shall be for the purpose of the pending action only and shall not be an admission by the party for any other purpose. The admission shall not be used against the party in any other proceeding.

(Authorized by K.S.A. 49-405; and implementing K.S.A. 49-405, 49-407, and 49-416a; effective, E-81-30, Oct. 8, 1980; effective May 1, 1981; amended May 1, 1986; amended Feb. 11, 1991; amended May 2, 1997.)

***** Authenticated Kansas Administrative Regulation *****