

>>C. Humphrey: So your project file has been developed. Your NEPA document has been written. And now a protest or appeal or lawsuit has been filed. So, you've got to put together an administrative record for your solicitor. Attorney-Advisor Michael Williams is here to take us through that process.

Again, don't forget, if you have any questions or best practices, ideas, thoughts to bring up, make a note of them and we can talk about it later. Michael?

>> M. Williams: Thanks, Cathy. I'm going to talk more about what an administrative record is, why we have one, who might put one together, when we have to put it together and maybe I'll talk a little bit about how it might be organized.

But first, I want to go back in time... That music is supposed to signify merry old England in the medieval days. Many of our laws come from England, including the idea the King can do no wrong. We have this same law in the United States and we call it sovereign immunity. The United States has sovereign immunity, which means that it's generally immune from lawsuits. No one can sue the United States.

But you all heard that the United States can be sued and just like in England where the King can waive sovereign immunity good-bye, the United States can waive sovereign immunity good-bye also. It's done this in several instances. In the 1930s when Roosevelt was president the executive branch of government was becoming very powerful and this made Congress nervous. So Congress came up with statutes to waive United States sovereign immunity good-bye so that the checks and balances of all the different branches of government would be more equal.

One of the ways it did this was with the Administrative Procedures Act. Another instance is the Federal Tort Claims Act. The Federal Tort Claims Act is where a member of the public can sue the United States due to the negligence of a federal employee. And a third instance is the Tucker Act, where if the United States breaches a contract, the party harmed by that breach can sue the United States.

We're not going to talk about the Federal Tort Claims Act or the Tucker Act today. We're going to focus on the Administrative Procedure Act. Under the Administrative Procedure Act, anyone who is aggrieved by an agency action within the meaning of a relevant statute can get a court to review that agency action.

So what does the APA mean by a relevant statute? I've listed statutes here relevant to the BLM every day, this includes FLPMA, NEPA, maybe the Mineral Leasing Act, the Wild Horse and Burro Act, Taylor Grazing Act. This list is not all inclusive, but pretty much every statute we work with on a daily basis could be a relevant statute under the Administrative Procedure Act.

Most of these statutes do not have provisions that allow you to sue the government. Like NEPA, you can't sue the government under NEPA directly. You have to go through the Administrative Procedure Act.

So how does a court decide if the BLM violates the APA? Here's the familiar language from the APA.

APA prohibits agency actions that are arbitrary, capricious and not in accordance with law. The "not in accordance with law" part is how the APA incorporates the other statutes like FLPMA, the Mineral Leasing Act or NEPA. Courts look to the administrative record to decide if the BLM acted in an arbitrary and capricious manner.

Before we jump into the excitement of administrative records, I wanted to remind everyone the statute of limitations insure the APA is six years. This means that the decision-maker today who is making a BLM decision, that person may not be around in six years, but the public has six years after a Record of Decision is signed to sue the BLM based on that decision. That underscores the importance of having a good project file so that six years from now when everybody in the office is different they can pick up that excellent project file containing everything that Megan and Anne talked about and work with the solicitor to turn that into a good administrative record.

When preparing for this class, Linda Garrison discussed several analogies I like a lot. I hoping on your screen is a picture of a motorcycle ranger. I like this picture a lot. I want your administrative record to be like this motorcycle ranger. It needs to tell a good story, explaining how BLM made its decision. It needs to be a beautiful picture, showing every aspect of all the different Resource Specialists who contributed to this decision.

And I like GIS analogy. The administrative record needs to be like a map showing how the BLM got from point A, the Purpose and Need of a project, to point Z, the final decision record.

So how does a court decide if the BLM was arbitrary and capricious? The BLM must show its decision is supported by some set of facts. Many people think the BLM gets to testify in court when we're sued. This is not true. People think maybe the State Director can go to the court and the lawyers could question her about how the BLM arrived at the decision and then the State Director will explain in a reasoned manner. But that doesn't happen. We don't get a chance to explain ourselves in person.

The administrative record is what the court looks at and it's the only thing the court looks at. Like Linda said earlier, if it's not in the admin record, it didn't happen. The most important thing the administrative record does is show the court how the facts are connected to the decisions being made.

The Supreme Court has stated that we will uphold a decision of less than ideal clarity if the agency's past may be reasonably discerned. This is kind of cool.

What is the ideal decision? There is no ideal decision. The BLM can make a dumb decision and I will make my legal disclaimer here that I've never seen the BLM make a dumb decision and I'm not advising that the BLM make a dumb decision, but so long as the BLM's decision is supported by some set of facts, then the BLM can make that

decision.

FLPMA requires the BLM to balance many competing resources, sometimes recreation, sometimes mineral development, sometimes travel management, and these resources don't always work well together. The FLPMA mandate requires the BLM to balance these competing resources. So not everyone is going to agree with the decisions the BLM makes. This is why judges have decided that they're not going to examine BLM decisions to see if they agree with the BLM. They just want to make sure that the BLM decision is supported by the record.

The Colorado District Court in a BLM case has said: so long as the BLM engaged in proper procedural steps in making its decision and so long as that decision draws its essence from substantial evidence in the administrative record, the actual wisdom of the BLM's decision is beyond the scope of the court's review.

This is a beautiful thing about the APA review that the courts do. Courts are going to defer to the BLM's interpretation of the statutes that the BLM carries out. This gives BLM a tremendous advantage that we can use to smite our foes if the administrative record is silent, however, and it doesn't contain the valuable opinions of our resource specialists, then the court has nothing to defer to.

In a recent Tenth Circuit case, the court examined the BLM's decision to open an area to leasing in southern New Mexico. The court found very few facts supporting the BLM's decision and said: we cannot defer to a void. Instead of a void the admin record should show first the statutes and regulations you acted under, including all the IMs we take for granted every day and we act under. We need to make sure they're all listed in the administrative record. Second, we need to show the facts we relied on. And, third, I think this is most important, we need to show the court that we considered multiple viewpoints. The court doesn't want to see that the BLM made its decisions with blinders on, that it made decisions that were predetermined. That's not good.

We want to show the court that we considered, of course, the outside voices of dissent. These may be public protests from industry or recreation groups. But we always -- we often forget the internal voices of dissent. Anne alluded to it earlier. The BLM is not always a happy family. We may have resource specialists who disagree with each other. Sometimes it may be even in the same area. There may be two biologists who are not agreeing or two archaeologists arguing even perhaps. The administrative record should contain the evidence, the e-mails, the meeting notes of these internal arguments that we have, but it's also important that someone, perhaps the decision-maker, put a memo to file showing how these differences were resolved.

The audience for the administrative record is the court. Or more frequently it is the recent law school graduates who are the clerks for the judge. These recent law school graduates, these baby lawyers, don't necessarily know anything about public lands or even the west or what the BLM does every day. So the administrative record needs to contain a lot of information to educate these baby lawyers who are assisting the judge in

making the decisions.

The secondary audience for the administrative record is the Department of Justice. When the BLM is sued it's the Department of Justice attorneys who are defending the BLM in court. This means they're writing all the briefs that the judge reads, and that the Department of Justice attorneys review the administrative record, and the solicitors help as go-betweens between the BLM and the Department of Justice.

Last year the BLM in New Mexico wanted to include some greenhouse gas studies.

I'm sorry I've gotten ahead of myself here. There's one important rule, and it's a primary rule for administrative records, and that's courts can review agency actions based only on the information before the agency at the time of the decision. This means you cannot include documents that were created after the decision record is signed in the administrative record.

For example, last year in New Mexico, the BLM wanted to include some greenhouse gas studies that were created by the EPA, I believe, after the BLM had made its decision. These studies supported what BLM did but they're created after the decision record is signed. This is called post-hoc rationalization and lawyers do not like this. This is a no-no. Courts would not allow the BLM to do this if we tried. So only include documents that are created before the decision record is signed.

I've got a list of things that Megan said to include in the project file that I wanted to repeat. The first is that, please, include, of course, external dissents, but also the internal dissent to show our internal disagreements and how those disagreements were resolved.

Second, memoranda to the record, the memoranda to the record is how the decision-maker or someone else, a project leader, could show how they considered the different viewpoints of the resource specialists, and then decided to choose one way or another.

And lastly, meeting notes, like Megan said earlier, I've attended too many BLM meetings where nobody is taking notes and there's important decisions taking place. Sometimes I'm the only one taking notes and my notes are protected by the attorney-client privilege. As we'll talk about in a second, my notes go into the administrative record frequently, but they are protected by the attorney-client privilege and kept in a separate confidential part of the admin record.

So who puts the administrative record together? Ideally it is someone from the BLM, maybe a project leader, the same person who put the project file together. But the BLM is going to work with the solicitor's office and the Department of Justice to put it together.

Courts want someone who certify the administrative record. The certification is just a piece of paper that someone from the BLM signs saying that the administrative record is, in fact, a true and correct copy of what it purports to be. This is just an evidentiary hoop

the courts make us jump through. Unfortunately the solicitor cannot sign this document. It needs to be someone from BLM. Sometimes if it's a large administrative record made up from various field offices the people who are responsible for their Field Office's portion of the administrative record could sign separate certifications just for that Field Office. There could be multiple people signing multiple certifications. The solicitors would help the BLM in that process.

These days, courts are wanting an electronic copy of the administrative record on a disk, and they usually want it very quickly. As Linda said earlier, it could be as short as 30 or 45 days. I've also had as long as six to nine months, which is quite a luxury, but you never know what the court is going to decide. When we're sued, the court sets the time that the administrative record is due, and it could be very quickly.

I've got a list here of some sample index criteria. How the administrative record is organized is very subjective because you never know on what aspect of a BLM decision we're going to get sued on. But every document in the administrative record will need to be scanned, and usually into PDF, and put onto a disk, and be made word searchable, and every single document in that electronic record will need to have a Bates number.

A Bates number is something lawyers use. It's a unique sequential number. In the olden days they had a stamp, and every time they would stamp the document, the number would go forward one number. Nowadays in the world of Adobe Acrobat, you can use PDFs to electronically write that number on each electronic page. Contractors maybe -- maybe have some kind of contract magic they can use to put the number down there as well.

The overall organization of electronic files on an administrative disk can vary completely. I would encourage when you're sued that you work closely with your solicitor to talk about the organization that the administrative record will take.

Other index headers I've shown are self-explanatory, but I want to focus on the privilege status. In an administrative record you want to include privileged documents, but I want the BLM to try and mark the privileged documents that are in the administrative record and keep them separate. This means that when you're keeping the project file before the decision is made, you want to make sure that all the documents that are in the project file that may be privileged are marked and kept separate. Maybe put them in a separate physical folder, maybe drag them to a separate electronic folder marked privileged. The BLM should be making the first attempt to mark the privileged documents.

When you're sued and the administrative record is being developed, the solicitor will make a second cut and review what the BLM did, and then the Department of Justice will review what the solicitors did.

There's three levels of review there because it's very important that we protect these confidential documents. The confidential documents, though, are included in the administrative record because there are occasions where a confidential privileged document becomes an issue in litigation, and if this happens, perhaps the BLM or

perhaps the opposing counsel will ask the judge who is presiding over the case to make an in-camera review of the confidential documents, or of some set of confidential documents.

An in-camera view means many the judge takes the documents back to her chambers and she reviews them and decides whether these documents are, in fact, not protected and should be released to the public or what happens more often is the judge says you can use these documents just for the purposes of this litigation under a confidentiality order that the judge issues; meaning that the documents can only be used for the litigation and will not be released outside of litigation and when the litigation is over the documents will be protected again.

Some sample privilege documents, I have a list here... attorney-client privilege, attorney work product -- these are documents created by an attorney -- privacy act documents -- these would be documents that contain Social Security numbers -- proprietary information.

In New Mexico with APDs, perhaps, an operator may submit documents showing proprietary engineering diagrams. These may be protected. In the Southwest we have a lot of Indian sacred sites; these may also be protected; and archaeological sites protected by the Archaeological Resource Protection Act, ARPA.

My favorite is the attorney-client privilege, which protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. The client of the solicitor, we're always told, is the Secretary of the Interior and his duly appointed officials. This means generally communications between a BLM employee and a solicitor in their official capacities as federal employees are protected by the attorney-client privilege.

I'm on my last slide. Yea, I'm almost done! The difference between FOIA and administrative records... FOIA, or the Freedom of Information Act, is where a member of the public can ask the government to produce a document. Under FOIA we generally withhold pre-decisional documents. This is before the decision is made. Because these pre-decisional documents, decision isn't made yet and releasing it to the public could impinge the deliberative process and we do not want to have a chilling effect on how the government makes its decisions.

However, an administrative record is put together when we're sued because the BLM's decision has already been decided. Once the BLM's decision is made there is no chilling effect on releasing these pre-decisional documents. In fact, we want to show the court and the public how we deliberated carefully, how we weighed both sides of an argument and then made an intelligent decision. So with administrative records we're going to produce all the different hundreds of early draft versions of an EIS with everybody's red lined comments showing how everyone discussed it and made an intelligent decision.

I'll end my presentation with the following lesson, please show your work and include an

address dissenting opinions in your administrative records.

>> C. Humphrey: I wanted to reiterate a few key points I picked up from what you said. You can't add documents -- it's very important, you can't add documents after the decision is made. When in doubt, include it. And, a decision can be unwise; as long as it's supported, we'd still win. And then decisions can be challenged for six years, so we need to keep our documents for at least that long.

Now, you said that we should mark and keep privileged documents separate. Would you say pre-decisional documents that are not FOIA-able should also be kept separate or marked?

>> M. Williams: I guess the people putting together the project file should know what's pre-decisional and work with the FOIA coordinator, if documents are FOIA'ed from the project file. I think it would make it easier to know the drafts we're not going to release and mark as final the drafts that are releasable and work with the FOIA coordinator to figure that out.

>> C. Humphrey: I think every state has a FOIA coordinator, is that right?

>> M. Williams: We do in New Mexico.