

ARCHAEOLOGICAL SERVICES BY LAURA MICHALIK

IBLA 2003-133

Decided May 25, 2006

Appeal from a decision of the Director, Bureau of Land Management (BLM), sustaining on review a decision by BLM's New Mexico State Director declining to renew Cultural Resource Use Permit No. 84-2920-01-S.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Permits--  
Public Lands: Leases and Permits--Special Use Permits

Cultural resource use permits are issued pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), among other authorities. Decisions involving permits issued under that provision are committed to the discretion of the Secretary, through BLM, and the exercise of that discretion must have a rational basis. A decision refusing to renew a permit must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. An appellant bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision to reject a permit renewal application is in error. Where BLM has decided not to renew a cultural resource use permit because of repeated instances of unrecorded or underrecorded sites, that decision is properly affirmed where the holder of the permit has not explained why the specific sites in question were not reported or were underreported in a manner that is consistent with applicable professional standards.

APPEARANCES: William A. Walker, Jr., Esq., Las Cruces, New Mexico, for appellant; Dale Pontius, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Archaeological Services by Laura Michalik (ASLM) has appealed from a November 20, 2002, decision by the Director, Bureau of Land Management (BLM), sustaining on review a January 2, 2002, decision by BLM's New Mexico State Director declining to renew ASLM's Cultural Resource Use Permit (Permit) past its December 31, 2001, expiration date. The decisions cited instances where BLM had issued warning letters to ASLM for underreporting or failing to report cultural sites, some of which were later damaged as a result of surface disturbances such as road building. We must decide whether BLM's decisions have a rational basis and are supported by facts of record demonstrating that its action is not arbitrary, capricious, or an abuse of discretion, and whether ASLM has met its burden of providing an explanation for not having fully recorded cultural sites that is consistent with adherence to professional standards that would warrant continuation of its Permit. The arguments in this case have taken wide range, so it is important at the outset to clarify the respective roles and responsibilities of BLM and the archaeologists to whom it issues permits.

### Background

ASLM performed contract services on public lands in New Mexico under a Cultural Resource Use Permit progressively numbered 84-2920-89-A through 84-2920-01-S beginning on June 9, 1989, and subject to annual renewal in accordance with standard New Mexico practice until December 31, 1999, when the New Mexico State Office shortened ASLM's renewal periods to 6 months. BLM declined to renew Permit No. 84-2920-01-S past its December 31, 2001, expiration date. BLM issued the Permit to ASLM under the combined authority of section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000), and section 4 of the Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. § 470cc (2000). See Jicarilla Archaeological Services, 110 IBLA 57 (1989).

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), requires that the head of any Federal agency having authority to license any undertaking take into account the effect of the undertaking on any property eligible for inclusion on the National Register of Historic Places. See Southern Utah Wilderness Alliance, 164 IBLA 1, 5 (2004); Mack Energy Corp., 153 IBLA 277 (2000). Regulations implementing that provision establish a process for identification and evaluation of historic properties; assessment of any adverse effect of the proposed undertaking on eligible properties; and creation of a plan to avoid, minimize, or mitigate those adverse effects. 36 CFR Part 800; see Southern Utah Wilderness Alliance, 164 IBLA at 6-7.

To carry out the Secretary's responsibilities under the NHPA, ARPA , and other statutes, the Department and BLM have established regulations and other requirements pertaining to cultural resource fieldwork on public lands. See, e.g., 43 CFR Part 7. BLM has long required authorized users of public lands such as holders of oil and gas leases and rights-of-way to obtain surveys by approved archaeologists prior to the commencement of surface-disturbing activities. See Mack Energy Corp., supra; Southern Utah Wilderness Alliance, 114 IBLA 327, 332 (1990); Cecil A. Walker, 26 IBLA 71 (1976). Permits such as those issued to ASLM authorize archaeologists to conduct the surveys on behalf of those lessees or holders of rights-of-way. Although the identification and reporting of sites by an archaeologist may delay a user's proposed action or require a modification of the action, those users are subject to possible penalties by BLM if they fail to comply with applicable requirements for protecting cultural resources as a result of inadequate fieldwork by an archaeologist. See James C. Mackey, 114 IBLA 306, 313-15 (1990). Inadequate fieldwork by an archaeologist not only may delay users of public lands from carrying out projects that BLM has authorized, but also may result in the destruction of cultural resources during surface disturbance.

Although an archeologist may be performing a survey for a client that results in the identification of sites and their evaluation as to eligibility, Congress has assigned this Department the ultimate responsibility under section 106 of the NHPA to consider the effect on eligible properties of an undertaking it authorizes. Because the fieldwork an archaeologist performs for a client affects how BLM fulfills its statutory responsibilities, BLM's confidence in an archaeologist's ability to identify sites is of paramount concern in deciding whether to issue or renew a permit. Ultimately, BLM must determine whether the renewal of a particular archaeologist's permit will enhance or diminish the agency's ability to carry out its duties under the NHPA. See generally, H. B. Holt, "Federal Archaeology Today: Survey Requirements and Predictive Alternatives," 6 *American Archaeology* 131, 138 (1987) ("Archaeologists must remind themselves that federal archaeology exists because of federal law, and we must ensure that our methodological efforts constantly are turned toward that law. Anything else, and we jeopardize federal archaeology and our own credibility.")

On April 26, 1999, BLM issued a Handbook establishing standards for fieldwork by archaeologists authorized under cultural resource use permits in New Mexico and procedures for handling unacceptable performance by a permittee. (BLM Manual Supplement H-8100-1, "Procedures for Performing Cultural Resource Fieldwork on Public Land in the Area of New Mexico State BLM Responsibilities" (NM Handbook)). On September 14, 1999, BLM approved standards and guidelines applicable to the Carlsbad and Roswell Field Offices in New Mexico. ("Cultural Resource Fieldwork and Report Standards and Guidelines for the Department of the

Interior Bureau of Land Management Carlsbad and Roswell Field Offices” (1999) (Carlsbad Standards).)

The NM Handbook includes provisions for warning letters and conditions for not renewing a permit. It makes the following provision for performance that warrants an official warning:

(1) In general, official warning letters are issued when permittee performance is so seriously deficient as to cause the Bureau to question whether or not all historic properties were located in the area of potential effect or whether the located properties were recorded accurately enough to judge their National Register potential.

(2) Specific examples which merit warnings include, but are not limited to: missed site(s), seriously under-recording a site or inaccurately recording a site, actual on-the-ground survey coverage varying from what was reported in the report, inaccurate descriptions of project impact areas in relation to sites, use of unauthorized personnel to perform fieldwork, or providing falsified information in a permit application, modification, or site record.

(NM Handbook, Ch. 4, ¶ I. L. 2. b.)

Although the NM Handbook explains that “[t]here is no set formula to determine how many warning letters must be issued before a decision must be taken not to renew a permit[,] \* \* \* three or four warning letters documenting serious performance problems will generally be considered the maximum that should be issued before action not to renew is taken.” (NM Handbook, Ch. 4, ¶ I. L. 3. d.) (emphasis added.) Permit renewal is to be based upon such factors as a permittee’s change in performance as a result of the warning letters, whether a pattern of under-recorded sites or missed sites has developed, whether BLM still has confidence that the permittee can adequately locate and record historic properties within areas of potential effect, and whether the necessity of field checking and rerecording sites covered by the permittee’s work creates such a burden on the BLM Field Office that other aspects of the Cultural Resources Management Program are suffering. (NM Handbook, Ch. 4, ¶ I. L. 3. e.)

[1] As noted above, BLM issued ASLM’s Cultural Resource Use Permit pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), among other authorities. We have held that decisions involving permits issued under that provision are committed to the discretion of the Secretary, through BLM, and the exercise of that discretion must have a rational basis. Board of Regents of the University of Oklahoma, 165 IBLA 231, 238-39 (2005). A decision refusing to

renew a permit must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. Larry Amos, 163 IBLA 181, 188-89 (2004).<sup>1/</sup> An appellant appearing before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision to reject a permit renewal application is in error. Id. Thus, where BLM has decided not to renew a cultural resource permit because of repeated instances of unrecorded or underrecorded sites, that decision is properly affirmed where the holder of the cultural use permit has not explained why the specific sites in question were not reported or underreported in a manner that is consistent with adherence to applicable professional standards.

Although BLM and ASLM refer to earlier periods in the life of ASLM's Permit, BLM's decision was based primarily on three warning letters sent to ASLM involving a total of 49 missed or underrecorded sites: (1) the September 16, 1999, warning letter concerning two sites involving ASLM's survey of the White Tip 7 Federal Com #1 Well Pad and Access Road in Eddy County prepared for Nearburg Producing Company (Nearburg warning letter); (2) the September 14, 2000, warning letter concerning two sites involving the ASLM's inventory for the Poker Lake No. 147 Well Pad and Access Road for Bass Enterprises Production (Bass warning letter); and (3) the August 6, 2001, warning letter concerning 45 sites involving ASLM's inventory for link 1 of a fiber optic line in southeastern New Mexico for C&B Associates (C&B) and American Telephone & Telegraph Company (AT&T) (AT&T warning letter).<sup>2/</sup> As noted above, the NM Handbook provisions specify that missing or under-recording sites are circumstances that merit warning letters and that three or four warning letters are the maximum that should be issued before a decision not to renew is made. (NM Handbook, Ch. 4, ¶¶ I. L. 2.b, 2. e.)

Each of the warning letters pertains to a Class III Intensive Field Inventory performed by ASLM for which BLM's NM Handbook establishes the following objective:

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<sup>1/</sup> The Amos case involved a special recreation permit and Board of Regents involved a paleontological use permit. In Board of Regents, 165 IBLA at 239 n.12, we recognized that because BLM's primary authority for issuing various kinds of permits for uses of the public lands arises under sec. 302(b) of FLPMA, our decisions addressing BLM's discretionary issuance or enforcement of any such permits generally are applicable.

<sup>2/</sup> The decision also referred to fieldwork problems and missed sites for a waterline project for the City of Jal, although BLM did not issue a warning letter because it was not the lead agency on that project.

The objective of a Class III inventory is to identify and record, from surface and exposed profile indications, all cultural resource sites within a specified and defined area. [A] Class III inventory must be preceded by a prefield investigation. The Class III inventory results in a total inventory of cultural resource sites observable within a specified area. Upon completion of Class III inventories within a specified area, no further cultural inventory work will usually be needed. However, occasionally follow-up survey may be appropriate if local conditions at the time of the first Class III survey obscured surface visibility (snow cover, vegetation cover, geomorphological conditions, etc.) or if dynamic geomorphological conditions, such as dune fields, are continuously revealing new surfaces.

(NM Handbook, Ch. 1, ¶ I. A. 6. a.) The NM Handbook requires investigators such as ASLM to “locate, identify, and record all visible cultural resources, including historic sites and isolated occurrences.”<sup>3/</sup> (NM Handbook, Ch. 1, ¶ I. A. 6. f. (3).)

<sup>3/</sup> The NM Handbook’s glossary defines cultural resources as follows:

“[T]hose fragile and nonrenewable remains of human activity, occupation or endeavor, including Districts, sites, structures, buildings, objects, historical documents, artifacts, ruins, works of art, architecture, natural features, folkways, customs, legends and oral history that were of importance in human events. These cultural resources may consist of (1) physical remains, (2) areas where significant human events occurred--even though evidence of the event no longer remains[,] (3) the environment immediately surrounding the actual resource, and (4) oral history or ethnographic accounts of lifeways and customs.”

The following definition of “cultural resource” applies in Carlsbad: “Any product of human activity, or any object or place given significance by human action or belief that is 50 or more years old. This age limit does not apply to sites, objects, or places that may have significance as known or suspected traditional cultural properties.” (Carlsbad Standards at 3.)

A description of “sites” and “isolated manifestations” appears as follows in Chapter I of the NM Handbook at I. A. 6. f. (1):

“(a) Sites. A site is a physical location of past human activities or events. Cultural resource sites are extremely variable in size, and range from a cluster of several objects or materials to structures with associated objects and features. A site may consist of secondarily deposited cultural resource remains. Features such as hearths, cairns, rock alignments, masonry concentrations, burned adobe, fire-cracked rock, cists, corrals, and rockart are generally recorded as sites. Sites also include definite locations of traditional cultural or religious importance to specified social and/or cultural groups.

(continued...)

ASLM has addressed issues leading to BLM's decision and the warning letters in its January 11 and March 8, 2002, letters requesting higher level review of the State Director's decision and in its Statement of Reasons (SOR) for this appeal. In its SOR, ASLM "vigorously disputes that there was any \* \* \* good faith evaluation of the quality" of its work. (SOR at 2.) ASLM states that Laura Michalik, principal of ASLM, has been an archaeologist for over 20 years, practicing mostly in New Mexico where she obtained a BLM Permit in 1989. (SOR at 4.) ASLM attributes BLM's decision to an extended history of personal animosity of employees of BLM's Carlsbad Field Office toward Michalik and Joseph Martin, an ASLM field supervisor who had conducted or supervised the surveys that were the subject of BLM's warning letters.<sup>4/</sup> (SOR at 4-19.) Nevertheless, the personal animosity ASLM perceives at

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<sup>3/</sup> (...continued)

"(b) Isolated Manifestation. Isolated Manifestations generally contain fewer than 10 artifacts, or contain a single undatable feature; and frequently are found to be redeposited material that lacks significant locational context; and are not related to other nearby Isolated Manifestations or Sites. Local definitions for what constitutes an isolated manifestation as well as standards for recording them within the body of the report or on Isolated Manifestation Forms may be provided by Field Office Archaeologists within whose territory a project will occur."

BLM's Associate State Director referred to the significance of the distinction between isolated occurrences and sites in a letter to ASLM dated Feb. 15, 2002:

"Isolated occurrences are not the same as sites and are treated very differently. Isolated occurrences, by definition, are considered to be so ephemeral that they are not considered eligible for nomination to the National Register of Historic Places. They are always allowed to be destroyed by undertakings with no further consideration. Sites, in contrast, must be recorded on detailed multi-page site forms, their significance evaluated, and those properties considered eligible for nomination to the National Register must be avoided by the undertaking or treated through a program of data recovery."

<sup>4/</sup> In its SOR, ASLM argues that from 1989 to 1993, Michalik "was constantly harassed, interfered with and discriminated against," with the support of the BLM State Director; that ASLM "began to experience difficulties in Carlsbad (but nowhere else) soon after" an individual became the Carlsbad Field Office's lead archaeologist who "was becoming close friends with a friend of Martin's ex-wife." Claiming a "99.99% success rate with archaeological projects," ASLM asserts that it "has experienced no problems anywhere, except when dealing with" certain BLM employees who are accused of abusing authority, manipulating regulations, misrepresenting their actions and "favor[ing] their personal friends by recommending them to clients wishing to conduct business on BLM lands, with the veiled threat that if they don't hire the people they recommend, the projects will not be approved."

(continued...)

BLM does not alter the fact that sites that ASLM did not report were later found in places that ASLM had been obliged to survey. We turn to the circumstances involving each of the warning letters BLM issued to ASLM and the effect of those letters on ASLM's permit history.

### The Nearburg Warning Letter

On September 3, 1999, BLM received ASLM's Report No. 99-NM-080-575 of a Cultural Resources Inventory of the White Tip 7 Federal Com #1 Well Pad and

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<sup>4/</sup> (...continued)

(SOR at 10-11.) ASLM pursues and amplifies this line of argument throughout its SOR, to which it has appended a 31-page unsigned first-person narrative document captioned "Laura Chronology (Laura Michalik)" whose author appears to be Martin. The narrative focuses for the most part on the events concerning the survey of the AT&T fiber optic line in Texas and New Mexico by ASLM and the resurvey of the route of that line by another firm.

In its Answer, BLM urges rejection of ASLM's allegations as "slanderous personal attacks on a number of BLM and state employees and allegations of numerous conspiracies to deprive ASLM of its Permit \* \* \*." (Answer at 4.) BLM argues that ASLM's allegations are "without any factual basis" and that ASLM has not "cited to a scintilla of credible evidence \* \* \* to substantiate these irresponsible allegations." *Id.* BLM refers to allegations in specified paragraphs of the SOR as "so vitriolic and beneath an acceptable standard of decency and professionalism that they should not be dignified by a specific response, other than to state there is absolutely no truth or validity to such accusations." BLM has moved to strike the "Laura Chronology," noting that it was not included with the Mar. 8, 2002, letter from appellant's counsel as claimed. Furthermore, BLM observes that the author of the document is not identified and that it "is nothing more than a sordid diatribe filled with rank hearsay, personal attacks and libelous comments about the integrity of numerous BLM employees, SHPO [State Historic Preservation Office] staff, other archaeological survey companies, and even corporations who were former clients of ASLM." (Answer at 5.)

In R.C.T. Engineering, Inc., v. OSMRE, 121 IBLA 142, 149 n.7 (1991), the Board declined to strike a pleading containing personal attacks, but admonished counsel as follows:

"The Board is capable of discerning the arguments that have merit and those that do not, and our analysis must ultimately be based on the relevant facts and pertinent law rather than arguments advanced by counsel. Counsel should bear in mind, however, that intemperate characterizations often tend to diminish the credibility of the party making them rather than the party against whom they are directed."

Access Road in Eddy County prepared for Nearburg Producing Company. The survey was conducted by Martin. The total area surveyed was 6.49 acres that included a 400-by-400 foot well pad and a 100-foot-wide access road corridor 1,227 feet long. A recorded site, LA 17787, was to the northwest of the well pad and road. The report identified a newly recorded site, LA 128124, on the north side of the well pad. Although the report contained a written recommendation for proposed fencing along the northern and western sides of the well pad to insure avoidance, the map showed a proposed fence only for the northern side of the well pad.

On September 9, 1999, two BLM employees went to locate a different and shorter route for the access road at the request of a grazing lessee. In checking LA 128124 they found a feature that was not recorded, as well as an additional site. BLM rejected ASLM's Report No. 99-NM-080-575, and on September 16, 1999, BLM issued a "formal warning" to Martin, notifying him of unacceptable performance: "A previously unrecorded site and an additional feature of LA 128124 was located while doing routine fieldwork with Nearburg at their White Tip 7 #1." The letter required that the site be recorded and its National Register status be evaluated, and that the additional feature be recorded and included in an update of LA128124.<sup>5/</sup> ASLM filed an Addendum Report No. 99-NM-080-575.1 dated October 12, 1999. It identified three isolated occurrences and new site LA 128361 containing "three distinct features"<sup>6/</sup> consisting of "burnt rock concentrations" located along the western edge of the drill pad.

When ASLM applied for an annual extension of its Permit to December 31, 2000, BLM approved an extension only through June 30, 2000. (No. 84-2920-99-O.) In a letter dated December 17, 1999, BLM stated that its review had revealed "several problems" in ASLM's performance that led to BLM's decision to issue a "6-month probational permit" and that renewal would be "conditional on improved performance between now and June 30, 2000." BLM's December 17 letter referred to two warning letters, the Nearburg letter and another letter that BLM stated had been

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<sup>5/</sup> Although the file copy of this letter indicates that the copy sent by certified mail was returned to BLM, a Jan. 12, 2000, letter from ASLM's counsel acknowledges that a copy of the letter was hand delivered.

<sup>6/</sup> The glossary in the New Mexico BLM NM Handbook defines an "artifact" as "any object made, modified or used by man, usually movable." It defines a "feature" as follows: "[A]ny nonportable remains of a cultural property that reflect distinct behavioral actions at that location which differentiate the remains from behavior exhibited in the rest of the property. Examples include bedrock mortars, hearths, middens, burials, etc."

returned as “refused.”<sup>7/</sup> BLM proposed a meeting and advised ASLM about its “increased efforts into field checks of permittee work.”

By letter dated January 12, 2000, ASLM’s counsel expressed concern that BLM had issued a probationary permit, noting that BLM’s letter had referred to two warning letters, but that only the Nearburg warning letter had been received. ASLM’s letter asserted that the probationary permit was based on “inaccurate information provided \* \* \* by the Carlsbad office.” In a letter dated March 14, 2000, counsel for ASLM restated his objection to a probationary permit throughout the State of New Mexico when the only performance deficiency had been identified by the Carlsbad Field Office. A meeting was held on March 17, 2000, with ASLM and BLM personnel from the State Office and the Las Cruces and Carlsbad Field Offices. (Letter dated April 10, 2000.)<sup>8/</sup> By letter dated June 19, 2000, BLM informed ASLM that it was extending its Permit until December 31, 2000, finding that the firm had remedied the fieldwork and performance issues that had been discussed earlier in the year. (Permit No. 84-2920-00-P.)

After BLM’s State Director decided not to renew ASLM’s Permit for reasons that included the Nearburg warning letter, ASLM attempted to address the warning letter in its January 11 and March 8, 2002, letters requesting a higher level of review as well as in its SOR. In its January 11 letter and in its SOR, ASLM referred to the finding in BLM’s June 19, 2000, letter that ASLM had remedied its fieldwork and performance problems. (SOR at 3.) However, when BLM issued that June 19, 2000, letter, it had not yet become aware of the problems in Martin’s survey of the Bass

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<sup>7/</sup> Markings on the envelope fail to make it clear whether the envelope was refused or unclaimed. We note that the letter was not sent to a residence or address where a mail deliverer would have presented the envelope to a person who could have refused delivery, but to a post office box where notices of the letter were placed on Sept. 20 and Oct. 15. The envelope indicates that it was “RETURNED” on Oct. 30 and received by BLM on Nov. 10, 1999.

<sup>8/</sup> It should be noted that when this meeting occurred, ASLM was in the midst of its fieldwork for the AT&T fiber optic line in southeastern New Mexico for which a warning letter would later be issued. ASLM had yet to undertake the fieldwork for the Bass Poker Lake well pad and access road for which a warning letter also would be issued.

Poker Lake well pad and access road <sup>9/</sup> or in ASLM's survey for the AT&T fiber optic line. <sup>10/</sup>

In the January 11 letter, ASLM dismisses its omission of "pieces of burned rock that BLM felt should be included within the site" as "an arbitrary decision made by BLM that this site should be two sites rather than one." In a February 15, 2002, letter BLM's Associate State Director expressly disagreed, noting ASLM's failure "to record a hearth feature within site LA 128124 and failing to record another site within the area of effect for this undertaking." In its March 8, 2002, letter, ASLM adheres to the view that the burned pieces of rock may have been naturally occurring and that BLM arbitrarily split a single site. ASLM further asserts that BLM's lead archaeologist who conducted the independent review lacks the experience and qualification with respect to the area covered by the Carlsbad Field Office.

ASLM has merely expressed a difference of opinion with BLM and has offered nothing to substantiate its argument that the artifacts and feature described in its supplemental report did not warrant recording. We are particularly troubled by ASLM's assertion that BLM arbitrarily divided one site into two. For determining site boundaries, the NM Handbook sets forth a "general rule" that "a site boundary can be drawn when no artifacts can be found within 20 meters in any direction from the last artifact on the site periphery." (NM Handbook, Ch. 1, ¶ I. A. 6. f. (2).) ASLM's map shows that the second site is more than 50 meters from the other site. Inasmuch as ASLM failed to identify any artifacts or features outside of the boundaries of the first site, it is disingenuous for ASLM to suggest that BLM erred in dividing a site defined by features and artifacts that ASLM itself failed to identify. In this appeal, ASLM has not addressed the matters raised by the Nearburg warning letter in a manner that inspires "confidence that the permittee can adequately locate and record historic properties within areas of potential effect." (NM Handbook, Ch. 4, ¶ I. L. 3. e.)

<sup>9/</sup> ASLM's Report No. 00-NM-080-571 dated May 11, 2000, and received by BLM on May 15, 2000, shows that the survey was performed on May 8. As discussed below, BLM did not become aware of the deficiencies in that report until the following September.

<sup>10/</sup> On Aug. 16, 2000, BLM received ASLM's Aug. 1 Report No. 00-NM-080-785, "Cultural Resources Class III Inventory and Significance Evaluation of a Proposed Buried Fiber Optic Cable in Eddy and Lea Counties, New Mexico" (ASLM NM Survey). The fieldwork for the inventory was conducted between Feb. 19 and May 3, 2000. It was not until Western Cultural Resource Management, Inc. (WCRM), conducted a new survey between Jan. 8 and Feb. 24, 2001, that the deficiencies in ASLM's report became evident. The record includes a copy of WCRM's 3-volume draft report, "An Archaeological Survey of the New Mexico Portion of Link One of the AT&T Nexgen/Core Project," dated June 4, 2001 (WCRM NM Survey).

ASLM's argument concerning site boundaries fails to meet its burden of providing an explanation that is consistent with adherence to professional standards that would warrant the continuation of its Permit. We find that BLM properly considered the circumstances described in the Nearburg warning letter in deciding whether to renew ASLM's Permit; if the concerns expressed by BLM in its later warning letters are valid, its conclusion in its June 19, 2000, letter that ASLM had remedied the deficiencies in its fieldwork was indeed premature.

### The Bass Warning Letter

On May 15, 2000, BLM received ASLM's Report No. 00-NM-080-571 of a Cultural Resources Inventory of the Poker Lake 147 Well Pad and Access Road prepared for Bass Enterprises Production (Bass). The inventory was conducted by Martin over 14.42 acres that included a 400-by-400 foot well pad and a 100-foot wide access road corridor 4,686 feet long "in an area of rolling sand hills." A records search disclosed four previously recorded sites<sup>11/</sup> near the project. ASLM identified only five isolated occurrences in the path of the road and nothing else in the 100-foot wide corridor ASLM was required to survey. Because no sites had been identified, road construction could proceed.

After the road was completed, BLM received Report No. 00-NM-080-811 on August 28, 2000, from another archaeologist entitled "An Archaeological Survey of the Bass Federal 147 Poker Lake Unit Pipe Line, Eddy County, New Mexico" prepared for Sid Richardson Gasoline Company. The survey was conducted on August 16 and covered 11.5 acres in a 100-foot-wide corridor 5,000 feet long running in an east-west direction. The proposed pipeline would be adjacent to the road and parallel to it on the north. The map in the report shows that the proposed pipeline is close enough to the road so that the road for which ASLM had conducted its survey fell within the area of the pipeline survey. The report identified the same four previously recorded sites in the vicinity that ASLM's records search had also identified. However, the report identified two more sites in the area surveyed by ASLM that were impacted by the road. One site, LA 127928, had been previously recorded but had not been found in a records search. The report stated that LA127928 was rerecorded and that a new site LA130882 was discovered and recorded.

Site LA127928 was identified in 1999 during a survey for a seismic line but the final report had not yet been received as of September 2000. A map in the pipeline report depicts the site as extending from the road running from east to west across the northern portion of the site to about 70 meters to the south. The report suggests that red and white surveyor's tape "represents a reroute" of the seismic line but states that the "eastern reroute cuts through the middle of the site" in what the

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<sup>11/</sup> The sites are numbered LA107957, LA107958, LA107959, and LA107960.

map shows to be roughly a north-south direction. The report states that the road (from east to west) “has impacted the northern portion of the site” and refers to “three burned caliche features [that] are less than 100 [feet] south of the road.”

Site LA 130882 is an artifact scatter that lies to the east of LA 127928 and the report states that that site was also impacted by the road. The report concludes:

Sites LA127928 and LA130882 are typical of sites in the area. They have few artifacts, are eroded, no diagnostic artifacts are present, and they are small in size. What is not typical of the sites is the damage by the recently constructed lease road. *Either the road had no archaeological examination prior to construction or the two archaeological sites were ignored by the archaeologist.* The reroute flags are very visible at Site LA127928 and even though the reroute was misplaced, the three burned caliche features are highly visible.

(Emphasis in original.)

Personnel from BLM visited the project area on August 28 and again on September 5, 2000. They concluded that the survey for the seismic line had underrecorded the eastern portion of LA 127928; the survey for the pipeline underrecorded the northern portion of LA 127928; and ASLM had not recorded either LA 127928 or LA 130882. BLM sent warning letters to all three firms. BLM’s letter to ASLM dated September 14, 2000, referred to the two sites impacted by construction of the road that were not recorded during the original survey for the access road. By letter of the same date, BLM notified Bass about the need for a damage assessment. A December 2000 damage assessment suggests that the damage mainly resulted from burial of artifacts during road construction and that damage was minimal due to the sandy nature of the soils and the sparse number of artifacts at the sites.

The Bass warning letter affected BLM’s consideration of ASLM’s application for a 1-year extension of its Permit until December 31, 2001. In a letter dated December 20, 2000, BLM referred to the warning letter and suggested that the fieldwork deficiencies previously identified had not been remedied. BLM granted only a 6-month extension until June 30, 2001. (Permit No. 84-2920-00-R.)

ASLM referred to the Bass warning letter in its January 11, 2002, letter seeking review of the State Director’s decision not to renew ASLM’s Permit. Noting that the field check was performed 4 months after the work was performed, ASLM refers to a 1993 BLM determination that a 3-month delay is excessive:

Prior to the untimely field check, the BLM had authorized the project to proceed and both the well pad and the road were in place and being used by the client with BLM's approval. The report of a missed site was provided by a direct competitor to Archaeological Services who was surveying a pipeline adjacent to the road that had already been installed. The ground surface that had been surveyed had been removed by the roadway at the time of the report from our competitor. The remaining surface was several feet lower than the original surface. Archaeological Services had, in fact, recorded some 17 items on that roadway, none of which met the BLM standards for a site. BLM had accepted the report and authorized the project to proceed after review of the report and field checks. The interpretation of the competitor that what had been found was part of a site missed by Archaeological Services is impossible to evaluate. The competitor arbitrarily and artificially expanded the site that he allegedly located so that it extended into the area of the survey performed by Archaeological Services. It was clearly in the competitor's interest to make Archaeological Services look bad, and he proceeded to tell anyone who would listen that Archaeological Services had missed a site. Moreover, the project was in an area of dunes, and even if the competitor did in fact discover the materials he claimed, the dune surfaces move, and these materials can be uncovered daily in the dunes. This is particularly significant since the new road surface is several feet lower than the road surface that was actually surveyed by Archaeological Services. \* \* \* It is also interesting that BLM was conducting 100% field checks on the fieldwork performed by Archaeological Services, and that BLM did in fact approve and authorize construction after those initial field checks.

(Jan. 11, 2002, letter at 3.)

In its SOR, ASLM makes many of the same points raised in the January 11 letter, asserting that BLM's letter falsely accused ASLM of "missing a site which never existed" and that ASLM "missed nothing." (SOR at 8.) ASLM asserts that it had "recorded everything that was present at the time the project was surveyed," and that BLM personnel inspected the location, found no problems, approved ASLM's report, and authorized the project to proceed. ASLM asserts that any damage "must have resulted from the failure to adequately inspect prior to authorization." (SOR at 8.)

BLM asserts that no archaeologist from its Carlsbad Field Office inspected the location prior to the acceptance of ASLM's report. (Answer at 8.) As for appellant's concerns about favoritism towards ASLM's competitors, BLM notes that it issued warning letters to two other firms for underrecording sites in this area. Id.

We turn first to ASLM's argument that the project was in an area of sand dunes that may have obscured sites at the time it conducted its survey. Both ASLM and its competitor referred to sand dunes in their reports. As noted above, BLM's NM Handbook recognizes the appropriateness of a "follow-up survey \* \* \* if dynamic geomorphological conditions, such as dune fields, are continuously revealing new surfaces." (NM Handbook, Ch. 1, ¶ I. A. 6. a.) ASLM, however, did not conduct the "follow-up survey" that would have been appropriate if ASLM believed that moving sand dunes were obscuring artifacts. We note that what ASLM identified as isolated occurrence (IO) #3 had lain within the northern portion of LA 127928. In this case, ASLM is essentially contending that the features and artifacts that led to the identification of site LA 127928 during the seismic survey were later covered in May 2000 except for IO #3 and then reappeared by the time of the pipeline survey in August. Although the size of the sites makes it doubtful that they had been completely obscured, the artifacts themselves were sparsely scattered. Nevertheless, the fact that not even an IO was found in the survey corridor outside the path of the road itself raises an issue as to whether ASLM understood the scope of its survey obligations.

Many of the points made in the January 11 letter do not withstand analysis. ASLM's contention that the sites were identified by a competitor does not excuse ASLM's failure to find them. Although ASLM states that "[t]he ground surface that had been surveyed had been removed by the roadway at the time of the report from our competitor," most of the area ASLM was required to survey was not disturbed by the road. The "survey area" that ASLM was required to examine for a linear corridor such as a road is not merely the width of the area on which the road is constructed. Such projects require "a minimum of a 100 [foot] wide cultural survey." (Carlsbad Standards at 8.) In conducting a survey, the space between transects within that area is not to exceed 15 meters. *Id.* "Transects are to be parallel in nature or zig-zag within a 15 meter area and no uninventoried areas are to be left between transects." *Id.*<sup>12/</sup> The Carlsbad Standards further provide:

All cultural resources encountered in the survey area must be documented. Sites and isolated manifestations that occur within or which can be seen from survey transects and are within 100 feet of the project must be completely recorded. Sites which occur within the survey area but which extend beyond the survey area shall be recorded completely unless they extend more than 1/4 mile outside the survey area. [Emphasis in original.]

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<sup>12/</sup> If transects are parallel at a maximum spacing of 15 meters, no point within the survey area should be more than 7-1/2 meters from a transect line.

Id. at 9. The road and proposed pipeline were adjacent so the 100-foot wide survey corridors would mostly overlap. Sites and isolated manifestations outside the “survey area” must also be completely recorded if they “can be seen from survey transects and are within 100 feet of the project.” Id. As noted above, the report of the pipeline survey referred to the three burned caliche features in LA 127928 as “highly visible.” Thus, the area in which ASLM and its “competitor” were required to record sites extended beyond the 100-foot corridors and well beyond the actual areas that would be disturbed by the road and pipeline themselves. The road and proposed pipeline were close enough to each other that ASLM’s competitor was obliged to report the sites and isolated manifestations that appeared in almost all of the 100-foot corridor that ASLM was obliged to survey.

In arguing that “[t]he competitor arbitrarily and artificially expanded the site that he allegedly located so that it extended into the area of the survey performed by Archaeological Services,” ASLM discredits itself, not its competitor, by showing its own failure to understand a permittee’s recording obligations. Although ASLM does not identify which of the two sites is the one to which its argument pertains, the argument makes no sense with respect to either one because artifacts were found in areas adjacent to the road in each site. Moreover, site LA 127928 had previously been identified as extending on both sides of the road and BLM faulted ASLM’s “competitor” for failing to include artifacts on the north side of the road within the site boundary. ASLM’s argument suggests that it does not understand its competitor’s survey obligations or its own. Rather than inspire “confidence that [ASLM] can adequately locate and record historic properties within areas of potential effect,” ALSM’s line of argument has the opposite effect. (NM Handbook, Ch. 4, ¶ I. L. 3. e.) Accordingly, we conclude that BLM properly took into consideration the circumstances leading to the Bass warning letter in deciding whether to renew ASLM’s Permit.

#### The AT&T Warning Letter

AT&T had been granted a right-of-way (ROW) to build a fiber optic line extending from LaMesa, Texas, to Los Angeles, California.<sup>13/</sup> Link 1 of the line extends from LaMesa, Texas, through southeastern New Mexico to El Paso,

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<sup>13/</sup> Much of the chronology of events concerning the AT&T ROW is based on a report dated Apr. 6, 2001, prepared by WCRM entitled “AT&T Nexgen/Core Project, Link One–Texas: Site Damage Assessment” (WCRM Damage Assessment), and a 3-volume draft report by WCRM dated June 4, 2001, entitled “An Archaeological Survey of the New Mexico Portion of Link One of the ATT Nexgen/Core Project” (WCRM NM Survey).

Texas.<sup>14/</sup> (Western Cultural Resource Management, Inc. (WCRM), Damage Assessment, Fig. 1.) The East Texas segment of Link 1 extends from LaMesa to the New Mexico state line east of Hobbs; the New Mexico segment continues from that point to the Texas state line south of Carlsbad; and the West Texas segment continues across Texas to El Paso. C&B Associates contracted with ASLM to conduct cultural resource inventories for the Texas and New Mexico segments of link 1.

The ROW roughly parallels highway US 62/180 along its entire route through link 1 in an existing ROW beside buried cables installed in 1948 and 1987. (WCRM Damage Assessment at 1; WCRM NM Survey at 1.) Between February 19 and May 3, 2000, ASLM conducted its Class III inventory of the New Mexico segment of link 1.<sup>15/</sup> The area to be surveyed was 100 feet wide and 111.72 miles long. ASLM found 15 newly recorded prehistoric sites, 6 historic sites, and 2 multi-component sites. The report of this survey is dated August 1, 2000. An undated copy of a letter from BLM to ASLM indicates that BLM had reviewed 19 of 23 sites reported by ASLM along the New Mexico segment for recommendations of eligibility and treatment. On August 31, 2000, BLM forwarded ASLM's report to New Mexico's State Historic Preservation Officer (SHPO) with its agreement with ASLM on the eligibility of the recorded sites. The SHPO concurred on September 21.<sup>16/</sup>

While it was clear at the outset that an archaeological survey would be required for the New Mexico segment, it was not clear until later that surveys were required for the Texas segments. (WCRM Damage Assessment at 1.)<sup>17/</sup> Inasmuch as

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<sup>14/</sup> Link 2 extended from El Paso through southwestern New Mexico to Tucson, Arizona. Link 3 extended from Tucson around Phoenix to Blythe, California. Link 4 continued from Blythe to San Diego, and Link 5 continued to Los Angeles. (WCRM Damage Assessment, Fig. 1.)

<sup>15/</sup> Report 00-NM-080-785, "Cultural Resources Class III Inventory and Significance Evaluation of a Proposed Buried Fiber Optic Cable in Eddy and Lea Counties, New Mexico" (Aug. 1, 2000) (ASLM NM Report).

<sup>16/</sup> ASLM contends that BLM had inspected and approved its report, but there is no indication that BLM conducted the sort of field investigation that would disclose additional sites that ASLM had overlooked.

<sup>17/</sup> In two letters dated Dec. 7, 1999, to the Texas Historical Commission (THC) pertaining to the two Texas segments of link 1, C&B sought recommendations concerning impacts on historic or cultural resources. In a letter dated Dec. 21, THC observed that most cables are placed within disturbed ROWs where the disturbances are significant enough and the width of the cable plow is small enough that historic properties are not likely to be affected. The letter urged C&B to contact the

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ASLM's report for the east Texas segment states that its fieldwork began by April 20, it is reasonable to assume that the determination that surveys were necessary had been made before that date.<sup>18/</sup>

The problem, however, was that construction on the Texas segments had already begun and continued until the end of June with the result that sites were being impacted before the reports could be completed and site eligibility determinations and treatment recommendations could be made. According to a

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<sup>17/</sup> (...continued)

Environmental Division at the Texas Department of Transportation, which was understood to require that known sites be visited and assessed.

Michalik contacted the Texas Historic Preservation Office in April 2000 and was told that a survey for the Texas segments would not be required, but later she was authorized to proceed with a survey in Texas. See telefax dated June 29, 2000, from Michalik to Bob Scott, contained in WCRM Damage Report, Appendix B.

<sup>18/</sup> See "Cultural Resources Class III Inventory and Significance Evaluation of a Proposed Buried Fiber Optic Cable between Lamesa and the Texas-New Mexico State Line near Hobbs, Dawson and Gaines Counties, Texas" (ASLM East Texas Report). The report states that fieldwork was performed from Apr. 20 to June 15, 2000. However, an Apr. 27, 2000, telefax from Martin to Robert Scott states that the ground survey for this segment had been completed. (WCRM Damage Assessment, Appendix B.)

ASLM denies that it ever prepared final reports for the Texas segments and states that it provided WCRM with the field notes and preliminary site forms which were incomplete. (SOR at 12.) ASLM further asserts that a BLM employee knew "full well that the documents in no way represented a final report," but "deliberately and maliciously portrayed them as a final report" to "discredit and defame" ASLM. Id. Indeed, ASLM asserts that it was threatened with litigation if it "turned over any information to the Texas Historical Commission \* \* \*." Id. at 14.

In its Answer, BLM asserts: "ASLM has once again misstated the facts and again hints at some mysterious conspiracy." (Answer at 10.) BLM states WCRM obtained ASLM's reports from C&B, and WCRM forwarded them to BLM. Id. The record shows that BLM forwarded copies of ASLM's reports on the Texas segments of link 1 to the THC with a letter dated Nov. 6, 2000, that contained eligibility recommendations for sites that ASLM reported. The letter's only reference to an incomplete site form pertains to a communications cable. A Nov. 29 letter to BLM from THC refers to these reports as drafts. We only note that copies of ASLM's Texas reports in this record appear in the same format as the final version of ASLM's New Mexico Report and are not stamped "DRAFT" as is the draft version of the New Mexico Report.

chronology prepared by WCRM,<sup>19/</sup> construction on the east Texas segment of link 1 began on April 6 and ended on May 26, 2000, even though ASLM's report for that segment states that fieldwork was performed from April 20 to June 15. Construction on the west Texas segment began on May 25 but was halted at the suggestion of BLM at the end of June. Fieldwork for the two reports for the west Texas segment was performed from May 6 to August 31. ASLM's reports for the Texas portions of the line are dated August 21,<sup>20/</sup> September 15,<sup>21/</sup> and September 21, 2000.<sup>22/</sup>

These circumstances appear to have impelled changes in the contractors working on the line. We note that WCRM's reports state that they were prepared for PF.Net Construction Corporation, not C&B. ASLM states that in September, it was told by C&B to cease all operations and to turn in the data it had at that point. (SOR at 12.) Between late September and November 2000, archaeological responsibilities were transferred from ASLM to WCRM. (WCRM Damage Assessment at 3.) On November 9, 2000, employees from WCRM and BLM conducted a field trip to evaluate treatment recommendations for the west Texas segment of link 1 and found that a site identified by ASLM had been bulldozed. Id. Further examination found that six of nine sites identified by ASLM in the west Texas segment had been damaged. Id.

Also on November 9, 2000, representatives of WCRM and an AT&T affiliate met with representatives of THC and concluded that treatment recommendations could not be adequately assessed without revised inventory reports as a result of certain discrepancies such as a variation on the reported width of the ROW. Id. In a letter to BLM dated November 29, 2000, THC stated that each of ASLM's reports "requires revisions in order to be acceptable" and that two reports "require substantial revisions \* \* \*." THC would not offer comments until revised and updated reports were received from WCRM.

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<sup>19/</sup> WCRM Damage Assessment, Appendix B.

<sup>20/</sup> "Cultural Resources Class III Inventory and Significance Evaluation of a Proposed Buried Fiber Optic Cable in the Guadalupe Mountains National Park, Culberson County, Texas" (ASLM Guadalupe Mountains Report). Fieldwork for this report was performed from May 6 to May 14, 2000.

<sup>21/</sup> ASLM East Texas Report.

<sup>22/</sup> "Cultural Resources Class III Inventory and Significance Evaluation of a Proposed Buried Fiber Optic Cable from El Paso to the Texas-New Mexico State Line near the Guadalupe Mountains, El Paso, Hudspeth and Culberson Counties, Texas" (ASLM West Texas Report). Fieldwork for this report was performed from May 6 to Aug. 31, 2000.

The initial damage assessment began on November 27 and continued to December 1 when four undocumented sites were found that had been damaged by bulldozer blading. (WCRM Damage Assessment at 3.) Furthermore, six sites were found on the east Texas segment where none had been reported by ASLM, so a complete resurvey of the Texas segments was found to be warranted. *Id.* at 4. This survey was performed from November 27, 2000, to January 23, 2001, and a draft report dated April 23, 2001, was prepared for PF.Net Construction Corporation.<sup>23/</sup> WCRM found 50 sites including the 9 identified by ASLM. *Id.* Recent bulldozer impacts were noted at 30 of those sites, including 6 of the sites identified by ASLM. *Id.*

Meanwhile, on November 27, 2000, ASLM requested an extension of its Permit to December 31, 2001. On December 20, BLM approved an extension only to June 30 because of the September 14, 2000, Bass Poker Lake warning letter. BLM's letter makes no reference to issues arising from the AT&T ROW, inasmuch as the resurvey had not been undertaken at that time. However, WCRM resurveyed the New Mexico segment between January 8 and February 24, 2001, and in its June 4 draft report, WCRM identified 45 new sites in addition to the sites reported by ASLM. (WCRM NM Survey at ii.) When ASLM's Permit reached the end of its term, on July 11, 2001, BLM approved an extension until December 31, 2001. (Permit No. 84-2920-89-S.) BLM explained that it was evaluating ASLM's field performance on its AT&T survey because field checks "suggest some systematic weakness" in ASLM's performance.

On August 6, 2001, BLM issued a warning letter notifying ASLM of unacceptable performance arising from ASLM's survey of Link 1 in New Mexico. The letter explained that construction on the Texas portion of Link 1 had impacted sites that ASLM had failed to record, and that a damage assessment led AT&T to have WCRM resurvey Link 1 in Texas and New Mexico. The letter identified the 45 sites that ASLM had failed to report, although it acknowledged that some sites may have been recorded as IOs.<sup>24/</sup> After referring to the Carlsbad Standards quoted earlier in

<sup>23/</sup> "An Archaeological Survey of the Texas Portion of Link One of the ATT Nexgen/Core Project" (Apr. 23, 2001) (WCRM Texas Report).

<sup>24/</sup> The letter listed the following sites: LA132483, LA132484, LA132485, LA132486, LA132487, LA132488, LA132489, LA132491, LA132492, LA132493, LA132494, LA51816, LA132495, LA132496, LA132497, LA132498, LA132499, LA132500, LA132501, LA132502, LA132503, LA132504, LA128874, LA132506, LA132507, LA132508, LA132509, LA132510, LA132511, LA132512, LA132513, LA132514, LA132515, LA132516, LA132517, LA132518, LA132519, LA132520, LA132521, LA132522, LA132523, LA132525, LA132528, LA132529, and LA132532.

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this opinion that require the complete recording of sites and features that occur within or which can be seen from survey transects, the warning letter further stated:

Our field staff has had the opportunity to compare your firm's site recordation practices with those of WCRM for the portion of Link 1 in the vicinity of Carlsbad, New Mexico. Our field checks suggest some systematic weaknesses in your firm's field performance. A number of the sites recorded by WCRM but not recorded by your firm are linear historic properties, including historic roads, canals, rail lines, and other linear site types. These sites constitute part of the archaeological record and should be recorded during inventory survey work. In addition, your firm was extremely inconsistent in recording historic features and trash scatters; in one instance, your field crews failed to record an extensive historic scatter and dump with dozens of pre-1960 cans and bottles clearly visible from the project centerline. In other cases, your crews appeared to have had difficulties in recognizing prehistoric components when sites had a significant overlay of more modern occupation and/or disturbance. Performance deficiencies were not restricted to historic properties. A number of sites recorded by WCRM but not discussed in your report contained burned rock scatters and burned rock concentrations which were also clearly visible from the project centerline. Although some of these features occurred in areas with extensive outcrops of limestone bedrock exposures and natural gravel deposits, others occurred in sections of the line crossing dune sands. Taken altogether, these problems compromise Archaeological Services' field performance and if not remedied in future projects, will have an adverse effect on our decision regarding renewal of Archaeological Services' Cultural Resource Use Permit.

The letter stated BLM's interest in meeting with ASLM's staff to discuss the situation and BLM's concerns regarding future renewals. In a letter dated August 29, 2001, counsel for ASLM referred to the sites discussed in the August 6 warning letter and requested that they be preserved because they may offer evidence relevant to ASLM's surveys. BLM responded with an undated letter advising ASLM that data recovery from the sites would begin on November 1, leaving 6 weeks for field visits and examination, and that permitted archaeologists from ASLM could inspect the sites but could not collect samples or artifacts.

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<sup>24/</sup> (...continued)

Sites ASLM may have recorded as IOs were listed as LA132486, LA132494, LA51816, LA132496, LA132501, and LA132523.

ASLM and BLM met on November 26, 2001, to discuss performance issues, one of which concerned Martin's supervision of the field crews on the AT&T project. According to BLM, Martin had split his time between two "leapfrogging" field crews, a practice that BLM believed was in violation of the requirement that field crews be under the direct supervision of an authorized Field Supervisor at all times.<sup>25/</sup> See Jan. 2, 2002, Decision at 2. ASLM maintains that BLM's "allegations" are "wholly misleading," asserting that "Martin was never out of sight of any crew involved in survey work." (SOR at 3.) However, BLM states that Michalik admitted at the meeting that Martin did in fact drive back and forth between crews. (Answer at 6.) At the meeting, Michalik suggested remedies that included (1) ensuring that field crews be under Martin's direct supervision and (2) ensuring that field workers associated with the AT&T project not be hired for subsequent projects. See Jan. 2, 2002, Decision at 2.

Meanwhile, by letter dated November 21, 2001, ASLM requested a permit extension to June 30, 2002. On January 2, 2002, BLM's New Mexico State Director issued her decision declining to renew ASLM's Permit that was sustained by the November 20, 2002, decision of BLM's Director.

As with the other warning letters, ASLM addresses the merits of the AT&T warning letter in its letters dated January 11 and March 8, 2001, seeking a higher level of review, and in its SOR. In these filings, ASLM vehemently challenges the propriety and the premises of actions that led to the resurvey of the New Mexico segment,<sup>26/</sup> but this line of argument does nothing to meet ASLM's burden in this appeal. It does not matter whether the resurvey was instigated by BLM, as ASLM claims, or whether AT&T decided to conduct the resurvey on its own. ASLM's argument ignores the fact that under section 106 of the NHPA, BLM carries the responsibility to "take into account the effect of the undertaking on any property eligible for inclusion on the National Register of Historic Places." Whatever the circumstances that led to the New Mexico resurvey, the fact remains that WCRM found new sites in areas ASLM had previously surveyed, and WCRM's report therefore provided a better basis for BLM to fulfill its duties under the NHPA than the report provided by ASLM.

What matters here are the reasons why ASLM did not record those sites. ASLM's explanation essentially consists of two arguments. First, ASLM asserts that WCRM recorded sites using different standards. Second, as in its response concerning the Bass warning letter, ASLM refers to the length of time between its

<sup>25/</sup> See NM Handbook, Ch. 4, ¶ I. E. 2. b. (3)(a); Carlsbad Standards at 7.

<sup>26/</sup> Jan. 11, 2002, letter at 4; SOR at 11-15.

survey and WCRM's and asserts that, in areas of shifting sand, artifacts and sites not visible at the time of its survey may have been revealed later.

Many of the sites ASLM did not record consisted of linear features such as roads, railroads, and utility ROWs <sup>27/</sup> that are so obvious that ASLM's failure to identify them clearly resulted from ASLM's belief that applicable standards did not require their identification. ASLM asserts that standards that required the recording of linear features were only agreed upon in a May 8, 2001, meeting involving personnel from BLM, the SHPO, and WCRM, and that WCRM was using standards from Arizona and the Las Cruces links of the project. (Mar. 8, 2002, letter at 2-3; see SOR at 17, 18.)

In its Answer, BLM refers to the NM Handbook and Carlsbad Standards quoted earlier in this opinion, asserting that definitions of a site have never changed over the course of the project. (Answer at 12.) As BLM indicated in its warning letter, linear sites are also part of the historical record, and ASLM provides no reason why such sites would have been excluded by the NM Handbook or Carlsbad Standards. Although this type of failure to adhere to applicable standards for recording sites may have warranted the issuance of a warning letter, one would not ordinarily expect a recurrence of this problem once a permittee understands that such sites are to be recorded.

The same cannot be said with respect to the remaining sites. We are not persuaded that ASLM's failure to record those sites, or its recordation of some as IOs, can be attributed to changes in standards or standards that are too vague. ASLM asserts that IOs it recorded were later recorded as sites by WCRM due to revised standards and inflated artifact counts (SOR at 17), but ASLM does not support this allegation with any kind of site-specific analysis. Although ASLM generally asserts that there are different definitions that were used to distinguish a site from an IO and that some definitions are "inconceivably vague," <sup>28/</sup> ASLM has not explained on a site-

<sup>27/</sup> E.g., LA132483, LA132484, LA132485, LA132491, LA132492, LA132493, LA132495, LA132498, LA132503, LA132508, LA132512, LA132514, LA132515, and LA132516.

<sup>28/</sup> For example, in its Mar. 8, 2002, letter at 3-4, ASLM contends:

"First of all, the BLM Manual on page IV-12, paragraph 15, provides that inventory and data recovery reports should be completed in accordance with three different standards. \* \* \* Indeed, the one characteristic shared by all of the definitions and the descriptions of what should be termed a 'site' is that they are vague, confusing, arbitrary and subject to almost limitless variability in their applications in the field on a daily basis and very dependent upon who was

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by-site basis how the artifact scatters recorded by WCRM but missed by ASLM conform to standards that differ from many of the artifact scatters that ASLM recorded. As for ASLM's argument that the definition of cultural resource is too vague because it appears to encompass things that may not be tangible, BLM's warning letter pertained to ASLM's failure to record sites containing tangible artifacts and features. The standards are not so vague that there can be any confusion about a permittee's duty to identify artifacts and features within the project area. Other than the linear sites, ASLM has not identified a single specific site recorded by WCRM that illustrates its arguments concerning any differences in standards or vagueness, even though ASLM had taken the opportunity to visit the sites prior to November 1, 2001. See Mar. 8, 2002, letter at 8.

Turning now to ASLM's argument that artifacts and sites in areas of shifting sand not visible at the time of its survey may have been revealed later, we note that except for one site,<sup>29/</sup> ASLM does not identify any of the particular sites recorded by WCRM to which this argument pertains. While the site descriptions prepared by WCRM suggest that some of the sites are in dune areas or may be affected by shifting sands,<sup>30/</sup> this is not true of all of them. ASLM has offered nothing to counter the BLM Director's finding that ASLM missed or inadequately documented sites in stable areas not affected by shifting sands. (BLM Director's Decision, Summary of Findings at 8.) Accordingly, we conclude that BLM properly took into consideration the circumstances leading to the AT&T warning letter in deciding whether to renew ASLM's Permit.

#### The Decisions not to Renew ASLM's Permit

In deciding whether to renew a permit, BLM considers factors in addition to the circumstances leading to warning letters. As stated earlier in this opinion, BLM considers whether a permittee has changed performance as a result of the warning letters, whether a pattern of underrecorded sites or missed sites has developed, whether BLM still has confidence that the permittee can adequately locate and record historic properties within areas of potential effect, and whether the necessity of field

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<sup>28/</sup> (...continued)

interpreting them at the time. To this must be added the 'special project-specific or field office-specific stipulations' that could be attached to permits 'as conditions warrant.' (H-8100-1 page IV-31, paragraph 3)."

<sup>29/</sup> In its Mar. 8, 2002, letter at 3, ASLM refers to WCRM's form for site LA132487 as noting that during a period of five weeks some artifacts were buried to three centimeters. ASLM had recorded the site as IO-90.

<sup>30/</sup> E.g., LA132487, LA132496, LA132497, LA132499, LA132501, LA132506, and LA132507.

checking and rerecording sites covered by the permittee's work creates such a burden on the BLM Field Office that other aspects of the Cultural Resources Management Program are suffering. (NM Handbook, Ch. 4, ¶ I. L. 3. e.)

As noted above, ASLM had suggested lesser remedies than nonrenewal of its permit. These included ensuring that field crews be under Martin's direct supervision and that field workers associated with the AT&T project not be hired for subsequent projects. The State Director, however, did not consider these remedies to be sufficient to address ASLM's performance problems: "These problems occur in projects where Mr. Martin has completed the survey work on his own, without a larger crew, as well as on projects where Mr. Martin has supervised, either directly or indirectly, one or more crews." (Jan. 2, 2002, Decision at 2.) The State Director stated: "BLM no longer has confidence in [ASLM's] ability to meet the standards for fieldwork performance that would allow us to extend their Cultural Resource Use Permit." Id.

Following a telephone conference that was held on February 11, 2002, the Associate State Director by letter dated February 15 determined that the January 2, 2002, decision should stand unchanged, and by letter dated March 8, ASLM petitioned for a higher level review. BLM's Director issued her letter decision dated November 20, 2002, concurring in the State Director's decision not to renew ASLM's Permit. Attached to that letter was a "Summary of Findings" (Summary) that included a description of the cultural resource permit program, the qualifications of permittees, the handling of disputes, and responses to arguments that ASLM had raised.

The issues concerning the warning letters have already been discussed. In deciding not to renew ASLM's Permit, BLM's Director referred to the fact that performance problems were brought to ASLM's attention in meetings but continued uncorrected, and that primary professional responsibility for work under the Permit rested with Michalik as principal investigator. (BLM Director's Decision, Summary at 9; see Answer at 7.) The Director concluded: "It is fair and appropriate for the New Mexico State Office to find Ms. Michalik unqualified as Principal Investigator and Permit Administrator, and Archaeological Services unqualified as an organization, owing to failure over an extended period of time to correct a pattern of deficient performance." (Summary at 9-10, Finding 7.)

ASLM asserts that if Martin's performance was inadequate, it was arbitrary and capricious for BLM to deny renewal of ASLM's Permit rather than apply "some lesser sanction involving Mr. Martin himself." (SOR at 4; see also Mar. 8, 2002, letter at 8.) However, BLM's confidence in a firm's performance depends on how the firm itself responds to inadequate performance by an employee. When BLM discussed the problems arising from the Nearburg warning letter and other issues

with ASLM on March 17, 2000, ASLM was in the midst of its New Mexico survey for AT&T and had not yet conducted the survey for Bass. If there were a change in performance as a result of this discussion, the problems later identified may not have arisen. Although BLM's June 19, 2000, letter extending ASLM's Permit suggests that ASLM's performance problems had been rectified, this letter was issued before the problems with the AT&T and Bass surveys came to light. Nevertheless, in its January 11, 2001, letter, ASLM states that the March 17 meeting "was not a terribly productive meeting," but this point does not weigh in ASLM's favor because it tends to negate the likelihood of a change in ASLM's performance.

As stated earlier in this opinion, BLM bears the ultimate responsibility under section 106 of the NHPA to consider the effect on eligible properties of an undertaking it authorizes, and the fieldwork of archaeologists to whom it issues permits affects how BLM fulfills its statutory duties. An archaeologist who misses sites or underreports them undermines BLM's mission because unreported sites may be impacted by surface disturbing activity, as has occurred in this case. In this case, deficiencies in ASLM's work became evident when other archaeologists found sites in areas that ASLM had been required to survey. By reporting those sites, the surveys prepared by those archaeologists unquestionably provided better support for BLM in the accomplishment of its mission than those prepared by ASLM. Surface conditions at the times of its surveys may have prevented ASLM from identifying some of the sites, but that leaves many others for which ASLM has provided no acceptable explanation for failing to identify.

Rather than acknowledge the deficiencies in its work and address them in a manner that might warrant something less severe than nonrenewal of its Permit, ASLM has chosen to attack the surveys of other archaeologists who merely were trying to do their jobs and whose work would enable BLM better to carry out its responsibilities under the NHPA. Such an argument is not helpful to ASLM's appeal, inasmuch as it evinces a disdain for the cultural resources identified by others that the holder of a permit has a duty to protect. Rather than inspire "confidence that the permittee can adequately locate and record historic properties within areas of potential effect" in a manner that better enables BLM to carry out its responsibilities under the NHPA, ASLM's line of argument provides more of a reason to affirm BLM's decision not to renew its Permit than it does to reverse that decision.

To the extent not expressly addressed in this decision, we have considered and rejected all other arguments raised by ASLM.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James F. Roberts  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge