



Legislation Text

File #: 12-055, Version: 2

AN ACT AMENDING TITLE 13 SECTION 102 (a) and SECTIONS 304 (A)(b) and (c) OF THE CHEROKEE CODE ANNOTATED AND AMENDING LEGISLATIVE ACT 13-07 OF THE CHEROKEE NATION ADMINISTRATIVE PROCEDURE ACT

BE IT ENACTED BY THE CHEROKEE NATION:

Section 1. Title and Codification

This Act may be cited as the "Cherokee Nation Administrative Procedure Amendments Act of 2012 " and codified as Title 13, Sections 102 and 304. of the Cherokee Code Annotated.

Section 2. Purpose

The purpose of this Act is to enact minimum standard procedures for agencies of the Cherokee Nation and confer the force of law upon rules adopted by agencies.

Section 3. Legislative History

a) "The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution."

Article V § 7. Cherokee Nation Constitution.

b) "The Principal Chief shall cause the laws of the Cherokee Nation to be faithfully executed, and shall conduct in person and in such manner as shall be prescribed by law, all communications and business of the Cherokee Nation."

Article VI § 10 Cherokee Nation Constitution.

Section 4. Definitions

See act.

Section 5. Substantive Provisions

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ARTICLE 1. GENERAL PROVISIONS

SECTION 101, Short Title.

This Act may be cited as the Cherokee Nation Administrative Procedure Act.

SECTION 102. Definitions.

As used in this Act:

(a) "Agency" means the ~~Election commission~~, Environmental Protection commission, Gaming commission, and Tax commission and **Cherokee Nation Tribal Employment Rights Office (TERO)**, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. The term does not include the Tribal Council or the courts, or the Principal Chief in the exercise of powers derived directly and exclusively from the constitution. The term does not include tribal owned commercial businesses.

(b) "Agency action" means:

- (1) the whole or a part of a rule or an order;
- (2) the failure to issue a rule or an order; or
- (3) an agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

(c) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law.

(d) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(e) "Emergency adjudication" means an agency adjudication taken in a situation in which there is an immediate danger to the public health, safety, or welfare that requires immediate action.

(f) "Filing" means delivery of a record or electronic transmission of a record to a place and in a manner designated by the agency by rule for receipt of official records, or in the absence of such designation, at the office of the agency head.

(g) "Index" means an alphabetical list of items by subject and title in a record with a page number, hyperlink, or any other connector that links the alphabetical list with the record to which it refers.

(h) "Law" means the whole or a part of the Constitution, or of any statute, case law, common law, rule of court, executive order, or rule or order of an agency.

(i) "License" means the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

(j) "Licensing" means an agency process relating to the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(k) "Mail" for purposes of any notice means 1st class mail of the United States Postal Service, a reputable

carrier other than the United States Postal Service, or electronic distribution, where electronic distribution has been designated by agency rule as an acceptable means for transmission or receipt of records.

(l) "Notice" means to take such steps as may be reasonably required to inform another person in the ordinary course, whether or not the other person actually comes to know of it.

(m) "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons.

(n) "Party to agency proceedings," or "party" in context so indicating, means:

(1) a person to whom the agency action is specifically directed; or

(2) a person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceeding.

(3) or properly seeking and entitled by law to participate, in an individual proceeding;

(o) "Party to judicial review or civil enforcement proceedings," or "party" in context so indicating, means:

(1) a person who files a petition for judicial review or civil enforcement or

(2) a person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding.

(p) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental subdivision, instrumentality, or agency, public corporation, or any other legal or commercial entity.

(q) "Public Notice" means conspicuously posting on the official Cherokee Nation website, delivering to persons who have requested routine notification, and any other method.

(r) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(s) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule. The term "rule" does not include:

(1) the issuance, renewal, denial, suspension or revocation or other sanction of an individual specific license,

(2) the approval, disapproval or prescription of rates.

(3) statements and memoranda concerning internal management not affecting private rights or procedures available to the public,

(4) declaratory rulings issued pursuant this title,

(5) orders by the Principal Chief or his designee, or

(6) press releases

(t) "Rule making" means the process for formulation and adoption of a rule.

(u) "website" means the official internet website of the Cherokee Nation, www.cherokee.org, or reasonably accessible via hyperlinks from the website.

(v) "Written" means inscribed on a tangible medium.

ARTICLE 2. DECLARATIONS BY AGENCY.

(a) Any interested person may petition an agency for a declaration of the applicability of any rule or prior order issued by the agency.

(b) Each agency may adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. In the absence of declaratory order procedural rules petitioners shall generally follow the rules of the District Court. The provisions of this Act for formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaration, except to the extent provided in this article or to the extent the agency so provides by rule or order.

(c) Within sixty days after receipt of a petition pursuant to this section, an agency shall either decline to issue a declaration in writing or schedule the matter for hearing.

(d) If the agency declines to consider the petition, it shall promptly notify the person who filed the petition of its decision, including a brief statement of the reasons therefore. An agency decision to decline to issue a declaration is not subject to judicial review.

(e) If the agency issues a declaration, the agency declaration shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion. A declaratory order has the same status and binding effect as any other order issued in an adjudication.

ARTICLE 3. PROCEDURAL RULES. The following procedures shall be followed to promulgate a rule:

SECTION 301. CURRENT RULEMAKING DOCKET.

(a) Except for sections 311, 312, 313, 314 and 315, as used in this article, "rule" does not include an emergency rule adopted under Section 309(a) or a fast-track rule adopted under Section 309(b).\

(b) The Information Systems Department shall maintain a current rulemaking docket for the agencies.

(c) A current rulemaking docket must list each pending rulemaking proceeding. The docket must indicate or

contain:

- (1) the subject matter of the proposed rule;
- (2) notices related to the proposed rule;
- (3) where written or electronic comments may be inspected;
- (4) the time within which written or electronic comments may be made;
- (5) electronic and written requests for public hearing;
- (6) appropriate information about the public hearing, if any, including the names of the persons making the request;
- (7) how comments may be made in writing and electronically; and
- (8) the timetable for action.

SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.

(a) An agency shall maintain an official rulemaking record for each rule it proposes to adopt. The record and materials incorporated by reference must be available for public inspection online via the Internet.

(b) The agency rulemaking record must contain:

- (1) copies of all public notices with respect to the rule or the proceeding upon which the rule is based;
- (2) copies of any portions of the agency's public rulemaking docket containing entries relating to the rule or the proceeding upon which the rule is based;
- (3) all written or electronic petitions, requests, submissions, and comments received by the agency and all other written or electronic materials or records considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based;
- (4) any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by the agency official who presided over the hearing, summarizing the contents of those presentations;
- (5) a copy of the rule and explanatory statement filed in the office of the Principal Chief; and
- (6) all petitions for exceptions to, or amendment, repeal or suspension of, the rule.

SECTION 303. Advise on Possible Rules before Notice of Proposed Rule Adoption.

(a) In addition to seeking information by other methods and before publication of a notice of proposed rule adoption under Section 204, an agency may solicit comments from the public on a subject matter of possible

rule making under active consideration within the agency by giving public notice of the subject matter and indicating where, when, and how persons may comment.

(b) Each agency may also appoint committees to comment, before publication of a notice of proposed rule adoption under Section 204, on the subject matter of a possible rule making under active consideration within the agency. The membership of those committees must be given public notice within 30 days of their formation or change of membership.

SECTION 304. NOTICE OF PROPOSED RULE ADOPTION.

(a) Following internal agency approval of a proposed rule, an agency shall cause notice of its contemplated action to be published on the website. The notice of the proposed adoption of a rule must include:

- (1) a short explanation of the purpose of the rule proposed;
- (2) the specific legal authority authorizing the rule proposed;
- (3) the text of the rule proposed, or if a rule is being amended the text shall plainly indicate the insertions and deletions;
- (4) where, when, and how persons may present their views on the rule proposed;
- (5) where persons may obtain copies of the full text of the regulatory analysis of the rule proposed; and
- (6) where, when, and how persons may present their views on the rule proposed and demand an oral proceeding thereon if one is not already provided.

(b) Within three days after publication of the notice of the proposed adoption of a rule on the website, the agency shall cause a copy of the notice to be mailed or sent electronically to each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a person for the actual cost of providing written mailed copies if the person has made a request for a written copy. **The Information Systems/Information Technology Division of the Cherokee Nation shall create an e-mail alert system within three months so all citizens may easily stay informed.**

(c) A copy of the proposed rule and public notice shall be provided to the Tribal Council and the office of the Principal Chief by **e-mail at the time they are posted online at www.cherokee.org.**
<<http://www.cherokee.org.3>>

SECTION 305. PUBLIC PARTICIPATION.

(a) For at least 30 days after publication of the notice of the proposed adoption of a rule, an agency shall allow persons to submit information and comment on a rule proposed by the agency. The information or comments may be submitted electronically or in writing.

(b) Persons requesting public hearings or submitting comments must include their name, address, phone

number, and e-mail address if submission is electronic, but may request that this identifying information be kept confidential.

(c) COMMENTS

- (1) Comments shall concisely address the proposed rule and contain relevant data, argument, and authorities supporting the position of the comment.
- (2) The agency may disregard anonymous, irrelevant or abusive submissions.
- (3) The agency shall consider fully all proper information and comments submitted respecting a rule proposed to be adopted by the agency.
- (4) A response to each comment shall be prepared and delivered to the person making the comment and given public notice. A single response may be addressed to groups of similar comments.

(d) PUBLIC HEARINGS

- (1) Recognizing that comments and responses may generate demand for a public meeting, the time to request a public meeting shall not end before 15 days following the public notice of all responses to written comments.
- (2) A request for a public meeting shall include a statement of the issues desired to be discussed and a summary of the argument supporting the person's position on the issues.
- (3) A public hearing on a rule proposed to be adopted may not be held earlier than 20 days after notice of its location and time is published on the website.
- (4) Public hearings may be held only from 8:00 A.M. to 10:00 P.M. on Monday thru Saturday.
- (5) An agency official shall preside at a public hearing on a rule proposed to be adopted. If the presiding agency official is not the agency head, the official shall prepare a memorandum for consideration by the agency head summarizing the contents of the presentations made at the oral proceeding.
- (6) Public hearings must be open to the public and recorded by audio, audio and video, stenographic or other means.
- (7) Persons requesting an opportunity to comment at a public meeting may be required to register by name and indicate whether they support or oppose the rule or a part of the rule.
- (8) The agency shall employ its best efforts to allow equal time to both sides of an issue. If present, not less than five persons for each side shall be allowed not less than three minutes each to present verbal comments and records. Registered persons may yield their time to another registered person.

(e) RULE ADOPTION FOLLOWING NOTICE AND COMMENT PERIOD

- (1) If no public meeting is timely requested, and no comments are filed, the rule as submitted shall be a final rule after 10 days from the deadline for requesting a public meeting.
- (2) If written comments are received or a public meeting is held, and the agency makes no

substantive amendments, then the rule shall be final.

(3) If, written comments are received or a public meeting is held, and the agency makes substantive amendments to the rule, the agency shall invite public participation as required by this section for a new rule.

(f) Copies of final rules shall be given public notice and provided to the public upon request.

SECTION 306. EMERGENCY RULES.

(a) If the Principal Chief finds that an urgent commercial issue or an imminent peril to the public health, safety, or welfare requires immediate adoption of a rule and states in writing the reasons for that finding, the agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule.

(b) The agency shall give public notice within a reasonable time and take appropriate measures to make an emergency rule known to the persons who may be affected by it.

(c) The concurrent or subsequent adoption of an identical or similar rule under Article 3 is not precluded.

(d) An emergency rule may be effective for no longer than the threat of or actual existence of the commercial issue or the imminent peril requiring the rule.

(e) An emergency rule shall not be effective longer than 90 days unless previously a notice of proposed rule adoption is given pursuant to Section 304 and the agency diligently proceeds to adopt a rule pursuant to Article 3. Such rule shall be identical to or cover the same issue as the emergency rule that it replaces.

(f) An emergency rule must be placed on the agenda of the next special or regularly scheduled meeting of the agency. Reasonable public comment shall be allowed concerning the emergency rule.

(g) An emergency rule may not be adopted if a substantially similar emergency rule addressing a continuing threat has been adopted within the preceding 90 days.

SECTION 307. REQUIRED RULE MAKING.

In addition to other rule-making requirements imposed by law, each agency shall:

(a) within 90 days of the enactment of this act, adopt as a rule a description of the organization of the agency which states the general course and method of its operations and where and how the public may obtain information or make submissions or requests;

(b) within 90 days of the enactment of this act, adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency;

(c) as soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by

this Act, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers; and

(d) as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases.

SECTION 308. CONTENTS OF RULE.

Each rule adopted by an agency must contain the text of the rule and be accompanied by a record containing:

- (a) the date the agency adopted the rule;
- (b) a concise statement of the purpose of the rule;
- (c) a reference to all rules repealed, amended, or suspended by the rule;
- (d) a reference to the specific statutory or other authority authorizing the rule;
- (e) any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule; and
- (f) the effective date of the rule.

SECTION 309. CONCISE EXPLANATORY STATEMENT.

(a) At the time it adopts a rule, an agency shall issue a concise explanatory statement containing:

(1) its reasons for adopting the rule, which shall include an explanation of the principal reasons for and against its adoption, and its reasons for overruling substantial arguments and considerations made in oral testimony and comments; and

(2) the reasons for any change between the text of the proposed rule contained in the published notice of proposed rule adoption and the text of the rule as finally adopted.

(c) Only the reasons contained in the concise explanatory statement required by subsection (a) may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

SECTION 310. INCORPORATION BY REFERENCE.

An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, or rule that has been adopted by Cherokee Nation, an agency of the United States, another state, or by a nationally recognized organization or association, if:

(a) incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient;

- (b) the reference in the agency rules fully identifies the incorporated matter by location, date, and otherwise,
- (c) the reference in the agency rules states whether the rule does or does not include any later amendments or editions of the incorporated matter;
- (d) the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the Cherokee Nation, the agency of the United States, a state, or the organization or association originally issuing that matter; and
- (e) the rule is of limited public interest, as determined by the Agency.

SECTION 311. COMPLIANCE, TIME LIMITATION AND EFFECT.

- (a) No rule adopted under this act is valid unless adopted in substantial compliance with the procedural requirements of this act.
- (b) A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this act must be commenced within two years from the effective date of the rule.
- (c) Rules shall be valid and binding on persons they affect, and shall have the force of law.
- (d) Except as otherwise provided by law, rules shall be prima facie evidence of the proper interpretation of the matter to which they refer.

SECTION 312. DECLARATORY JUDGMENT

- (a) The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.
- (b) The agency shall be made a party to the action.
- (c) Rules promulgated pursuant to the provisions of the Administrative Procedures Act are presumed to be valid until declared otherwise by a district court of the Nation.
- (d) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

ARTICLE 4. ADJUDICATION

SECTION 401. WHEN ARTICLE 4 APPLIES. DISPUTED CASES.

This Article applies to an adjudication made by an agency if, under Cherokee Nation or federal law, an

opportunity for an evidentiary hearing is required for the formulation and issuance of an order. If the requirements for informal adjudication under sections 405 and 406 or an emergency adjudication under section 407 are met, a disputed case hearing may be conducted following the procedures in those sections.

SECTION 402. PRESIDING OFFICERS.

(a) In a disputed case, a presiding officer shall preside over the conduct of the hearing and shall regulate the course of the proceedings in a manner that will promote their orderly and prompt resolution.

(b) The agency head, one or more members of the agency head, one or more persons designated by the agency head, in the discretion of the agency head, may serve as the presiding officer.

(c) An individual who has served as investigator, prosecutor, or advocate at any stage in a disputed case, including investigation, may not serve as a presiding officer or assist or advise any presiding officer in the same proceeding;

(d) An individual who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a disputed case, including investigation, may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(e) A presiding officer is subject to disqualification for bias, prejudice, financial interest, or any other cause for which a judge is or may be disqualified.

(f) A party may request the disqualification of a presiding officer by filing an affidavit, promptly after discovery of grounds, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule or canon of practice or ethics that requires disqualification.

(g) A presiding officer whose disqualification is requested shall determine whether to grant the position, and state facts and reasons for the determination in writing.

(h) If a substitute presiding officer is required, the substitute must be appointed by:

- (1) the Principal Chief, if the original presiding officer is the agency head; or
- (2) the agency, if the original presiding officer was designated by the agency.

SECTION 403. DISPUTED CASE PROCEDURE.

(a) Except for emergency adjudications and except as otherwise provided in section 406, this section applies to disputed cases.

(b) Except as provided in section 407(c) for emergency adjudications, the agency shall give to the person to which the agency action is directed notice that is consistent with Section 404.

(c) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure.

(d) The following rules apply in a disputed case:

- (1) Relevant evidence must be admitted if it is the type of evidence on which responsible persons are

accustomed to rely in the conduct of serious affairs. Evidence may not be excluded solely because it is hearsay.

(2) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence except that on timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

(3) Upon proper objection the presiding officer shall exclude evidence that is immaterial, irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of the Cherokee Nation. In the absence of proper objection, the presiding officer may exclude evidence that is objectionable.

i. Evidence is unduly repetitious under this subsection if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

ii. A presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion.

iii. An objection is timely if made before submission of the case or on reconsideration.

(4) In a disputed case, any part of the evidence may be received in written form, if doing so will expedite the hearing without substantial prejudice to the interests of a party. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(5) All evidence must be made part of the hearing record of the case, including, if the agency desires to avail itself of information or it is offered into evidence by a party, records in the possession of the agency which contain information classified by law as not public. No factual information or evidence may be considered in the determination of the case unless it is part of the agency record. If the agency record contains information that is not public, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(6) In a disputed case the presiding officer may take official notice of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency.

i. Parties must be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data.

ii. The parties must be afforded an opportunity to contest any judicially noticed facts before the decision is announced, unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

(7) The experience, technical competence, and specialized knowledge of the presiding officer may be used in the evaluation of the evidence.

(e) Except for informal hearings under sections 405 and 406 and emergency hearings under section 407, in a disputed case, the presiding officer, at appropriate stages of the proceedings, shall give all parties the opportunity to file pleadings, motions, objections, and offers of settlement in a timely manner. The presiding officer, at appropriate stages of the proceeding, may give all parties full opportunity to file briefs, proposed

findings of fact and conclusions of law, and proposed, recommended or final orders. If available, the original of all records must be filed with the agency, and copies of all filings shall be sent to all parties.

(f) Except for informal hearings under sections 405 and 406 and emergency hearings under section 407, in a disputed case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

(g) Unless prohibited by law, if each party to a hearing has an opportunity to hear, speak and be heard in the proceeding as it occurs, the presiding officer may conduct all, or part of, an evidentiary hearing, or a pre hearing conference, by telephone, television, or other electronic means;

(h) All testimony of parties and witnesses must be given under oath or affirmation and the presiding officer may administer an oath or affirmation for that purpose.

(i) The hearing in a disputed case is open to public observation, except for a hearing or part of a hearing that the presiding officer states to be closed on the same basis and for the same reasons that a Cherokee Nation court is empowered to close a hearing or states to be closed pursuant to a statutory provision other than this act that authorizes closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

(j) Unless prohibited by law other than this [act], at the party's expense, any party may be represented by counsel or may be advised, accompanied or represented by another individual.

(k) The decision in a disputed case must be in writing, based on the record, and include a statement of the factual and legal bases of the decision.

(l) This section applies to agency procedure in disputed cases without further action by the agency, and prevails over a conflicting or inconsistent provision of the agency's rules.

(m) The rules by which an agency conducts a disputed case may include provisions equivalent to, or more protective of, the rights of the person to which the agency action is directed than the requirements of this section.

SECTION 404. NOTICE.

(a) Except for emergency adjudication under section 407, an agency shall give reasonable notice of the right to a hearing in a disputed case.

(b) In case of applications or petitions submitted by persons other than the agency, within a reasonable time after filing the agency shall give an initial notice to all parties that an action has been commenced which must include:

- (1) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

- (2) the name, official title, mailing address, e-mail address, fax address and telephone number of the presiding officer;
- (3) a statement of the time, place and nature of the pre hearing conference or hearing, if any;
- (4) the name, official title, mailing address and telephone number of any attorney or employee who has been designated to represent the agency; and
- (5) any other matter that the presiding officer considers desirable to expedite the proceedings.

(c) In case of actions initiated by the agency that may or will result in an order, the agency shall give an initial notice to the party or parties against which the action is brought by personal service in a manner appropriate under the rules of civil procedure for the service of process in a civil action in the Cherokee Nation which includes:

- (1) notification that an action that may result in an order has been commenced against them; and
- (2) a short and plain statement of the matters asserted, including the issues involved; and
- (3) a statement of the legal authority and jurisdiction under which the hearing is held that includes identification of the statutory sections involved; and
- (4) the official file or other reference number, the name of the proceeding and a general description of the subject matter; and

the name, official title, mailing address [e-mail address] [fax address] and telephone number of the presiding officer, or, if no officer has been appointed (5) at the time the first notice is given, the name, official title, mailing address [e-mail address] [fax address] and telephone number of any attorney or employee designated to represent the agency; and

(6) a statement that a party who fails to attend any subsequent proceeding in a disputed case may be held in default.

(7) a statement that the party served may request a hearing and instructions in plain language about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(d) When a pre hearing, hearing or other hearing, meeting or conference is scheduled, the agency shall give notice that shall contain the pre hearing information described in this subsection at least 14 days before the hearing.

(e) Any notice may include other matters that the presiding officer considers desirable to expedite the proceedings.

SECTION 405. INFORMAL ADJUDICATION IN DISPUTED CASES.

Unless prohibited by law other than this act, an agency may use informal hearing procedure as provided in Section 406 in a disputed case if:

- (a) there is no disputed issue of material fact; or
- (b) the matter at issue is limited to any of the following:
 - (1) a monetary amount of not more than \$1,000 whether liquidated in a sum certain or as periodic payments over no more than 12 months;
 - (2) a disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days or an employee that does not involve discharge from employment, demotion, or suspension for more than five days;
 - (3) a disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than five days;
 - (4) a proceeding in which an opportunity for an evidentiary hearing is not required by Cherokee Nation or federal constitution or statute, common law, court rule, or executive order, and the agency by rule authorizes use of an informal hearing procedure under this section;
 - (5) a proceeding where the Cherokee Nation or federal constitution requires an evidentiary hearing, but the hearing is not required to follow the adjudication procedures of Section 404; or
 - (6) the parties by written agreement consent to an informal hearing under this section.

SECTION 406. INFORMAL ADJUDICATION PROCEDURE.

- (a) Except as otherwise provided in subsection (b), the adjudication procedures required under Section 403 in a disputed case apply to an informal adjudication.
- (b) In an informal adjudication, the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and their representatives, and may permit others, to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument and may limit or eliminate the use of pleadings, intervention, discovery, pre hearing conferences, and rebuttal. Where appropriate in the discretion of the presiding officer, an informal adjudication may be in the nature of a conference.
- (c) In regulating the course of the informal adjudication proceedings, the presiding officer shall recognize the rights of the parties:
 - (1) to notice that includes the decision to proceed by informal adjudication;
 - (2) to protest the choice of informal procedure, and that protest must be promptly decided by the presiding officer;
 - (3) to participate in person or by a representative;

(4) to have notice of any contrary factual material in the possession of the agency that can be relied on as the basis for adverse decision; and

(5) to be informed briefly, in writing, of the basis for adverse decision in the case.

(d) The agency record for review of informal adjudication consists of the official transcript of oral testimony and any records that were considered, prepared by, or submitted to, the presiding officer for use in the informal adjudication or by or to the agency on review. The agency shall maintain these records as its record of the informal adjudication.

SECTION 407. EMERGENCY ADJUDICATION.

(a) Unless prohibited by law other than this act, an agency may conduct an emergency adjudication in a disputed case under the procedure provided in this section.

(b) An agency may issue an order under this section only to deal with an immediate danger to the public health, safety, or welfare. The agency may take only action that is necessary to deal with the immediate danger to the public health, safety or welfare. The emergency action must be limited to temporary, interim relief.

(c) Before issuing an order under this section, the agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice and hearing may be oral or written and may be communicated by telephone, facsimile, or other electronic means. The hearing may be conducted in the same manner as an informal hearing under this article.

(d) Any order issued under this section must contain an explanation that briefly explains the factual and legal basis for the emergency decision.

(e) An agency shall give notice of an order to the extent practicable to the person to which the agency action is directed. The order is effective when issued.

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as feasible to conduct an adjudication following disputed case procedure under section 403, or, if appropriate under this article, informal adjudication under Sections 405 and 406, in order to resolve the issues underlying the temporary, interim relief.

(g) The agency shall take reasonable and appropriate steps to document the emergency and the agency response, including the use of field notes, audio, video, or photography.

(h) The agency record in an emergency adjudication consists of any testimony or records concerning the matter that were considered or prepared by the agency. The agency shall maintain those records as its official record.

(i) On issuance of an order under this section, the person against which the agency action is directed may obtain judicial review without exhausting administrative remedies.

SECTION 408. EX PARTE COMMUNICATIONS.

While a disputed case is pending, the presiding officer shall not receive any communication, direct or indirect, from any person regarding any issue in the proceeding, without notice and opportunity for all parties to participate in the communication.

SECTION 409. INTERVENTION.

(a) A presiding officer shall grant a petition for intervention in a disputed case if the petitioner has a statutory right to initiate the proceeding in which intervention is sought.

(b) A presiding officer may grant a petition for intervention if the petitioner has an interest that will or may be adversely affected by the outcome of the proceeding and that interest is not adequately represented.

(c) When intervention is granted or at any subsequent time, the presiding officer may impose conditions upon the intervener's participation in the proceedings.

(d) A presiding officer may permit intervention conditionally, and, at any time later in the proceedings or at the end of the proceedings, may revoke the conditional intervention.

(e) The presiding officer, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer shall promptly give notice to the petitioner for intervention and to all parties of an order granting, denying, or modifying intervention.

SECTION 410. SUBPOENAS.

(a) In a disputed case, upon request of a party, the presiding officer may issue subpoenas for the attendance of witnesses and the production of books, records and other evidence.

(b) After the commencement of a disputed case, when a written request for a subpoena to compel attendance by a witness or to produce books, papers, records, or records that are relevant and reasonable is made by a party, the presiding officer shall issue subpoenas.

(c) Subpoenas and orders issued under this subsection may be enforced pursuant to the rules of civil procedure.

SECTION 411. DISCOVERY.

(a) For purposes of this section, "statement" includes records signed by a person of his oral statements, and records that summarize these oral utterances.

(b) Except in an emergency hearing under section 407, a party, upon written notice to another party at least

10 days before an evidentiary hearing, is entitled to:

- (1) obtain the names and addresses of witnesses to the extent known to the other party; and
- (2) inspect and make a copy of any of the following material in the possession, custody, or control of the other party:
 - i. a statement of a person named in the initial pleading or any subsequent pleading if it is claimed that respondent's act or omission as to that person is the basis for the adjudication;
 - ii. a statement relating to the subject matter of the adjudication made by any party to another party or person;
 - iii. statements of witnesses then proposed to be called and of other persons having knowledge of facts that are the basis for the proceeding;
 - iv. all writings, including reports of mental, physical and blood examinations and objects which the party then proposes to offer in evidence; and
 - v. investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication, to the extent that these reports contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the adjudication or reflect matters perceived by the investigator in the course of the investigation, or contain or include by attachment any statement or writing described in this section.

SECTION 412. CONVERSION.

- (a) The adjudication in a disputed case of one type may be converted to an adjudication of another type under this article provided that:
 - (1) the adjudication at the time of conversion no longer meets the requirements under this article for adjudication of the type for which it was originally commenced; and
 - (2) at the time it is converted it meets the requirements under this article for the type of adjudication to which it is being converted.
- (b) To the extent practicable and consistent with the rights of the parties and the requirements of this article relative to the new proceeding, the record of the original proceeding must be used in the new proceeding.
- (c) The agency may adopt rules to govern the conversion of one type of proceeding under this article to another. The rules may include an enumeration of the factors to be considered in determining whether and under which circumstances one type of proceeding will be converted to another.

SECTION 413. DEFAULT.

Unless displaced or modified by law other than this act, if a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of a disputed case, the presiding officer at his discretion may issue a default order.

SECTION 414. LICENSES.

(a) This article applies when an opportunity for an evidentiary hearing is required by law to formulate an order granting, denying, renewing, revoking, suspending, annulling, withdrawing, limiting, transferring, or amending a license.

(b) If an opportunity for an evidentiary hearing is not required by law for agency action on an application for a license, the agency shall give prompt notice of its action in response to the application. If the agency denies the application under this section, the agency shall include an explanation of the reasons for denial.

(c) When a licensee has made timely and sufficient application for the renewal of a license, the existing license does not expire until the application has been finally acted upon by the agency and, if the application is denied or the terms of the new license are limited, the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

SECTION 415, ORDERS: INITIAL AND FINAL.

(a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order in 30 days, unless reviewed within the 30 days by the agency head on its own motion or on petition of a party.

(c) Unless the time is extended by stipulation, waiver, or upon a showing of good cause, an initial or final order must be served in a record within 90 days after conclusion of the hearing or after submission of memos, briefs, or proposed findings, whichever is later.

(d) An initial or final order must include, separately stated, findings of fact and conclusions of law on all material issues of fact, law, or discretion; on the remedy prescribed, and, if applicable, the action taken on a petition for stay of effectiveness. If a party has submitted proposed findings of fact, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative or judicial relief. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(e) Findings of fact must be based exclusively upon the evidence of record in the disputed case and on matters judicially noticed.

(f) A presiding officer shall cause copies of the initial or final order to be delivered to each party and to the agency head within the time limits set in subsection (c).

SECTION 416. AGENCY REVIEW OF INITIAL ORDERS.

(a) An agency head, upon its own motion, may review an initial order. A party may appeal an initial order. Upon appeal by any party, the agency head shall review an agency order, except to the extent that:

- (1) a provision of law precludes or limits agency review of the initial order; or
- (2) the agency head, in the exercise of discretion conferred by a provision of law, declines to review the initial order.

(b) An appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within 10 days after the initial order is rendered. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 10 days after it is rendered. The 10-day period for a party to file an appeal or for the agency head to give notice of its intention to review an initial order is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to Section 415. A new 10-day period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(c) An agency head that reviews an initial order shall exercise all the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the initial order, except to the extent that the issues subject to review are limited by a provision of law or by the agency head upon notice to all the parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses. The agency head shall personally consider the whole record or such portions of it as may be cited by the parties.

(d) An agency head may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the presiding officer who rendered the initial order. Upon remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(e) A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section must include, or incorporate by express reference to the initial order, all the matters required by Section 415(d). The agency head shall cause an order issued under this subsection to be delivered to the presiding officer and to all parties.

SECTION 417. RECONSIDERATION.

(a) Any party, within 15 days after notice of an initial or final order is rendered, may file a petition for reconsideration that states the specific grounds upon which relief is requested. The place of filing and other

procedures, if any, shall be specified by agency rule.

- (b) Filing a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.
- (c) No petition for reconsideration may stay the effectiveness of an order.
- (d) If a petition for reconsideration is timely filed, and the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration as provided in section 504(d).
- (e) If a petition is filed under subsection (a), the presiding officer shall render a written order within 20 days denying the petition, granting the petition and dissolving or modifying the initial or final order, or granting the petition and setting the matter for further proceedings. The petition may be granted only if the presiding officer states findings of facts, conclusions of law, and the reasons for granting the petition.

SECTION 418. STAY.

Except as otherwise provided by law other than this act, a party may request an agency to stay an initial or final order within five days after it is rendered.

SECTION 419. AVAILABILITY OF ORDERS; INDEX.

- (a) Except as otherwise provided in subsection (b), an agency shall index, by caption and subject, all final orders in disputed cases and give public notice of the index and orders.
- (b) Final orders privileged by law or order of court and final orders, the disclosure of which would constitute an unwarranted invasion of privacy or release of trade secrets, are not public records and may not be indexed.
- (c) In each case in which a final order is excluded under subsection (b), the justification for the exclusion must be explained in writing and attached to the order.
- (d) An agency may not rely on a final order as precedent in future adjudications unless the order has been indexed and given public notice.
- (e) An agency may not change, repeal, alter or modify a rule that the agency has enacted under article 3 through adjudication under this article.

SECTION 420. AGENCY RECORD IN DISPUTED CASE.

- (a) An agency shall maintain an official record of each disputed case.
- (b) The agency record consists only of:

- (1) notices of all proceedings;
- (2) any pre-hearing order;
- (3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (4) evidence received or considered;
- (5) a statement of matters judicially noticed;
- (6) proffers of proof and objections and rulings thereon;
- (7) proposed findings, requested orders, and exceptions;
- (8) the record prepared for the presiding officer at the hearing, and any transcript of all or part of the hearing considered before final disposition of the proceeding;
- (9) any final order, initial order, or order on reconsideration; and
- (10) all memoranda, data or testimony prepared under Section 410;

(c) Except to the extent that this act or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in a disputed case and for judicial review of the case.

ARTICLE 5. JUDICIAL REVIEW

SECTION 501. JUDICIAL REVIEW GENERALLY

- (a) Except as otherwise provided by this article, a person is entitled to judicial review of final agency action affecting that person.
- (b) Final agency action for purposes of this article is agency action that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.
- (c) A person otherwise qualified under this article is entitled to judicial review of agency action not subject to review under subsection (a) if postponement of judicial review would result in:
 - (1) an inadequate remedy or substantial and irreparable harm to that person that outweighs the public benefit derived from postponement; and
 - (2) it appears likely that the person will prevail in judicial review of the agency action.
- (d) The District Court shall conduct judicial review.
- (e) Venue shall be in Tahlequah unless allowed elsewhere in the Cherokee Nation by Court rule and agreed

by the parties.

SECTION 502. REVIEW OF AGENCY ACTION OTHER THAN ORDER.

A person otherwise qualified under this article is entitled to judicial review of agency rules and agency action other than an order if:

- (a) the agency action is intended to be final or is the completion of action on that issue;
- (b) postponement of judicial review of that issue would subject the person affected to a risk of substantial harm; and
- (c) the issue involved is fit and appropriate for judicial resolution; and
- (d) the judicial action does not substantially interfere with development of agency policy.

SECTION 503. RULES OF PROCEDURE.

(a) Subject to this section, judicial review of agency action may be taken only by proceeding as provided by Cherokee Nation rules of civil procedure.

(b) A petition for review must be filed with the clerk of the court.

(c) fees shall be paid as established by the court.

(d) A petition for review must set forth:

- (1) the name and mailing address of the petitioner;
- (2) the name and mailing address of the agency whose action is at issue;
- (3) identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;
- (4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;
- (5) facts to demonstrate that the petitioner is entitled to obtain judicial review;
- (6) the petitioner's reasons for believing that relief should be granted; and (7) a request for relief, specifying the type and extent of relief requested.

(e) A petition for review must be served by personal delivery or first class mail with evidence of delivery on the agency, the Office of the Principal Chief, and all other parties in any adjudicative proceedings that led to the agency action.

SECTION 504. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY ACTION.

- (a) Judicial review of a rule may be sought at any time after the date 30 days before the effective date of the rule.
- (b) Judicial review of an order or other agency action other than a rule must be commenced within 30 days after issuance of the order or other agency action if the record of the action provides notice that it is a final agency action and notes the 30 day time limit for judicial review.
- (c) If a final agency action other than a rule does not provide notice as required in subsection (b), then judicial review may be sought within 2 years of the action becoming final.
- (d) A time for seeking judicial review under this section is tolled during any time a party is pursuing an administrative remedy before the agency which must be exhausted as a condition of judicial review.
- (e) A party may not file or petition for judicial review while seeking reconsideration under Section 417. During the time that a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

SECTION 505. STAYS PENDING APPEAL.

The initiation of judicial review does not automatically stay a decision of the agency appealed from. An appellant may petition the reviewing court for a stay upon a showing of immediate, unavoidable, irreparable harm, and a colorable claim of error in the agency proceedings. The reviewing court may grant a stay whether or not the appellant first sought a stay from the agency.

SECTION 506. STANDING.

The following persons have standing to obtain judicial review of an agency action:

- (a) a person to which, or against which, the agency action is specifically directed;
- (b) a person that was a party to the agency proceedings that led to the agency action;
- (c) a person eligible for standing under law of the Cherokee Nation other than this act; and
- (d) a person aggrieved or adversely affected by the agency action.

SECTION 507. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

- (a) Except as otherwise provided in subsection (b), a person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being

challenged and within any other agency authorized to exercise administrative review, except a petition for reconsideration .

(b) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which that rule is based.

(c) If the issue that a petitioner for judicial review under this subsection challenges was not raised and considered in a rulemaking proceeding:

(1) before bringing a petition for judicial review, the petitioner must petition the agency to initiate rulemaking under section 317 to take action to resolve or cure the issue or issues that the petitioner is challenging; and

(2) in the petition for judicial review the petitioner must disclose the petition to the agency for rulemaking and the final agency action on that petition.

(d) A petitioner need not have exhausted his administrative remedies if this act or a statute other than this act provides that exhaustion is not required.

(e) the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm.

SECTION 508. AGENCY RECORD ON JUDICIAL REVIEW.

(a) Judicial review of adjudication and rulemaking is confined to the agency record except as allowed by this section.

(b) Within 30 days after service of the petition, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action.

(c) By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or organized.

(d) The court may tax the cost of preparing transcripts and copies for the record against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record.

(e) The court may admit additional evidence when:

(1) explanation or background of the decision is required;

(2) a party alleges that the administrative record presented to the court fails to disclose evidence or factors considered by the agency;

(3) no record exists in cases where agencies are sued for a failure to take action; or

(f) The court may receive additional evidence if it is needed to decide disputed issues regarding:

(1) improper constitution as a decision-making body, or improper motive or grounds for

disqualification, of those taking the agency action;

(2) unlawfulness of procedure or of decision-making process;

(3) any material fact that was not required by any provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review

(4) a failure to consider adequately a matter required to be considered by the agency's statute;

(5) a factor not considered that is well known and relevant enough to be judicially noticeable as requiring consideration; or

(6) whether the explanation or the record made by the appropriate agency procedures raises issues irrationally neglected by the agency.

SECTION 509. SCOPE OF REVIEW; GROUNDS FOR INVALIDITY.

(a) Except to the extent that this Act or another statute provides otherwise, the validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(b) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.

(2) The agency has acted beyond the jurisdiction conferred by any provision of law.

(3) The agency has not decided all issues requiring resolution.

(4) The agency has erroneously interpreted or applied the law.

(5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

(6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.

(7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.

(8) The agency action is subject to agency discretion which has been abused by one or more of the following:

- i. agency reliance on factors that may not be taken into account under, or ignored factors that must be taken into account under, law;
- ii. agency action does not bear a reasonable relationship to statutory purposes or requirements;
- iii. necessary factual premises of the action do not withstand scrutiny under the relevant standard of review;
- iv. agency action is unsupported by any explanation or rests upon reasoning that is seriously flawed;
- v. the agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action;
- vi. the agency action is, without legitimate reason and adequate explanation, inconsistent with prior agency policies or precedents;
- vii. without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action;
- viii. The agency failed to consider substantial arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action;
- ix. The agency has imposed a sanction that is greatly out of proportion to the magnitude of the violation;
- x. or the action fails in other respects to rest upon reasoned decision making.

(e) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

- (1) the agency was required by this Act or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;
- (2) the court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, until after the agency action, and (ii) the interests of justice would be served by remand to the agency;
- (3) the agency improperly excluded or omitted evidence from the record; or

(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

Section 6. Provisions as cumulative

The Provisions of this act shall be cumulative to existing law.

Section 7. Severability

The provisions of this act are severable and if any part or provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Section 8. Effective Date

This act shall take effect and be in full force as to each agency as of the date that the requirements of Section 304 (a) and (b) are met, but not later than 90 days after passage and approval of this act. Any agency action taken by an agency in conformity with this act but before its enactment is hereby ratified and subject to this act.

Section 9. Self-Help Contributions

To the extent that this Act involves programs or services to citizens of the Nation or others, self- help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.