



**Special Institute on**

# **Challenging and Defending Federal Natural Resource Agency Decisions**

**Westin Westminster  
Westminster, Colorado  
September 14-15, 2016**

“You can’t please all of the people all of the time.” That old adage seems particularly apropos in the context of federal natural resource agency decisions. With a multitude of stakeholders holding divergent interests and priorities, almost every decision by a federal natural resource agency is bound to draw ire from one or more individuals or entities. Agency decisions that draw challenges range from the high-profile—such as EPA’s Waters of the U.S. rule, BLM’s hydraulic fracturing rule, Fish & Wildlife’s lesser prairie-chicken listing decision, and the greater sage-grouse amendments to BLM’s and the Forest Service’s land use plans—to the “routine” but equally important, such as appeals of ONRR royalty rulings.

This Special Institute will focus on challenging and defending decisions made by federal natural resource agencies, including administrative appeals, judicial review, and the various complex issues associated with those processes. While this conference is appropriate for the sophisticated in-house, outside, or agency practitioner, attorneys and other resource professionals who are relatively new to the practice will also benefit from the insights and experience of our distinguished speakers.

*Course materials and audio recordings are available in various formats if you are unable to attend. See inside for details.*



# Challenging and Defending Federal Natural Resource Agency Decisions

Wednesday, September 14, 2016

7:30 am - **Registration**

8:30 am – 8:40 am

## **Introductions and Opening Remarks**

STEVIA M. WALTHER, Executive Director, Rocky Mountain Mineral Law Foundation, Westminster, CO

JONATHAN A. HUNTER, President, Rocky Mountain Mineral Law Foundation; Shareholder, Liskow & Lewis, New Orleans, LA  
SANDRA A. SNODGRASS, Program Chair; Partner, Holland & Hart LLP, Denver, CO

8:40 am – 9:25 am

## **What Actions May Be Challenged: The Deceptively Complex Concept of Final Agency Action**

Determining when an agency action is “final” can involve a complex analysis of multiple issues. The issues surrounding this determination include: what is appealable; (e.g., *Devon Energy*); agency inaction; exhaustion of administrative remedies; parallel proceedings (e.g., *Darby v. Cisneros*, including the NEPA context); waiver/issue exhaustion (e.g., *Public Citizen/Vermont Yankee*); and the reviewability of guidance documents.

SAM KALEN, Winston S. Howard Distinguished Professor of Law, Co-Director of the Center for Law and Energy Resources in the Rockies, University of Wyoming College of Law, Laramie, WY

9:25 am – 10:10 am

## **Justiciability: Barriers to Administrative and Judicial Review**

Issues of standing, ripeness, mootness, and waiver of sovereign immunity arise in both the administrative and judicial contexts. Who can participate in the proceeding? What are the agency’s defenses? This presentation will explore these issues of justiciability.

KIRSTEN L. NATHANSON, Partner, Crowell & Moring, LLP  
Washington, DC

10:10 am – 10:25 am - **Coffee Break**

10:25 am – 11:15 am

## **Process and Practice Tips for BLM State Director Review of Oil and Gas Decisions**

What are the legal and practical issues involved in seeking or otherwise participating in BLM State Director Review of oil and gas decisions? This presentation will explore the procedures involved, the rights of participants, and the opportunity for meetings with the State Director.

TRAVIS D. BARGSTEN, Physical Scientist, U.S. Bureau of Land Management, Cheyenne, WY  
GREGORY J. NIBERT, Partner, Hinkle Shanor LLP, Roswell, NM  
MARY LYNN BOGLE, Partner, Hinkle Shanor LLP, Roswell, NM

11:15 am – 12:00 pm

## **Process and Practice Tips for Appeals to the Interior Board of Land Appeals**

What is the process for appeals to the IBLA? This presentation will address procedural issues of stays, settlements, remands, judicial review of IBLA determinations, and attorney fees before the IBLA, among other topics, and will provide useful practice tips.

HADASSAH M. REIMER, Of Counsel, Holland & Hart LLP,  
Jackson, WY

12:00 pm – 1:30 pm - **Lunch – On Your Own**

1:30 pm – 2:20 pm

## **Hearings Before the DOI Office of Hearings and Appeals**

The speakers will discuss hearings before an Administrative Law Judge within the Department of the Interior Office of Hearings and Appeals, including mineral validity contests, title disputes, fact-finding referrals from the IBLA, requests for reviews of proposed oil and gas penalties, and grazing appeals.

NANCY S. ZAHEDI, Attorney, U.S. Department of the Interior, Office of the Solicitor, Sacramento, CA

ROBERT B. FIRPO, Attorney, U.S. Department of the Interior, Office of the Solicitor, Boise, ID

2:20 pm – 3:00 pm

## **Process and Practice Tips for Appeals to the Interior Board of Indian Appeals**

The process for appealing decisions to the Interior Board of Indian Appeals is unique. This session will focus on appeals of decisions made by the IBIA in the mineral extraction context and will explain the differences between appeals to the IBIA and IBLA.

ROBERT S. THOMPSON III, Shareholder, Greenberg Traurig, Denver, CO

ROBERT S. THOMPSON IV, Associate, Greenberg Traurig, Denver, CO

3:00 pm – 3:15 pm - **Coffee Break**

3:15 pm – 4:15 pm

## **Pre-Decisional Objections and Post-Decisional Appeals: Making Sense of the Forest Service’s Varied Review Processes**

The U.S. Forest Service has relatively new pre-decisional objection procedures (36 C.F.R. Part 218) for proposed projects and activities implementing land and resource management plans, such as timber sales, campground restoration or development, trail development or maintenance programs, and range-improvement projects. These speakers will review these procedures, as well as more traditional post-decisional administrative appeals applicable to written decisions authorizing the occupancy or use of national forest system lands and resources, such as special use permit authorizations (36 C.F.R. Part 214).

VINCENT L. DEWITTE, Senior Counsel, Office of the General Counsel, Natural Resources and Environment Division, U.S. Department of Agriculture, Washington, DC

STEVEN K. IMIG, Director, Lewis, Bess, Williams & Weese P.C., Denver, CO

4:15 pm – 5:00 pm

## **Process and Practice Tips for U.S. Army Corps of Engineers Administrative Appeals**

What is the administrative appeal process for the U.S. Army Corps of Engineers’ regulatory program? This presentation will include appeals of jurisdictional determinations, permit denials, and declined individual permits.

AARON C. COURTNEY, Partner, Stoel Rives LLP, Portland, OR  
JOAN E. DRAKE, Shareholder, Modrall Sperling, Albuquerque, NM

5:00 pm – 6:00 pm - **Hosted Reception for Speakers, Registrants, and Guests**

# Challenging and Defending Federal Natural Resource Agency Decisions

Thursday, September 15, 2016

8:30 am – 9:20 am

## **The Administrative Record: Compiling, Reviewing, and Supplementing the Basis for the Agency's Decision**

The administrative record constitutes the complete “story” of an agency’s decision-making process. This session will cover the issues related to the administrative record for agency decisions, including building the record; compiling, identifying, and supplementing the record; deliberative-process privilege; issues of extra-record evidence and discovery; and administrative record disputes.

ROXANE J. PERRUSO, Vice President & General Counsel, Transwest Express/Power Company of Wyoming, Denver, CO

9:20 am – 10:10 am

## **Getting a Seat at the Table: Intervention in Administrative Appeals and Judicial Challenges**

Who can intervene, at what time is intervention appropriate, what are the standards for intervention, and what role can intervenors play, including during the settlement process? This session will address intervention issues in both the administrative and judicial contexts.

Moderator: JONATHAN A. HUNTER, Shareholder, Liskow & Lewis, New Orleans, LA

MICHAEL J. McGRADY, Senior Assistant Attorney General, Wyoming Attorney General’s Office, Cheyenne, WY

LAURA K. GRANIER, Partner, Davis Graham & Stubbs LLP, Reno, NV

ROBIN L. COOLEY, Staff Attorney, Earthjustice, Denver, CO

10:10 am – 10:30 am - **Coffee Break**

10:30 am – 11:30 am

## **What Can Be Reviewed, Where to File, and What the Process Is: Jurisdictional Provisions of the APA and Other Statutes**

Comparing and contrasting agency decisions that are subject to judicial review under the traditional Administrative Procedure Act avenue with specific judicial-review provisions of other statutes, such as the Clean Water Act and ESA citizen’s suits, this presentation will explain what types of decisions can be reviewed by which court or courts. It will also discuss the general process of judicial review, such as summary judgment (*Olenhouse* in the Tenth Circuit vs. other circuits) and bifurcation of merits and remedies.

FRED R. WAGNER, Principal, Beveridge & Diamond PC, Washington, DC

11:30 am – 1:00 pm - **Lunch – On Your Own**

1:00 pm – 2:00 pm

## **Deference to Administrative Agencies: Substantive Review of Agency Decisions**

It is critical to understand the standards that courts apply when reviewing agency decisions. This session will cover the APA standard of review and deference to agency interpretations of statutes and regulations, including *Auer* and *Chevron* deference.

MICHAEL J. MALMQUIST, Shareholder, Parsons Behle & Latimer, Salt Lake City, UT

ELIZABETH A. SCHULTE, Attorney-Advisor, Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, UT

2:00 pm – 2:45 pm

## **The Uncertain Question of Remedies Should a Challenge Prevail**

What remedies are available to a successful litigant? This session will review both interim injunctive relief and the remedies available at the end of the trial on the merits, including injunctive relief, remand (with or without vacatur), and the administrative-remand rule for appeals, vacatur, attorneys’ fees, etc.

JENNIFER L. BIEVER, Partner, Hogan Lovells US LLP, Denver, CO

ANA MARIA GUTIERREZ, Senior Associate, Hogan Lovells US LLP, Denver, CO

2:45 pm – 3:00 pm - **Coffee Break**

3:00 pm – 3:45 pm

## **Mediation and Alternative Dispute Resolution**

Both mediation and alternative dispute resolution are used in the context of appeals of agency decisions. This presentation will explore these processes, including the use of magistrates in appeals of IBLA decisions and Court of Appeal mediation programs.

PHILIP C. LOWE, Attorney Advisor, U.S. Department of the Interior Office of the Solicitor, Lakewood, CO

3:45 pm – 4:45 pm

## **Avoiding Ethical Traps When Challenging and Defending Agency Decisions**

Ethics considerations are often at play when challenging or defending agency decisions. This session will explore ethical issues in the administrative appeal and judicial review contexts, addressing topics such as joint representation of multiple parties, joint defense or other cooperative arrangements among parties, privilege concerns, appropriateness of communications with agency officials (whether represented or not) during pendency of proceedings, and lawyer competency requirements in light of the various facets of agency and judicial review as well as related litigation. Reference will be made, where applicable, to the ABA Model Rules, and a combination of real-life and wholly fabricated fact scenarios will be used to illustrate the ethical questions discussed.

MARK CHAMPOUX, Partner, Davis Graham & Stubbs LLP, Denver, CO

CHELSEA HUFFMAN GROSSI, Associate, Davis Graham & Stubbs LLP, Denver, CO

4:45 pm - **Course Adjournment**

*Can't attend? You can still order the course materials.*

# ORDER FORM



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 Westminster, CO 80031 USA  
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*Course materials and audio for Challenging and Defending Federal Natural Resource Agency Decisions will be available within 4 weeks after the program.*

All registrants will receive a link to the online course materials. A hard copy manual is available to registrants for \$65. See the registration form.		<b>Unit Price</b>		
<b>Title/Description</b>	<b>Qty.</b>	<b>Non-Member</b>	<b>RMMLF Member</b>	<b>Total</b>
<b>CHALLENGING AND DEFENDING FEDERAL NATURAL RESOURCE AGENCY DECISIONS</b>				
Looseleaf Manual only ( <b>ADL3M</b> )		\$195	\$155	\$
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# PROGRAM COMMITTEE

SANDRA A. SNODGRASS, Program Chair; Partner, Holland & Hart LLP, Denver, CO

TIMOTHY CANON, Associate, Davis Graham & Stubbs LLP, Denver, CO

KENNETH S. CAPPS, Senior Counsel, USDA Office of General Counsel, Denver, CO

AARON C. COURTNEY, Partner, Stoel Rives LLP, Portland, OR

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CHRISTOPHER G. HAYES, The Hayes Law Firm LLC, Denver, CO

STEVEN K. IMIG, Director, Lewis Bess Williams & Weese P.C., Denver, CO

ANN E. LANE, Senior Counsel, WPX Energy Inc., Denver, CO

PHILIP C. LOWE, Attorney Advisor, U.S Department of the Interior Office of the Solicitor, Denver, CO

HADASSAH M. REIMER, Of Counsel, Holland & Hart LLP, Jackson, WY

STEPHEN W. WIEGAND, Shareholder, Liskow & Lewis, New Orleans, LA

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## Challenging and Defending Federal Natural Resource Agency Decisions



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Mail, fax, or email registration form and payment to:

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[info@rmmlf.org](mailto:info@rmmlf.org)

**For membership information, contact the Foundation**

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	Registrations Received thru 8/29/16 after 8/29/16		PAPERLESS (Electronic materials only)	HARD COPY (Receive manual at conference)
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Government Agency / Non-Profit* Organization (submit PO# if req'd)	<input type="checkbox"/> \$525	<input type="checkbox"/> \$625	<i>Conference Materials will be provided electronically to all attendees about 2 weeks before the course.</i>	
Student—Full-Time, proof of status required	<input type="checkbox"/> \$35	<input type="checkbox"/> \$75		

\*IRS tax-exempt status

**TOTAL:** \$ \_\_\_\_\_

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# CHALLENGING AND DEFENDING FEDERAL NATURAL RESOURCE AGENCY DECISIONS

## Rocky Mountain Mineral Law Foundation

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## GENERAL INFORMATION

**Room Reservations:** The Westin Westminster, 10600 Westminster Blvd., Westminster, Colorado 80020, has blocked rooms for this course until August 30 at the rate of \$163 per night. Ask for special rates for Rocky Mountain Mineral Law Foundation registrants. For reservations, contact the Westin at:

- Toll Free: 800-937-8461
- Direct: 303-410-5000
- Online: <http://tinyurl.com/rockym115>

Government registrants - Please note that our group rates are less expensive than government per diem rates!

Difficulty making room reservations? Contact us at [info@rmmlf.org](mailto:info@rmmlf.org)

**Car Rental:** Hertz is offering special discounts by referencing Meeting CV#03NJ0011 and Rocky Mountain Mineral Law Foundation. Make reservations at <http://tinyurl.com/RMHertz2016> or call 800-654-2240 (U.S.); 800-263-0600 (Canada); 405-749-4434 (International).

**Registration Fees:** Include course materials, refreshments, and hosted functions as listed in this brochure. These fees do not include hotel costs or transportation. Registrations will be accepted only when accompanied by a check, money order, government purchase order or training form, credit card information, or wiring information. No registrations can be processed without payment.

**Registration Cancellations:** Refunds, less a \$50 administrative fee, will be given for cancellations received by 3:00 pm on Monday, August 29, 2016. No refunds will be given thereafter, although substitution of attendees may be made by contacting the Foundation. Cancellations must be made in writing or email to [info@rmmlf.org](mailto:info@rmmlf.org). Registrants not entitled to a refund will receive

a link to the written materials. For questions on refunds, complaints, and/or program cancellations, please contact our office at 303-321-8100.

**CLE Credit:** This course consists of approximately 12.5 hours of continuing education, including 1 hour of ethics. You must let us know, at least 30 days in advance of the conference, the states or organizations for which you will need credit (see registration form). Credit hours for states will vary and are subject to each state's approval and credit rounding rules. Foundation conferences are typically accredited by all mandatory CLE states and Canadian provinces, the AAPL, NADOA and NALTA, and other professional organizations. Attorneys from certain states may be required to pay an additional fee. The Foundation is a State Bar of California MCLE-approved provider.

**CPE Credit:** Rocky Mountain Mineral Law Foundation is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be addressed to the National Registry of CPE Sponsors through its website: [www.learningmarket.org](http://www.learningmarket.org). There are no prerequisites and no advance preparation is required to attend this course. The delivery method is Group-Live, and up to 15 CPE credits are available, including 1 ethics credit. The program level is "overview."

**Recording:** Audio and video recording, streaming, or other types of live or stored dissemination are not permitted without express authorization from the Foundation.

**Special Needs:** If you have special needs addressed by the ADA, please notify us at least four weeks before the program.