

Administrative Records

What they are
When to use them
And
Why they are critical to your
program!

Solicitor's Office Brown Bag Presentation
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Administrative Record (AR)

- Is the paper trail that documents the agency's decision-making process and the basis for the agency's decision.
- Establishes that the agency complied with relevant statutory, regulatory, and agency requirements; and demonstrates that the agency followed a reasoned decision-making process.
- The Administrative Procedures Act (APA) governs the *judicial* review of challenged agency action.
- The APA does not apply to administrative review—so it does not apply to IBLA appeals.

When do you use an AR?

- Whenever a project or decision-making process is started
- When there is a clear indication that litigation is possible (e.g., notice of intent to sue)
- When a lawsuit or protest is filed
 - Yes, I know that the APA does not apply to IBLA proceedings, but if you prepare a solid AR before you have to, it will make things easier if the matter is challenged in federal court after the IBLA matter is resolved. More on this later.....

Why are they critical to your program?

- When the “court finds that the agency, in view of the administrative record as a whole, has considered the relevant factors and articulated a rational connection between the facts found and the ...decision[,]” the agency wins the challenge.
Friends of Endangered Species v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985)
- In other words: if you explain yourself, the court offers your decision deference. The challenge is to explain yourself and sustain your decisions!

What is the difference between a case file and an AR?

- **CASE FILE**
 - Determined by BLM guidance
 - Differs depending upon type of matter (e.g., right-of-way, realty matter, survey, etc.)
 - Only includes minimal number of records that support the decision
- **AR**
 - Guidelines for A.R.s established by courts
 - Includes all documents and records before or available to the decision maker at the time the challenged decision was made.
 - Includes documents that do NOT support the final decision.
 - Includes privileged and non-privileged documents and records.
 - Includes policy documents as well as reference books and articles

Who is responsible for completing the AR?

- The **agency** is responsible for completing the AR.
- The agency must assign an administrative record coordinator
 - The AR coordinator certifies to the court that the AR is complete. **The Solicitor's Office cannot do this!**

What does the Solicitor's Office do?

- Solicitor's Office assists with organizing the AR- there are various ways of organizing it and often the organization depends upon the DOJ attorney's preference.
- Solicitor's Office reviews records identified by you as privileged. SOL will negotiate the privileges with DOJ.
- Solicitor's Office can be consulted at any time regarding documents that are questionably relevant; where to search for documents; how to draft the search request and how the index is prepared.

What are the mechanics of preparing an AR?

- Begin early-as soon as the project begins start a logical, easy-to-follow filing system.
- Educate team members about the AR and what you are doing. If you know you are making a record, it's less likely that imprudent or unnecessary remarks will be included.
- Keep paper records, electronic records, data, charts, graphs, etc.

It's all part of the Administrative Record!

Mechanics, cont'd

- If you are sued on a matter that does not already have an AR:
 - Step 1: the AR coordinator must conduct a thorough search for all documents and materials
 - Contact all agency people (field, regional, and WO)
 - Contact non-agency personnel as necessary (Departmental offices: budget, congressional affairs, OEPC, etc)
 - Search agency files as necessary,
 - Contact former agency employees
 - Contact other agencies as necessary
 - Step 2: **KEEP A RECORD OF WHERE YOU SEARCHED**
 - Step 3: Prepare the Index

AR Indexes are Critical!

- They must identify each document or record by a **unique number**. This is called a **Bates Stamp**
- They must briefly **describe** each document (date, type of document, author).
- They must **identify privileged** documents or other protected documents as necessary. *Privilege logs* require consultation with the Solicitor's Office and often DOJ.

Certifying the Record

- Once you have completed the bates stamping process and prepared an index you can
- CERTIFY the A.R.:
 - Certifying language should explain that the agency person who was responsible for compiling the administrative record has personal knowledge of the assembly of the record. In some situations, there may need to be multiple certifications, for example, if different individuals were responsible for compiling various portions of the record.

Electronic Records-the modern Achilles Heel

- Information contained in electronic communications, such as email, is treated the same as information contained in other documents when compiling an AR.
- any email that contains relevant factual information, a substantive analysis, or that documents the agency decision-making process should be included in an AR.
- In addition, emails that include the agency decision-maker, other agencies, stakeholders or representatives from advocacy groups are generally appropriate for inclusion.
- Emails that contain a commingling of relevant and non-relevant information must also be included in an AR. For example, an email that contains information relevant to the decision-making process *as well as a personal statement about the author's weekend plans* must be included, unless otherwise protected or privileged.
- When compiling an AR, the AR Coordinator should attempt to ensure that the context of information and comments contained in email is as clear as possible. The context of relevant comments and information included in emails, especially in emails with attachments or email "chains" with multiple parties and topics, is often lost or misinterpreted. For example, it may be difficult for a court reviewing email without an attachment or a "chain" email to determine what topic or portion of the message a specific comment is responding to. While multiple copies of emails should typically not be included in the AR, where multiple copies help to explain the context of a relevant email they may be included.

Identification of Privileged or “Exempt” Documents

- Statutorily Exempt Documents
 - Documents protected by the Privacy Act (5 U.S.C. 552(a))
 - Documents protected by court order
 - Documents protected by other statutes (e.g. Native American artifacts)
- Privileged Documents
 - Attorney-Client privileged
 - Attorney-work product privileged
 - Deliberative process privileged
 - Predecisional (this is rarely asserted in the AR), **AND**
 - Deliberative-makes recommendations or expresses opinions on legal or policy matters
 - Executive or Governmental privileged

What happens when you forget a document that **SHOULD** be in the AR?

- You can supplement—depending upon the court And the DOJ attorney.
- If you supplement too much, you lose credibility.
- If you refuse to include documents you may wind up in a limited

Discovery

If you end up in

Discovery

You'd better make peace with your
attorneys because you will be getting
to know them very well....