

JICARILLA ARCHAEOLOGICAL SERVICES

IBLA 87-274

Decided July 13, 1989

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying a cultural resource use permit application. 20-2920-86-E (New Mexico).

Set aside and remanded for further review.

1. Appeals: Generally--Regulations: Generally--Regulations: Interpretation--Rules of Practice: Appeals: Generally

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

APPEARANCES: Terry L. Knight and Andrew R. Gomolak, Aztec, New Mexico, for appellant; Gayle E. Manges, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Jicarilla Archaeological Services (JAS) appeals from a decision of the State Director, New Mexico State Office, Bureau of Land Management (BLM), dated December 9, 1986, denying its application for a cultural resource use permit under the Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa through 470ll (1982).

On November 8, 1984, BLM issued cultural resource use permit 20-2920-84-B to JAS, effective from that date through November 8, 1986. This permit was issued under the authority of section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1982), and section 4 of ARPA, 16 U.S.C. § 470cc (1982). The permit authorized JAS to perform cultural resource surveys on Federal land. During the 2-year period of the permit, JAS was hired by various private enterprises to conduct the cultural resource surveys required by BLM as a prerequisite to BLM approval of projects on Federal land. <sup>1/</sup>

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<sup>1/</sup> BLM required such archaeological surveys pursuant to its responsibilities under section 106 of the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. § 470f (1982).

Prior to the expiration of the permit, JAS filed an application for a new cultural resource use permit under ARPA. By a decision-letter dated December 9, 1986, the Acting State Director, BLM, denied the permit application. The decision letter states:

[T]he Bureau has carefully reviewed the record of your firm's performance. The record demonstrates unacceptable performance in the areas of full and complete recording of cultural resources and submission of acceptable inventory reports. The seriousness of these deficiencies has been pointed out to you by telephone, in field conferences and by written correspondence. Despite such notification, your firm has continued to submit reports which have not fully and accurately reported all cultural resources present in the areas you inventoried.

Consequently your application for a cultural resource use permit dated October 21, 1986, and your request for a permit modification for a time extension dated December 3, 1986 are hereby denied. We regret having to take this action but incomplete reporting jeopardizes this agency's ability to meet its \* \* \* responsibilities [under Section 106 of NHPA, 16 U.S.C. § 470f (1982)].

BLM's decision-letter did not specify the particular incidents relied upon as the basis for the determination that JAS' performance was unacceptable. 2/

On appeal, JAS has expressed some understandable confusion as to the exact basis for BLM's decision. Consequently, JAS' statement of reasons consists of a page-by-page rebuttal to the discussion of facts and issues contained in the Dole report, a report issued in October 1986 after an internal BLM investigation of allegations made by JAS of employee misconduct in connection with BLM's treatment of JAS. In this rebuttal, JAS repeats many of the arguments and explanations it made contemporaneously during the 2-year term of its permit in direct response to specific problems raised by

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2/ The Board has held that BLM not only must ensure that its decision is supported by a rational basis, but also that the factual and legal basis must be clearly explained in the written decision as well as being demonstrated in the record. Eddleman Community Property Trust, 106 IBLA 376 (1989); Roger K. Ogden, 77 IBLA 4, 90 I.D. 481 (1983); Petrovest, Inc., 71 IBLA 250 (1983). We find the explanation provided by BLM in this decision-letter to lack the requisite specificity as to the factual and legal basis for the decision. However, review of the record, which appears to be very complete, reveals several examples of the asserted problems referred to in the decision-letter. Of course, the record also contains both favorable commentary concerning JAS and strenuous disputations by JAS as to the accuracy of allegations of wrongdoing that might militate against adverse action on its application. We expect any decision issued by BLM following further review to contain the required level of specificity, including indications that JAS' defenses have been considered.

BLM concerning aspects of JAS' work. JAS notes that BLM has never clearly addressed most of those detailed responses.

In its answer, BLM reasserts that JAS' performance was unsatisfactory, and that BLM communicated the deficiencies to JAS in time for it to improve its performance. In support of its allegations, BLM provides some examples of the problems it had with JAS, but it does not engage in a point-counterpoint discussion of all of JAS' rebuttal arguments.

The record contains numerous reports filed by JAS with BLM. Appended to some of these reports are BLM's comments on the perceived deficiencies of the reports. The case file also contains JAS' detailed, point-by-point refutations of BLM's reasons for concluding that the reports demonstrate inadequate work. The record thus contains allegations and counter-allegations, leaving many factual questions unanswered.

This Board has the authority to order a formal evidentiary hearing before a Departmental Administrative Law Judge pursuant to 43 CFR 4.415 when there are significant factual issues to be decided and the record is insufficient to resolve them without a hearing. E. B. Brooks, Jr., 92 IBLA 282 (1986); Rosita Trujillo, 77 IBLA 35 (1983); Patricia C. Alker, 70 IBLA 211 (1983). Based upon the record as it now stands, we cannot determine whether, in fact, JAS' performance was unsatisfactory, and, ordinarily we would refer the matter for a fact-finding hearing. However, because, as discussed below, regulations promulgated during the pendency of this appeal provide procedures by which an affected person can challenge the denial of an ARPA permit by first obtaining internal BLM review of the denial decision, we have decided instead to set aside the denial and remand the case to BLM for further internal review. <sup>3/</sup>

[1] On March 23, 1987, while this appeal was pending before the Board, the Department promulgated regulations to supplement the uniform regulations in 43 CFR Part 7 implementing ARPA. 52 FR 9168 (Mar. 23, 1987). Subpart B, the "supplemental regulations," codified as Subpart B of 43 CFR Part 7, describes the procedures for cultural resource use permit reviews and disputes. See James C. Mackey, 104 IBLA 393 (1988). Specifically, 43 CFR 7.36 contains procedures for internal BLM review of permit denials and disputes. That regulation provides:

(a) Any affected person disputing the decision of a Federal land manager with respect to the issuance or denial of a permit \* \* \* may request the Federal land manager to review the disputed decision and may request a conference to discuss the decision and its basis.

(b) The disputant, if unsatisfied with the outcome of the review or conference, may request that the decision be reviewed by the head of the bureau involved.

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<sup>3/</sup> Because we have determined to remand the case to BLM, we deny BLM's earlier motion to dismiss the appeal for failure to comply with 43 CFR 4.401(c).

(c) Any disputant unsatisfied with the higher level of review, and desiring to appeal the decision, pursuant to § 7.11 of this part, should consult with the appropriate Federal land manager regarding the existence of published bureau appeal procedures. In the absence of published bureau appeal procedures, the review by the head of the bureau involved will constitute the final decision.

(d) Any affected person may request a review by the Departmental Consulting Archeologist of any professional issues involved in a bureau permitting decision, such as professional qualifications, research design, or other professional archaeological matters. The Departmental Consulting Archeologist shall make a final professional recommendation to the head of the bureau involved. The head of the bureau involved will consider the recommendation, but may reject it, in whole or in part, for good cause. This request should be in writing, and should state the reasons for the request.

Under these regulations, JAS will not only be able to explain its disagreements with BLM's evaluation of its work, but it will also receive a direct response to its explanations, something JAS has stated was lacking in its earlier communications with BLM on those issues. Additionally, JAS may obtain review by the Departmental Consulting Archeologist of its disagreements with BLM over any matters involving professional archaeological judgments. In the course of these reviews, the disputed factual and professional issues raised in the record would be determined in the first instance by BLM. <sup>4/</sup>

As noted above, we are concerned that BLM has not set out with specificity the acts of misconduct it feels justify the rejection of JAS' application. It may be that BLM is relying on the record as a whole. If so, the scope of the review will be extensive, in view of JAS' challenges to specific acts of alleged misconduct. On remand, BLM may wish to narrow the scope of the dispute by singling out specific acts which, in its view, justify the denial of the application.

It is possible that this matter may be resolved to JAS' satisfaction within BLM under its review procedures, thus obviating the need for an appeal to this Board. See James C. Mackey, *supra* at 395. On the other hand, BLM's decision on the matter is subject to appeal to this Board. 43 CFR 4.410(a), 7.36(c). If an appeal to the Board occurs following BLM review, our adjudication will be facilitated by the record developed before BLM, particularly as to technical archaeological issues.

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<sup>4/</sup> From the record, it appears that there have been personality conflicts and personal animosities between JAS and various BLM personnel. Because time has passed since the activities documented in the record, these tensions may have lessened and the situation improved. In any event, the new review procedure should help ensure that JAS will receive a fair review of its permit denial.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action as described herein.

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David L. Hughes  
Administrative Judge

I concur:

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Wm. Philip Horton  
Chief Administrative Judge