

Administrative Records Training

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What is an Administrative Record (AR)?

Why bother creating one?

An AR documents the process the agency used in reaching its final decision in order to:

1. Show that an agency followed the required procedures, as provided by statute, regulation, and any applicable agency policies;
2. Explain and rationally support an agency's decision; and
3. Demonstrate that an agency considered opposing viewpoints, if any, and provide a thorough explanation as to why the preferred course of action was adopted.

Keep in Mind...

- If a statute or regulation states that the BIA must consider certain factors, the AR must reflect that the BIA considered those factors – not just reference them or listing them in the decision without analysis.
- Oral testimony is typically not allowed, so it is critical that the agency's files “tell the story” of how the agency complied with applicable laws.
- Courts generally give some deference to agency decisions, however, if the AR does not reflect that the decision was both informed and thorough any deference a court may have given to the agency could be lost or diminished.

What goes into an AR?

Substantive documents that were considered or relied upon by the decision maker or the decision maker's staff. These include, but are not limited to:

- Letters and documents, including all attached exhibits, submitted by the Tribe and other interested parties.
- Emails containing substantive discussion about the application.

What goes into an AR? (con't)

- Emails that were sent or received by outside parties concerning the application.
- Reports, studies, memoranda pertaining to the NEPA and Part 151 processes.
- Comments received on the application.
- All records necessary to understand the decision making process or the basis for the decision, especially when they are not readily available.
 - Tribal constitutions, ordinances, resolutions, etc.
 - BIA policies, guidelines, directives, manuals, etc.

Assembling the Administrative Record for IBIA Litigation

- Table of Contents
- The final BIA decision
 - Include all documents referenced in the decision
- Notice of appeal
- Certification by BIA that the record contains all information and documents utilized by the deciding official

What stays out of an AR?

Documents that are not relevant, substantive, or within the appropriate time-frame should not be included in the record. This includes, but is not limited to:

- Emails scheduling internal meetings or containing meeting acceptances or declinations.
 - Exception: Emails regarding meetings with outside parties (such as tribes, interested parties, and NEPA consultants) should be in the record.
- Personal calendars
- Personal meeting notes or draft documents that were never circulated
- Meeting agendas
- Documents that post-date the decision (except for the notice of appeal)
 - E.g., staff's critique of the notice of appeal
- Documents not in BIA's possession at the time the decision was made

Privileges?

- Be sensitive to privileges and prohibitions against disclosures, including Privacy Act records, attorney-client communications, pre-decisional deliberative communications, attorney-work product, confidential business information, or other information subject to exemption under the Freedom of Information Act.
- A privilege index will need to be created to describe the protected and privileged documents and those documents should be maintained separately from the non-protected and privileged documents.
- With judicial litigation, SOL works with the DOJ to determine whether the protected information may be disclosed under seal or other protective order. Unlike protected information, privileged information may be disclosed at the agency's discretion. However, disclosure of privileged information forever waives the privileges in that information.

The Lifecycle of an AR

- Date of Application
- Duration of Decision
- Notice of Decision
- Challenges to the Decision

Creating Contemporaneous AR

- The AR should be compiled as documents are generated or received during the decision-making process.
- Documents that help substantiate the agency's decision making process should be included in the AR.
- The agency must also protect the public's interest in government documents and preserve its own interests, including compliance with the Federal Records Act and related requirements.

Ensuring Your Contemporaneous AR is Complete

Formulating a Game Plan:

The person charged with assembling the AR must come up with a system for:

1. Identifying all of the people, including those who have since left the Department, who may have worked on the matter;
1. Developing a plan for obtaining the physical and electronic files of those people, including emails;
1. Tracking the progress for gathering such documents, including knowing who provided you what and when, and whether what you were provided was complete.

Organizing Paper Records

Some records you encounter will only be available in hardcopy. These hardcopy records lack the helpful identifiers (i.e. metadata) found in electronic records and therefore require special treatment.

- **Indexing** – a stand-alone document is a mysterious creature. One cannot determine who submitted it, when it was submitted, or whether any attachments were submitted with it. In order to preserve this context, an index should be prepared for paper files.

Example of Indexing Paper Files

Doc #	Date	Doc Type	Author	Recipient	Description
00001.pdf	1910-00-00	Census			Excerpt from 1910 Federal Census
00002.pdf	1906-08-23	Letter	Charles Kelsey	Comm'r of Indian Affairs	Seeking guidance re: land acquisitions
00003.pdf	2007-01-19	Application	Wyone Tribe	Carl Artman, ASIA	Application to acquire 900,000 acres in trust for gaming
00004.pdf	2008-02-11	Email*	Maria Wiseman, SOL	George Skibine, OIG	Email re Indian lands opinion
00005.pdf	2010-03-12	Report	CSHOA RFE Engineering, Inc.		Long Range Transportation Plan for Ione Band of Miwok Indians
00006.pdf	2010-11-01	EIS	BIA		Administrative draft EIS
00007.pdf	2012-12-20	Decision	Kevin Washburn, ASIA		Decision to acquire 900,000 acres in trust for the Wyone Tribe for the purpose of gaming.

* Emails will usually be gathered in native form (i.e., .pst file) but emails that have been printed and scanned or converted into a PDF must be indexed.

- Chronological Order
- Include: date (if a document contains several exhibits, use the date of the parent document), doc type, author (and office or organizational affiliation), and recipient where possible.
- After documents ordered chronologically, assign a numerical identifier (e.g., 00001.pdf)

Organizing Electronic Records

Email Labels

- The best way to organize emails is to routinely label each one for the appropriate matter.
- Gmail has a user-friendly organizational system where you can create labels for each matter and then individually label emails as you read them.
- If you have questions about labeling, don't hesitate to contact your friendly IT representatives.

Overall Organization for the AR

- Generally, reverse chronological or chronological order for the primary documents is best.
- Anyone should be able to readily locate, and cite to, each document and page of the AR.
- Liberally use tabbed dividers. Avoid masses of unseparated documents.
- Include complete copies of enclosures, and keep them with the primary document.
 - BIA should make a note of any enclosures that were not provided to BIA or that were submitted to BIA separate from the primary document.
- Documents submitted to BIA as a package should be kept intact.
- If a document or enclosure should logically be located in a different place in the AR as well (e.g., in the “Maps” portion), make a copy and place the copy there.

AR Table of Contents

- Identify the documents by their tab number or letter.
- Briefly describe each document (type of document, author, recipient, date, topic, number of enclosures), and the nature of any privilege or protection asserted.
- Describe enclosures separately.
- E.g., “AR Tab 10, Letter from Regional Director to Tribal Chairman, Jan. 1, 2015, concerning lease to Jones, with five attachments as follows:”
 - Not: “Letter, Jan. 1, 2015”

Real Example of the Importance of an Organized AR

In a recent Interior Board of Indian Appeals decision, the Board made the following observations in a decision footnote:

- The AR for a decision was submitted in electronic format and contained
 - Individual files numbered 1 through 13, and
 - several unnumbered PDF files
 - Which included the bulk of the record in a single PDF consisting of 695 pages, with no dividers.
- The table of contents did not always conform to the record itself, e.g. there were mislabeled documents.
- The IBIA ended up having to renumber and relabel the AR so that they could refer to the proper documents in their decision.

Fundamental Documents

While there are many documents that should be included in an administrative record, every record contains a handful of key documents that were critical to the final decision. The record keeper should ensure that these documents are:

1. Included in the record provided to the SOL;
2. In the finalized form; and
3. Each set out as an independent document.

Fundamental Documents (con't)

- Fundamental documents generally include:
 - Tribe's fee-to-trust application (and any amendments)
 - Main NEPA documents
 - Environmental Assessment
 - Federal Register Notice of Intent to Prepare DEIS
 - Federal Register Notice of Availability for DEIS
 - Draft EIS
 - Federal Register Notice of Availability for FEIS
 - Final EIS
 - Final Notice of Decision

Timeline

- Have paper files scanned into PDFs and labeled
- Burn all .pst files (emails) and other native files (anything that is not a .pdf) onto a disc
- Review and index scanned documents, as well as any other PDFs the record
- Organize PDFs chronologically and re-name PDFs so they have numerical file name, e.g., 00001.pdf
- Review the administrative record to ensure that it is complete and properly organized, and that the table of contents accurately describes the contents of the record

Submitting the AR

- Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the BIA deciding official must assemble and transmit the AR to the Board.
 - Don't forget the certification.
 - AR may be transmitted via hard copy, compact disc, or both.
 - May request extension from the Board.

Help Us Help You!

In the past, incomplete or delayed administrative records have seriously damaged the Department's position in litigation and, in some instances, caused the Department to lose the entire case.

By keeping records organized and labeled from the day an application arrives, we will be better able to efficiently and efficiently compile a strong, comprehensive administrative record at the time of appeal.

This places us in the best position to protect the Department's decisions.