SESSION NOTES
SESSION NAME: UNDERSTANDING OBJECTIONS, LITIGATION AND INTERVENING AMICUS/BRIEFS
DAY & TIME: OCT 20/820AM

SPEAKER #1 NAME: RAY SMITH

MAJOR POINTS:

- Appeals process takes place after decisions made so difficult to change decision.
- Once in appeals process USFS cannot go back to appellant for more information.
- So in 2004, Congress, through the Healthy Forests Restoration Act called for pre-decisional review process (objection process that allowed public to weigh in on draft decisions).
- Process worked well so it now applies across all USFS projects.
- Public can now communicate with USFS team that reviews objections.
- Public must have standing to be part of objection process.

- Scoping letter from USFS kicks off opportunity asking for input on pre-decisional process.
- Also NEPA has a scoping process notice.
- These are the two opportunities for the public to respond in writing and specifically note issues concerned about. Gives standing to those that submit written comments regarding specific issues.
- Draft Record of Decision with the Final EIS, or the Draft Decision Notice with the Environmental Assessment, comes out and triggers 45-day period for those with standing to object. Must match issues you originally raised.

- If new issues raised by USFS in draft decisions, you may also be able to comment on new issues.

- Reviewing officer spends 30 days reviewing objections and can schedule public meeting to hear from objectors.

- Objection process meant to continue collaboration and USFS can suggest and incorporate alternative approaches to address objections.

- If objections cannot be satisfied, litigation is next stage.

LESSONS/BIG TAKEAWAYS:

Participate in early stages of NEPA or pre-decisional processes to achieve standing for later stages.

SPEAKER #2 NAME: MARK PHARES

MAJOR POINTS:

- Complaint filing in federal district court commences litigation process.
- Complaint needs careful review.
- Commissioners should be involved in projects from the beginning to understand the issues.
- If you are named as a party, you will file an answer to the complaint.

- If you are not named you can file amicus brief to help educate the court on the issues (not a party to the lawsuit).
- Or you can file to intervene and become a party if you can demonstrate you will be impacted by lawsuit decision.
- Must ask court for permission to file amicus brief or to intervene.
- If case appealed to 9th Circuit Court of Appeals, have to again petition court to be an amicus.
- Local Government Forest Advisor legislation in Montana says the advisor can provide assistance if requested by local government.
- Assistance includes fire/fuels/esa/municipal watersheds
- Assistance with evaluating economic assistance to depressed counties also an option.

- Declarations – affidavit to court swearing to certain set of facts in a case. Declaration of economic harm can have an impact on the court for example.

LESSONS/BIG TAKEAWAYS:
Know the facts of the case to determine if/how to become part of the suit.

Litigation is tremendous time sink and very stressful. Reviewing administrative record that could be thousands of pages.

But Amicus brief participation less stressful and opportunity to be more focused on human dimensions.

Connect with Matt Arno and have county attorneys connect with DNRC attorneys in advance of litigation or other forest challenges.

SPEAKER #3 NAME: PAUL SPITLER

MAJOR POINTS:

- Cold Summit Project on the Lolo was for forest restoration and developed by collaborative group with federal funding for that group.
- Approved by USFS but subject to litigation. 12 claims filed against project.
- Wilderness Society involved in collaborative process so filed an amicus brief to support the project decision.
- Unique coalitions of NGOs and timber industry and retired Forest Service chiefs filed joint amicus brief.
- DNRC and counties also filed amicus briefs.
- Plaintiff prevailed on one of their 12 clams and got project enjoined. (No cumulative impact on lynx so supplemental EIS required).
- Still in litigation today although injunction lifted after supplemental EIS delivered, not supplement to EIS.
- Most of the progress on the project now complete and to be wholly complete next spring.

LESSONS/BIG TAKEAWAYS:

Court did not cite amicus briefs in decisions

However, sent a strong signal to the court that many diverse parties were in favor of the project by filing amicus briefs. Put a thumb on the public interest side of the scale and sends a strong political/legal/social message.

Collaboration works even when litigation results. (Cold Summit)

Collaboration is bringing real results to Montana. (Southwestern Crown)

Collaboration cannot stop on the ground in Montana. We need it from our Congressional delegation and all of Congress as well.

REFERENCED MATERIALS:

SPEAKER #4 NAME: MIKE COLE

MAJOR POINTS:

- East Reservoir Project in Lincoln County (large landscape with significant timber output)
- Kootenai collaboration group has diverse membership
- Alliance for the Wild Rockies challenged project on basis that ESA (lynx, griz and bull trout) was not analyzed in NEPA
- Lincoln County decided to be involved in litigation. American Forest Resource Council out of Oregon helped county engage in the litigation and county intervention was allowed by the court.
- In a 39 page decision The District Court rejected claim by AWR
- AWR appealed decision to the 9th Circuit and asked for injunction pending appeal. Injunction request was rejected.
- 9th Circuit issued emergency injunction days before project was to commence on the ground. Major heartburn at the local level

LESSONS/BIG TAKEAWAYS:

Need strong and focused attorney assistance once in federal court

Intervenor status can be very valuable and being in court personally can send a good message to court.

Intervenors and DOJ were not part of 9th Circuit emergency injunction decision. Why not?

County plans to engage at the appellate level going forward

REFERENCED MATERIALS:

FULL DISCUSSION – MAJOR POINTS

Question on should Counties band together in litigation to protect timber infrastructure state wide and even across state boundaries? YES