

## Planning Nuts and Bolts: Administrative Record

As you're going through the planning process, there are many considerations that you need to have in setting up how you're going to do planning. A very important element to that is managing information; managing information in terms of creating the record that's going to ultimately support your decision.

This section is going to be discussing the requirements related to the administrative record. And how, when you're going through the planning process, you should be thinking about this starting at day one and throughout on management of the information, not just in terms of Freedom of Information Act and public records issues that might be a requirement related to some other laws, but in terms of that ultimate decision making process and that record that's going to support it.

Just in case something might come up at the end of the process in terms of a protest, in terms of an appeal, in terms of litigation, the administrative record becomes very, very, very important.

So, we're going to be talking about why it's important. We're also going to be talking about some of the considerations as you're going through planning and creating this administrative record.

As I mentioned, it's important because it shows the public, it shows your participants you kept all the information, you evaluated all the information, you used the information where relevant in making your decision on the plan. It also shows that you're complying with other laws. Whether it be things like the Endangered Species Act, Clean Air Act, Clean Water Act, whether it be compliance with FLPMA and the BLM regulations, planning regulations, whether it be complying with NEPA. All of these elements should be reflected somewhere in the administrative record.

It provides support for the decision that is going to be made at the draft EIS stage and then at the final EIS stage in terms of that plan that's proposed and that plan that becomes final. It also, as I mentioned, just in case get to the legal challenge at the end of the process, this is the body of evidence that the federal government uses to support its case, that the action was reasonable. So, it's going to use this information. The court is going to review it; the court is not going to interview every person that was on the ID team, was within the planning process, was participating. The court uses the administrative record to judge whether the final decision was reasonable.

It also is used as a part of this process ultimately for that standard to say, when the federal agency got this letter from the state or local agency or from an interested group, did they - - was their action arbitrary? Was it inconsistent with the facts that were presented in front of them in a way that no reasonable person would have done that kind of action? Again, it's the administrative record and all of that information, the studies, the analysis, the information from others, all of that that helps support that final decision.

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As you're developing the ultimate plan, as you're developing the ultimate final EIS, there's a lot of information that might necessarily be in the actual document. You'll have a final document at the end of the process, or these days you might have a final CD, with all the information at the end of the process. But that isn't the entire administrative record. Again, as you're starting the plan process, you should be thinking about all the notices that you do. Well, how are they collected? Is that a part of the administrative record? Yeah, everything that you're doing in terms of public outreach, everything you're doing in terms of soliciting information and what you receive is a part of that solicitation; that supports your ultimate decision. You may not actually decide that that information is relevant. Well, why is that? Well, there might be something in the record that says it's not relevant, it needs to be updated, whatever the case is. But it still supports the ultimate decision. It's the starting point on which you ultimately develop that final plan. So you have the record of decision, if you will, the tip of the pyramid and you have that final plan and the final EIS, but there's underlying information that if you don't have it, that final decision fails. You're only as good as the information - - Your final decision is only as good as the information that it's based on. So, without it, it ultimately, most likely will fail, either because of a court challenge, because of a protest or appeal, an administrative review of some kind. That's the important element as you're working through this process.

If you will, graphically, it really is kind of a pyramid. That information that you collect, the analysis that you do on it, the relevant information submitted by others, all sets up, you know, maybe the next level of planning information that an analysis that BLM does. Maybe it sets up how you do your biological assessment on the endangered species side. It's going to set up how you develop your goals and objectives. It's going to set up all of that information that eventually feeds into the actual plan. And again, that final decision, that doesn't stand on its own. It stands with all of that supporting information. You're not going to include the entire body of information in that plan. Your appendices would be long and, well, basically, something that would be very difficult for the public or decision makers to pour through. So that's why you think about it in terms of how you manage this administrative record. It's not all going to go in the plan, but it should be saved somewhere and some kind road map developed, if you will, on saying why it's relevant or not relevant depending on the case for the management of that ultimate administrative record.

You're going to be developing the administrative record and the elements of it in terms of what information you start with. You might be starting with a plan that already exists. That is part of the administrative record, basically setting the past practice related to land uses. So you'll have that and that information, could be environmental analysis also. You might have past environmental analysis based on plan amendments or implementation of the plan in the past. You could have published reports from the scientific community, from state agencies, from non-governmental organizations. A number of different entities may have relevant published information on species information, on land use issues, on resource issues. All of that could be part of the administrative record. You could literally have references related to general categories of issues, resource issues, species issues that could be important.

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You then will have the specific information to your planning process that also needs to be considered. Again, starting with the notices at the very beginning of the process, your preparation plan, and the information that goes into that leading up to the information that you collect that's part of the actual plan process, the studies that might need to be done in addition to what's already been done. The draft EIS then becomes, of course, part of it. The appendices related to the draft EIS and then that final EIS and all of that information that comes into that. That includes submittals from other agencies, includes submittals from non-governmental entities, the public. All of that is part of the admin record. Again, you might not think it's relevant, but you should create a record to say why it's not relevant. You want to create this literally as a road map, so if ever a judge is looking at this after the fact, they can say, yeah that information was submitted but here's why BLM didn't consider it or here's how they did consider it and here's how they did include it in the plan. So all of that is important as you're developing your admin record because, again, that's what the judge reviews. The judge does not have a Perry Mason moment where the planning lead comes in and swears to tell the whole truth and nothing but the truth, it's typically done by just reviewing the administrative record. And the administrative record could be quite large, it could be a file cabinet, it could be several cabinets, it could be lots of boxes of information.

And that leads to the next issue is, how are you going to organize it? How are you going to maintain this administrative record? Originals are very important. It's very important to keep information as you receive it, not modify it, not change it, but possibly create information linking it to what happens next. If you get that letter and it requires a response, how are you going to respond? All of that should be part of the admin record. But as you collect it, you need to be thinking about ways to organize it. Again, these processes take a long time, so your years and years of information could be collected; staff turns over, so you may have different staff managing it at different times. I know it's difficult when one staff leaves and they give you a box of information and says, "Here, that's all my information related to this particular plan effort." That's challenging to sift through and try and figure out what's here. Or, after the fact, when you have references to certain documents that a particular resource person has put together and that resource person isn't there anymore to ask those questions like where is it, how is this relevant. Doing an admin record collection after the fact creates many challenges and that's why it's recommended to start at the very beginning of the process and think about, okay, how are we going to organize this. What kind of direction do we give to staff, what kind of direction, if you're hiring contractors, what kind of direction are you going to give the contractor in order to help you maintain the admin record. What kind of direction are you giving your collaborators, those other agencies that are involved? One of the challenges with this is if you have other agencies that are involved in the process, they might not understand admin record issues and may be collecting their own information. They may have their legal requirements. So, making sure you have communication with those other folks that are taking part in your process and how they're feeding you information, how they're saving and collecting things.

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You could possibly be doing things electronically. One of the challenges also, in the electronic age related to email and other non-hard copy pieces of information, websites for instance, it's very difficult, sometimes, to track that. So, making sure you give your staff, your team direction upfront on how you're going to be saving information is very important. Ultimately, it comes down to the judgment of the quality of the admin record is if there's a legal challenge, but you don't know that up front if that legal challenge is going to happen, so starting day one in maintaining a well-organized and complete admin record is very, very important.

Again, the challenges associated with the administrative record is when you can't find something. If there's a reference to a document that no one can find, or a letter, this can be quite a challenge if you're trying to show a judge we considered a certain piece of information and it doesn't exist in the admin record. Basically, if it's not in the administrative record, it didn't happen, according to a judge, so it needs to be in there. If it's unorganized, that's frustrating from a review standpoint and it may make a judge's job more difficult and it may make them less able to see the logic in the planning process that you've done. So, all of that good work that you're doing right now in your plan process could be for not if you didn't organize the admin record and keep a clear road map of your decision making process.

Again, if there's staff departures, collaborator departures, you have people that leave that aren't necessarily coordinating with you on the information that they're using, it may be difficult after the fact to go and try to recreate it. When you're working with your staff and the collaborators, they all need to be knowing up front how you're going to maintain that. If you're going to maintain it electronically, if they're sending information through certain electronic means, make sure you have an adequate site set up to maintain that information.

Again, when you collect certain information, when you have these pieces on the record and yet you don't explain how it's relevant or why it's not relevant, that's also an important decision that needs to be made and reflected in the administrative record. Because the consequence basically is that the judge may overturn the final and, as I said, all that good planning effort be for not and you might have to go back and re-do certain aspects of the plan just because the record wasn't collected. You might have done a great job, but it just wasn't reflected in the record. So that's a very important consideration as you start the plan process.