Administrative , Civil & Criminal Law:

Resolving the Case

Introduction To Resource Protection

June 2012

Objectives for this class

- Identify similarities & differences between three legal resolution systems: administrative, civil and criminal law.

- Properly evaluate and select the best resolution system for a given BLM law enforcement situation.

Introduction

- This online class is intended to introduce the BLM officer to alternate resolution systems for resolving a law enforcement case. New officers are often taught only the criminal justice system as they begin their careers. However, the BLM makes far more daily decisions using the administrative system than any other. The criminal justice and civil system are used relatively rarely by the BLM in resolving conflicts.

Introduction

- We all want to feel competent in our jobs. We all feel the pressure to resolve matters quickly and efficiently. Unfortunately, BLM officers trained only in the resolution of cases through the criminal justice system may tend to use that system exclusively, whether or not it meets the best interests of the agency.

Introduction

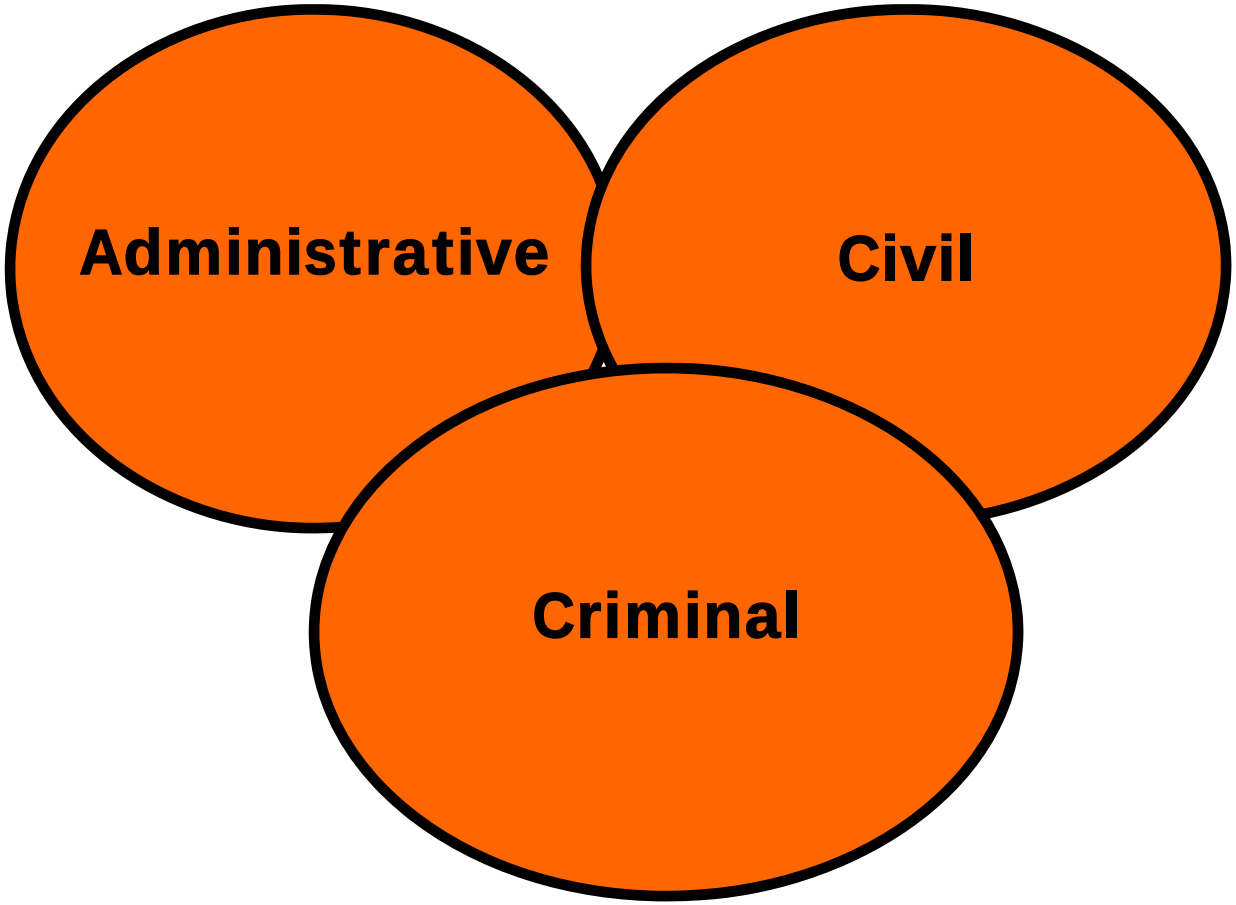
- Main point: officers who lack an understanding of the civil and administrative systems will not be fully able to assist in the work of the BLM.
- Main Point: An important goal of all BLM law enforcement is to gain compliance by all parties involved in the use of natural and cultural resources on public lands. And resolving a case through the criminal justice system is only 1 of 3 ways to reach this overall goal.

Introduction

- Therefore, all BLM officers must be able to objectively assess their case and make an informed decision as to the best resolution system will meet that overall goal.

[Note: since all BLM officers are assumed to have a complete, if basic, understanding of the criminal justice system, less time will be spent on it during this training.]

The Three Resolution Systems



Definitions

- **"Administrative Law" -** Administrative law in general includes two types of law : (1) laws enacted by Congress that govern Federal agencies, and (2) administrative law that the BLM makes internally with Congress' permission.
- All Federal administrative law is governed by the Administrative Procedure Act.

Definitions

- **"Procedures":** *created by* administrative agencies (e.g. DOI or BLM) involving rules, regulations, applications, licenses, permits, available information, hearings, appeals & decision-making.
- BLM creates procedures related directly to public lands & property under authority granted by Congress.

Definitions

- **"Civil Law" -** a body of laws and legal concepts which is the framework of most legal systems. It's often used as a generic term for non-criminal law.
  - Examples: Torts (negligence/accidents/personal injury); constitutional violation of civil rights; contract law; real estate law; probate law; trademarks and patents

Definitions

- **"Criminal Law" -** statutes dealing with crimes against the public. Penalties are carried out exclusively by the government. Includes all of the procedures connected with arresting, charging, trying, sentencing & punishing defendants convicted of crimes.

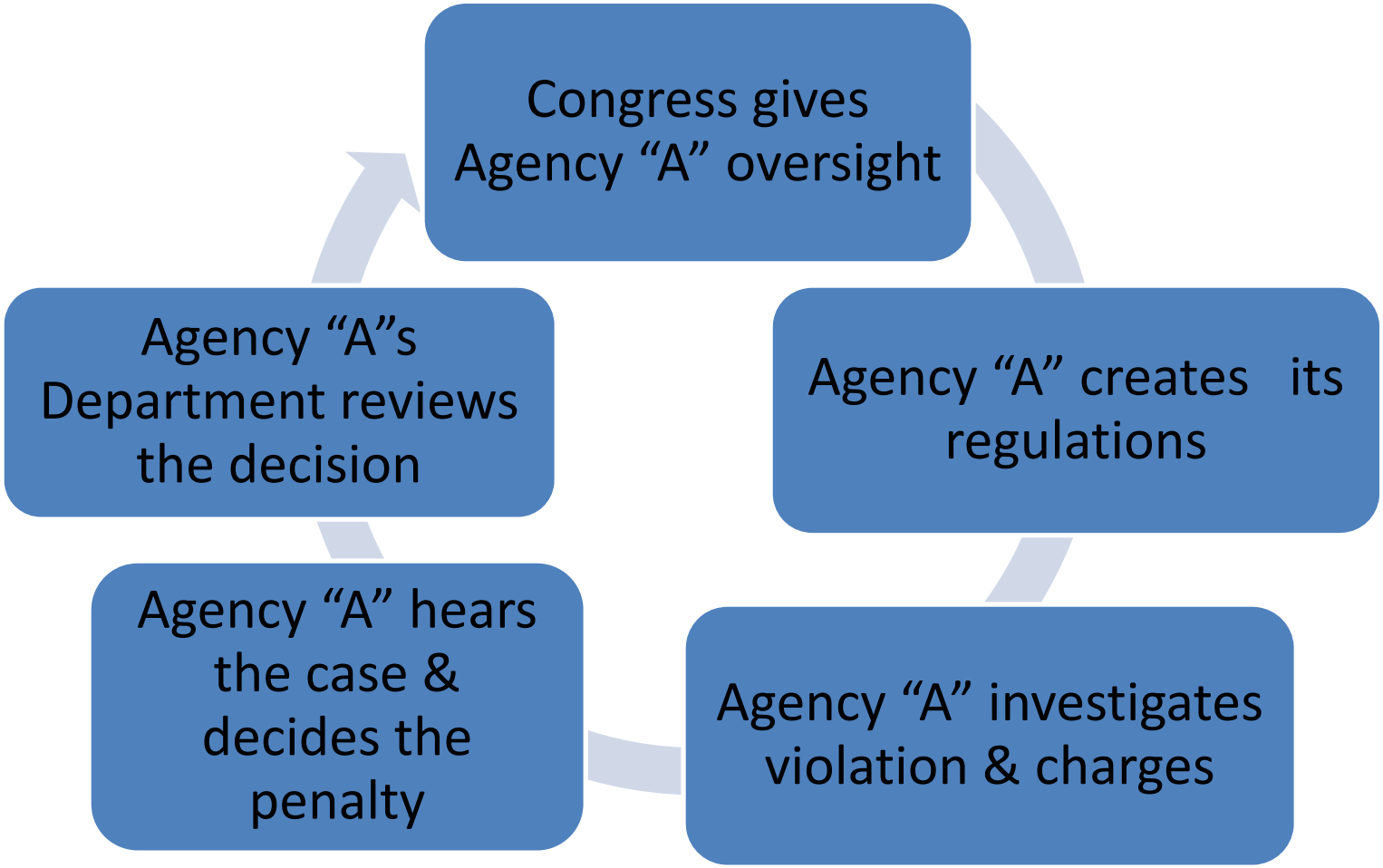
Deciding Which System to Use?

- A BLM law enforcement case isn't over until (1) it's closed without further action, or (2) one of the three resolution systems is used to conclude it.
- The government must always make a choice for enforcement actions. There are advantages and disadvantages to each resolution system.

Deciding Which System to Use?

- As the lead officer, you must be able to evaluate your case, determine it’s strengths and weaknesses and make recommendations for which of the three resolution systems will be the best.

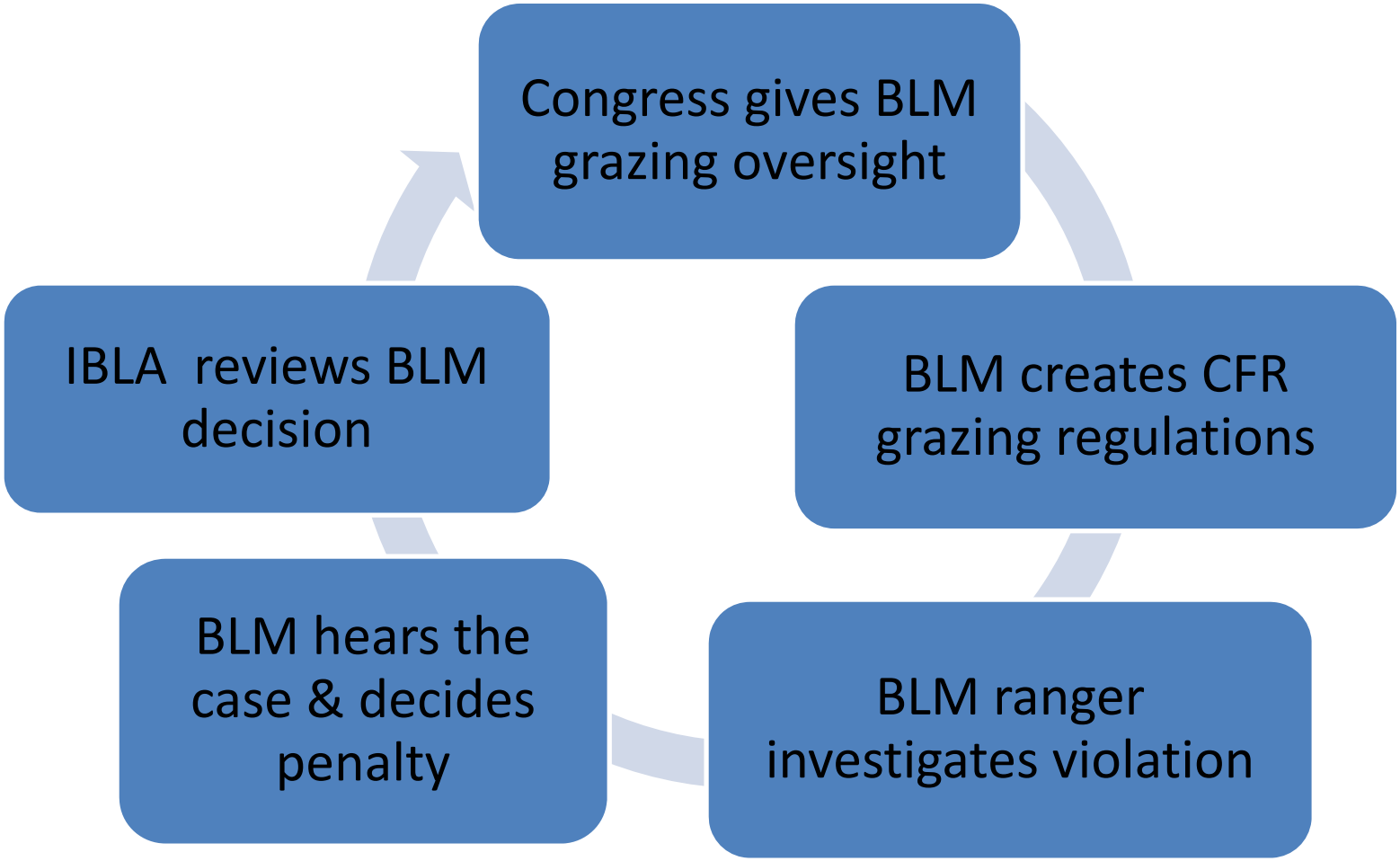
Example: Agency Law-making Authority



Agency Law-making Authority

- The previous slide shows the standard process by which an agency may:
  - Be granted authority from Congress to regulate an activity on public lands
  - Create the regulation (in the CFRs) related to that activity
  - Investigate and determine if a violation has occurred of the regulation
  - Assign an administrative penalty for the violation
  - Review it’s own decision if challenged

A BLM Specific Example



Agency Law-making authority

- As you can see, the BLM is capable of defining a violation, publishing regulations about that violation, investigating that violation itself and determining a penalty, all within the agency.
- Although looking similar to the criminal law system, the administrative system may have advantages that will bring a better overall result in your case. We will compare these advantages in this training.

Deciding on a Resolution System

We will now look at the pros and cons of using each individual resolution system: criminal, civil and administrative. Each system is the best in some circumstances and less useful in others.

Without knowing the advantages and disadvantages for each of the three systems, an officer may choose a resolution method that doesn’t bring the best result for the BLM.

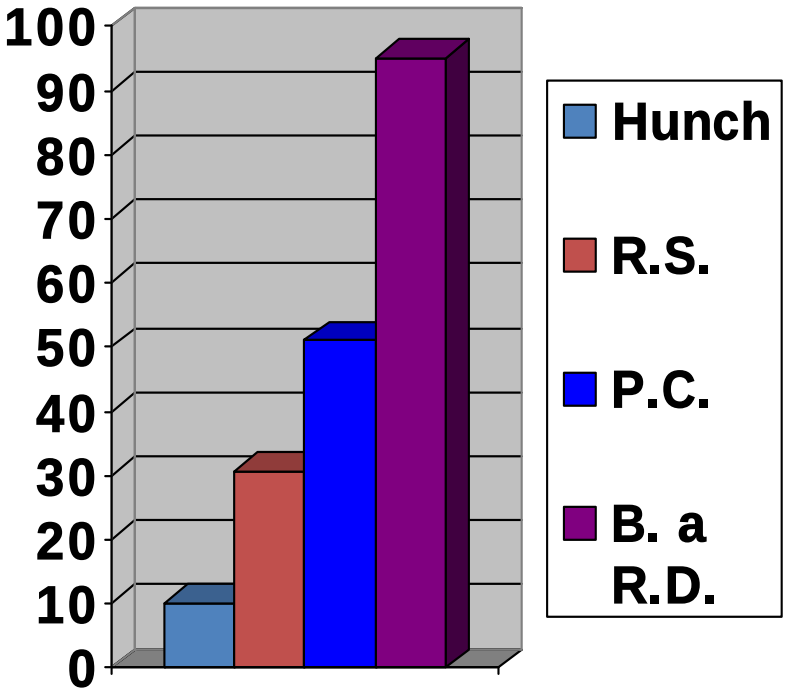
Deciding on a Resolution System

We will compare 3 resolution systems based on:

- What burden of proof is required by the system?
- Which Federal rules apply to the system?
- What sanctions are available?
- Does double jeopardy apply?
- Who is available to help you?
- Who will review the decision?
- Other Relevant considerations?

1. What will be the Burden of Proof?

- Criminal Prosecution: Beyond a reasonable doubt.
- Administrative: Greater weight of evidence; not arbitrary or capricious.
- Civil: At least a preponderance of the evidence; sometimes more.



What will be the Burden of Proof?

- *semper necessitas probandi incumbit ei qui agit,* : “The necessity of proof always lies with the person who lays charges.“
- Burden of proof refers most generally to the obligation of a party bringing any type of case to prove its allegations at trial or hearing.
- Since in our examples the BLM is always bringing the charges, we always have the initial burden of proof.

What will be the Burden of Proof?

- **Preponderance of the evidence**, also known as balance of probabilities, is the standard required in most civil cases. This is also the standard of proof used in Grand Jury indictment proceedings.
- The standard is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than 50 percent chance that the proposition is true.

What will be the Burden of Proof?

- **Clear and convincing evidence** is a higher level of burden of persuasion than a preponderance of the evidence. It is employed in many Administrative Court determinations, as well as in civil and certain post-conviction criminal procedures in the United States.

What will be the Burden of Proof?

- **Clear and convincing evidence** is a lesser requirement than "Proof Beyond a Reasonable Doubt", which requires that the trier of fact be close to certain of the truth of the matter asserted, but a stricter requirement than proof by "Preponderance of the Evidence,"

What will be the Burden of Proof?

- **Beyond a reasonable doubt** has been described as, in negative terms, a proof having been met if there is no plausible reason to believe otherwise. It does not mean an absolute certainty.
- It does not mean that no doubt exists as to the accused's guilt, but only that no reasonable doubt is possible from the evidence presented.

2. What Rules will Apply?

- Criminal Prosecutions: Both Federal Rules of Evidence and Criminal Procedure apply.
- Civil Judicial Proceedings: Both Federal Rules of Evidence and Civil Procedure apply.
- Administrative Proceedings: Neither Federal Rules of Evidence or Procedure apply. The Administrative Procedure Act applies. Often, more freedom is available to introduce evidence and relevant documents and materials.

2. What Rules will Apply?

- The Federal Rules of Criminal Procedure:
  - http://www.law.cornell.edu/rules/frcrmp/
- **Title 28 USC, § 2072. Rules of procedure and evidence; power to prescribe:** The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

Federal Rules of Criminal Procedure

- The **Federal Rules of Criminal Procedure** are the procedural rules that govern how federal criminal prosecutions are conducted in United States district courts.
- The admissibility and use of evidence in criminal proceedings (as well as civil) is governed by the separate Federal Rules of Evidence. Find those rules here: http://www.law.cornell.edu/rules/fre/

Federal Rules of Criminal Procedure

- The rules are promulgated by the Supreme Court of the United States, pursuant to its statutory authority under the Rules Enabling Act.
- Congress also retains the power to reject the Court's proposed rules or amendments, to modify them, or to enact rules or amendments itself. It has rarely rejected the Court's proposed amendments, though it has frequently passed its own.

Federal Rules of Civil Procedure

- The Federal rules of Civil Procedure: http://www.law.cornell.edu/rules/frcp/
- The Federal Rules of Civil Procedure (FRCP) govern civil procedure (i.e. for civil lawsuits) in United States district courts.
- The FRCP are promulgated by the United States Supreme Court and then the United States Congress has 7 months to veto the rules promulgated or they become part of the FRCP.

Federal Rules of Civil Procedure

- Although federal courts are required to apply the substantive law of the states as rules of decision in cases where state law is in question, the federal courts almost always use the FRCP as their rules of procedure. States may determine their own rules, which apply in state courts, although most states have adopted rules that are based on the FRCP.

Administrative Procedure Act

- Find the entire A.P.A. here: http://www.law.cornell.edu/uscode/text/5/part-I/chapter-5
- The **Administrative Procedure Act** (**APA**), is the law that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations.

Administrative Procedure Act

- The APA also sets up a process for the United States federal courts to directly review agency decisions. It is one of the most important pieces of United States administrative law. The Act became law in 1946.
- The APA applies to both the federal executive departments and the independent agencies.

Administrative Procedure Act

- Agencies are unique governmental bodies, capable of exercising powers characteristic of all three branches of the United States federal government: judicial, legislative and executive.
- The separation of powers doctrine is less of an issue with rulemaking not subject to trial-like procedures.

Administrative Procedure Act

- The basic purposes of the APA are: (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; (4) to define the scope of judicial review.

Administrative Procedure Act

- The APA gives the BLM great deference in making it’s decisions.
- The APA requires that in order to set aside agency action not subject to formal trial-like procedures, a federal court must conclude that the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law”.

Administrative Procedure Act

- How created: Rules and regulations issued by federal administrative agencies, including the BLM, are published by date of issuance in the Federal Register. Rules and regulations are then organized by topic in a separate publication called the CFRs.
- Approved CFRs become law.

3. What Sanctions are available?

- For Criminal Prosecutions:
  - Incarceration , forfeitures, fines.
- For Civil Judicial Proceedings:
  - Money damages or injunction.
- For Administrative Proceedings:
  - Specific sanctions based on the case(revocation of licenses/permits) and financial penalties.

What Sanctions are available?

- Sanctions in the criminal system are already known to BLM officers. Civil sanctions do not include incarceration, but may include monetary penalties or orders from the Court requiring a party to either do, or not do, a specific action. (a “court order” or an “injunction”).

What Sanctions are available?

- Administrative sanctions vary widely under federal law, and can often be structured by the BLM to more appropriately deal with the violation(s).
- Administrative sanctions may include debarment, loss of a permit, change of permit, civil money penalties (including “fines” and “forfeitures”) and many others.

4). Double Jeopardy?

- Application: Only to Criminal Prosecutions.
- Different Burdens: Systems of resolution having different standards of proof are not in jeopardy of one another.
- Criminal and Civil Sanctions: Congress may impose both criminal and civil sanctions for the same act.

Need Assistance?

5). Who is available to help you?

- One of the most important considerations in deciding which resolution system to use is: how much help will you need in the case?
- One of an BLM officer's strengths is the ability to work out difficult problems alone, or with minimal assistance. However, this trait can also work against you in some cases.
- In general terms, always consider if you may need an expert witness or specialist to assist you?

Who is available to help you?

- “When you are a hammer, everything looks like a nail.”
- We all want to feel competent in our jobs. Unfortunately, officers trained only in the resolution of cases through the criminal justice system may tend to use that system exclusively, whether or not it meets the best interests of the agency.

Who is available to help you?

- For example, go to this current BLM organizational chart. How many areas are you truly familiar with?
- http://web.blm.gov/portal/global/_assets/links/blm_org_chart.pdf

Who is available to help you?

- Perhaps the best link to learning more about the BLM's many natural resource areas is through the National Training Center (NTC). This NTC link is a good reference you may wish to keep handy:
- http://www.blm.gov/wo/st/en/prog/more.html

Who is available to help you?

- Within the BLM, you will find these people helpful:
  - BLM Staff Specialists
  - BLM Managers (Field, District)
  - Other BLM Law Enforcement personnel
- Outside the BLM, you will need assistance from:
    - U.S. Attorney, Criminal Division
    - U.S. DOJ Civil Division Attorney
    - U.S. DOI Solicitors

Who's Who Among Attorneys?

DOI Solicitor

- Principal legal advisor for DOI Agencies
- Handles DOI Administrative Cases
- Assists DOJ in some litigated cases

U.S. Attorney

- Executive Branch legal advisor for all Agencies
- Primary Prosecutor
- Handles both Civil & Criminal Cases

Office of the Solicitor

- The DOI Solicitor's Office performs the primary legal work for the United States Department of the Interior. Their primary client is the Secretary of the Interior. They provide advice, counsel and legal representation to the Office of the Secretary, the Assistant Secretaries, and all other Bureaus and Offices overseen by the Secretary.

Office of the Solicitor

- More than half of the attorneys are assigned to regional and field offices located as far west as Anchorage, Alaska and as far east as Boston, Massachusetts. The rest of the attorneys are assigned to various divisions located at headquarters in Washington DC.
- Find a full list of Regional offices here: http://www.doi.gov/solicitor/regions.html

Who is available to help you?

Other interested parties who may affect your decision as to which resolution system to use include:

- Interior Board of Land Appeals (IBLA)
- Administrative Law Judge
- Federal Judges and Magistrates
- Jury in a criminal case

Interior Board of Land Appeals (IBLA)

- The Interior Board of Land Appeals (IBLA) is an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior.
- Located within the Department's Office of Hearings and Appeals, IBLA is separate and independent from the Bureaus and Offices whose decisions it reviews.

Interior Board of Land Appeals

- The IBLA handles administrative decisions for BLM, Mineral Management Service, Bureau of Indian Affairs and the Office of Surface Mining Reclamation and Enforcement
- Its decisions are final for the Department but can be appealed to Federal District Court.

Interior Board of Land Appeals

- Legal Standard for court review on IBLA: a BLM administrative decision will <u>not</u> be set aside if it is reasonable and substantially complies with the provisions of the relevant regulations.
- To be overturned, the decision must be arbitrary, capricious or inequitable…only if the decision is not supported by any rational basis will it be overruled.
- Burden of proof is on the objecting party.

Internal Expertise Available

Resource Specialists

Expertise in resource management, range, archeology, minerals, recreation, lands and titles, permitting, finding public records

Law Enforcement Officers

Expertise in recognizing violations, documentation, interviewing, evidence collection, case management and prosecution

Expertise Available

- Administrative cases – there really is NO outside reliance in these cases. BLM can prepare all the documents and all the responses for IBLA. We may use the DOI Solicitor for help in preparing these documents.
- Experts and/or Specialists needed for preparation and/or hearings will normally come from within the BLM.

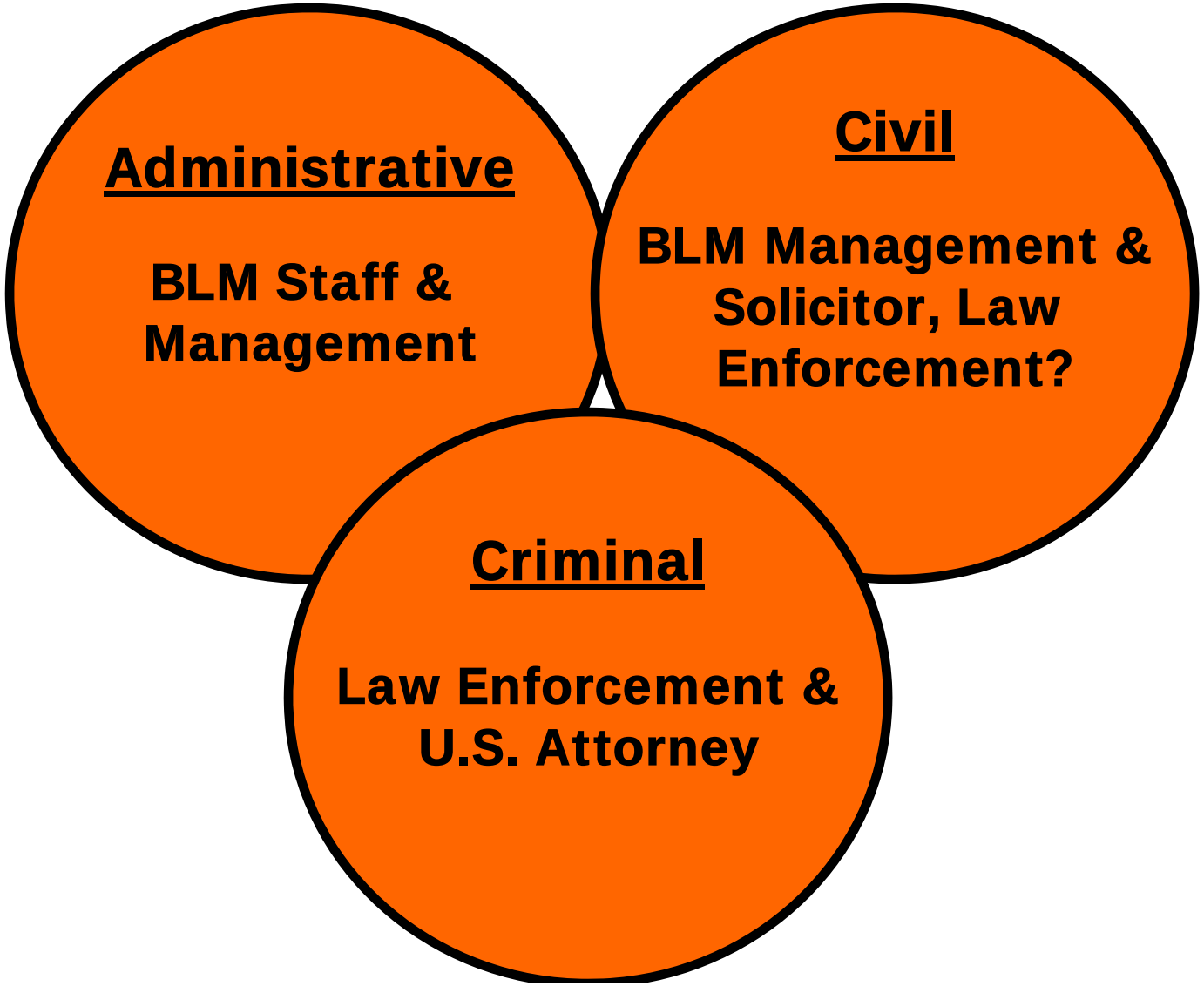
6). Who Will review the Case Decision?

- In a criminal case: US District court, US Court of Appeals, US Supreme Court
- In a civil case: the same
- In an administrative case: per the Administrative Procedures Act , the review of a BLM decision normally resides within the BLM. However, a review of the system itself may be brought in Federal district court.

7). Other Relevant Considerations in Choosing a Resolution System

- How much natural resource damage?
- How quickly do you need a remedy?
- What previous contacts have there been?
- Is all your evidence admissible under strict criminal law standards?
- Community support: strong or lacking?
- Employee interest: are there valid reasons to pursue or refer the case for office morale?

Who’s doing the Investigation?



Who Investigates?

- <u>Criminal</u>

  Who: primarily BLM Law enforcement, aided by the U.S. Attorney's Office and other LE agencies

- <u>Civil</u>

  Who: BLM law enforcement and management together, aided by the Solicitor's Office and possibly DOJ Civil Division attorneys

- <u>Administrative</u>

  Who: BLM management and maybe law enforcement

Comparison of Resolution Systems

	Administrative	Civil	Criminal
Investigators	BLM Management & Staff	BLM Management Solicitor	Law Enforcement U.S. Attorney
Basis for BLM Decision	Documents Reports of Violation	Documents Evidence/Statement	Evidence of Action & Intent
Rules Applied	Regulations/Laws	Civil Law	Criminal Law
Process Control	Complete	Some	None
Outside Reliance	None	USDOJ/ENRD	U.S. Attorney
Reviewer	IBLA/Federal Judge	Federal Judge	Jury
Standard	Not Arbitrary or Capricious	Preponderance of the Evidence	Beyond Reasonable Doubt
Outcome	Adverse BLM Decision	Judicial Decision	Conviction
Enforcement	Reduced Benefits or Monetary Charges	Injunction Threat of Contempt	Fine Prison

The key to working together to determine the proper resolution is actually working together.

Keys to Working within BLM

- Recognize that LE may keep information quiet while resource specialists tend to share information.
- Take time to know your local resource specialists. Treat them like an asset.
- Spend a day with them in the field.
- Always participate in monthly staff meetings, even if inconvenient to your work schedule.
- Always keep your manager in the loop.

Communicate Your Decision Factors:

- Fact: No one is a mind reader. There are countless examples of LE cases handled incorrectly because people didn't communicate. And they didn't communicate because often they thought the other people knew what they knew.
- Always keep in mind: ***You don't know what you don't know.***
- What are important decision factors?

Important Decision Factors to Discuss:

1). Safety of Public and BLM Employees?

2). How much natural resource damage?

2). Is there urgency for a remedy?

3). Previous Contacts? Of what type?

4). Do we really have provable criminal intent?

5). Sufficiency of admissible evidence?

7). Other considerations: community support, employee morale, sufficient resources, budget, etc.

Communicate Your Decision Factors

- Of prime importance is the safety of the public and our employees. Will our decision result in continued safety for people on public lands?
- Our second decision usually looks at the natural resources. How urgent do we need to move….how fast will we get compliance?
- Criminal history? We take a different look at a situation if we have continually contacted the same person over and over.

Communicate Your Decision Factors

- We also look at provable criminal intent. (for example, think about a grazing trespass where when you contact the permittee they say “I know I have my cattle grazing without a permit. I know I need a permit. I’m not going to get a permit”).

Final Review

- Each resolution system has it's own advantages and disadvantages. One will often bring the best result. Part of an officer's job is to sit down with other interested BLM parties and objectively consider each option.
- Before you move on to the final slides, see if you can list several advantages and disadvantages for each resolution system. Then check the following slides.

Considerations for Using Criminal Process?

- Highest burden of proof
- Defendant need not testify or cooperate at all
- Everything must be proven by government
- May have the right to counsel & a jury trial
- Strict procedural rules…speedy trial, discovery
- Venue…only where offense occurred
- Strong penalties: incarceration, fines, forfeiture
- Often takes the longest time to resolve
- May get the most publicity for deterrence

Considerations for Using Civil Process?

- Lower burden of proof than criminal
- Invocation of 5th amendment or non-cooperation can be used as admission of guilt
- All rules of evidence and procedure still apply
- Venue is broader…where D is located, where agency is located, or where event took place
- Remedy is usually only money or injunction
- No free lawyer or right to trial
- Can take as long or longer than Criminal
- May be considered “cost of doing business”

Considerations for Using Administrative Process?

- No right to jury trial or free lawyer
- Heard by Admin. Law judge or a hearing officer
- Burden of proof is often only a preponderance
- Refusal to testify may be used against party
- Remedies are more specific to offense:
  - Contract changes, debarment, revocation of licenses or permits, etc.
- Venue…anywhere within region of the agency
- Can usually be resolved sooner

Other Benefits of Administrative Resolution?

Greater flexibility in carrying out the intent of Congress and the BLM mission:

- Expediency in Decision-Making… it's faster
- Greater Expertise from Administrative Law Judge…experience in DOI technical issues
- Greater opportunities for accuracy and fairness
- Greater in-depth discussion of the technical points of law