

Cultural Resource Use Permits

By Gary Stumpf

Edited by Tom Burke

How did BLM obtain authority to issue permits?

Before 1906. Before the Antiquities Act was passed in 1906, anyone could dig for artifacts on federal land as they pleased, with the possible exception of lands in Yellowstone, the first national park, which was established in 1872, and Casa Grande National Monument in Arizona, which was set aside in 1889. The Antiquities Act was intended to bring control to a generally uncontrolled situation. Up until that time, people like the Wetherill brothers, Nordenskiold and myriad others had few or no restrictions placed on them. Archaeological sites were there for the taking, by anyone who cared to dig them up.

1906 – 1929. Beginning in 1906, permits to excavate and collect “objects of antiquity,” as they are called in the Antiquities Act, were issued by the Secretary of the Interior on behalf of all federal land managing agencies. The Secretary’s office coordinated their review of permit applications with the Smithsonian, and to some extent with the appropriate land managing agencies. But the agencies had no expertise to make recommendations on the applications, nor did they very much care about such esoteric activities. That probably reduced the amount of coordination even more.

1929 – 1967. The Secretary’s “Departmental Archaeologist,” later called the “Consulting Archaeologist,” and later still the “Departmental Consulting Archaeologist,” didn’t exist and didn’t have a role in issuing permits until 1929. The first Departmental Archaeologist was Jesse Nusbaum, superintendent at Mesa Verde National Park and the first archaeologist to work for the Department of the Interior. His role with respect to permits was to advise the Secretary. The authority to issue permits remained with the Secretary, but this first connection between the National Park Service and the Departmental Consulting Archaeologist was established at that time, and it remains to this day.

1967 – 1984. The Secretary did not delegate the authority to issue permits to the National Park Service’s Departmental Consulting Archaeologist until the National Park Service reorganized in 1967 to enable implementation of the National Historic Preservation Act. The Departmental Consulting Archaeologist sent copies of permit applications to the appropriate land managing agencies for review, but didn’t expect much, if any, response.

By the mid 1970s, when BLM had hired a few archaeologists in its State Offices, the role of issuing permits was held by the National Park Service’s “Interagency Archaeological Services,” the division overseen by the Departmental Consulting Archaeologist. Interagency Archaeological Services gave BLM the opportunity to comment on applications, and perhaps add a stipulation or two, but that was about it. Usually, BLM

recommended approval, but occasionally not. Sometimes BLM said no, and IAS issued the permit anyway. That didn't sit well with BLM, and in 1981, BLM's Washington Office began moving to get permit authority re-delegated to the agency heads.

From the mid-1970s, permit applications came to BLM's Washington Office from IAS, and WO sent them to the appropriate State Office(s) for review and recommendations. By the late 1970s, the number of applications had sharply increased, primarily due to the growth of Section 106 compliance work. By the mid-1980s, BLM was carrying about 500 permits a year, which was more than 85 percent of the permits issued for the entire Department of the Interior. Processing permits in those days was very slow, taking 3 to 4 months or more from the time the application was received to the time the permit was issued.

In 1979, the Archaeological Resources Protection Act, or ARPA, was passed, supplanting the Antiquities Act and greatly strengthening protection for archaeological resources. During the next few years, an interagency task force worked to draft uniform regulations to implement ARPA. BLM's Washington Office archaeologist, John Douglas, played the lead role in writing the regulations. Anticipating that BLM and other bureaus would be given the authority to issue their own permits under ARPA, BLM drafted permit procedures.

1984 – present. The Departmental Consulting Archaeologist indicated on several occasions in 1983 and 1984 that authority to issue permits would be delegated to the bureaus, but it didn't happen. Some reluctance had to be overcome. But finally, on October 1, 1984, Secretarial Order No. 3104 was signed delegating the authority to issue permits under ARPA to the respective federal land managing agencies with jurisdiction over the lands involved.

Roles and Responsibilities.

State Office responsibilities. State Offices are responsible for:

- Receiving permit applications
- Preparing and maintaining permanent permit files
- Reviewing applications to ensure that the applicant and organization are qualified to do the work proposed
- Issuing or denying permits
- Issuing warnings to permittees
- Modifying, suspending and revoking permits

Field Office responsibilities. Field Offices are responsible for:

- Reviewing permit applications as requested by the State Office
- Making recommendations concerning permit issuance, denial, modification, warning, suspension and revocation
- Receiving Fieldwork Authorization Requests
- Issuing or denying Fieldwork Authorizations

- Notifying and consulting with Indian tribes when the proposed work has the potential to harm or destroy sites of religious or cultural importance to tribes
- Monitoring work conducted under permits and Fieldwork Authorizations

Types of Permits.

Permits are issued for three kinds of work: (1) survey & recordation, (2) limited testing and/or collection, and (3) excavation and/or removal.

Survey and Recordation Permits. Survey and Recordation permits are issued to applicants who want to identify, evaluate, record or do similar kinds of non-impacting studies that do not involve excavation or collection or other significant disturbance of sites. Minor subsurface testing, i.e., what is commonly called “shovel testing” or “probing,” and collection of isolated artifacts that are not associated with sites may be authorized by this kind of permit, depending on which BLM state is involved and the outcome of possible proposed changes (2012). However, the specific conditions under which shovel testing and collection of isolates can occur need to be specified in the permit conditions and must be consistent with any agreements states have with their State Historic Preservation Officers.

Survey and Recordation permits may be issued on a project-specific basis for individual surveys or recordation projects within a Field Office area. They may also be issued on a more general basis to cover multiple fieldwork episodes over a period of several years for more than one Field Office area, or even for all BLM-administered lands within a State. However, if a Survey and Recordation permit is issued on a general basis to cover multiple surveys or recordation projects, each survey or project carried out during the life of the permit will require a separate Fieldwork Authorization from the office administering the lands involved.

One advantage of issuing general permits covering multiple episodes of fieldwork is that they reduce paperwork for each specific survey or recordation project that is done under those permits. Instead of having to re-apply for a new permit every time a consultant wants to do a survey for some project, the consultant only has to submit a Fieldwork Authorization Request to the appropriate Field Office for approval before doing the survey. The Fieldwork Authorization Request is a simple one-page form that can be faxed to a Field Office, signed, and faxed back in a short time. And in fact, an office can even issue a Fieldwork Authorization by email or over the telephone as long as some form of written documentation is placed in the permit file.

The purpose of requiring these subsequent Fieldwork Authorizations under general survey and recordation permits is to make sure the permittee contacts the appropriate Field Office before starting work. That gives the Field Manager and staff an opportunity to check to see if the areas have previously been surveyed, whether surveying them at that time might cause conflicts with other resources, or whether there might be safety issues involved that could affect the timing or scope of the proposed work. Sometimes companies jump the gun and hire consultants to start doing cultural resource surveys

before the companies even come to the BLM with a land use application. When that happens, Field work Authorization Requests can be very helpful by alerting a Field Office to projects they didn't even know about.

Survey and Recordation permits issued on a general basis for multiple projects can save time and paperwork for consultants and BLM staff by requiring a consultant to submit a complete permit application only once every few years. But they have a downside, too.

One problem with permits issued on a general, rather than project-specific, basis is that they tend to be viewed by cultural resource consultants as something like a license to practice, or a precondition to compete for jobs. Many consultants are afraid that if they aren't carrying a current permit with BLM, they will be overlooked by companies who want to make sure they are hiring consultants who qualify to work on BLM lands. Some companies have the impression that obtaining a permit from BLM is a long and involved process, so they want to hire a consultant that already has a BLM permit to avoid any potential delays.

Companies seeking to hire cultural resource consultants often ask BLM for a list of current permit holders so they can be assured of hiring someone they know is qualified and who can start work immediately. This puts BLM in a difficult position because any list of consultants it provides to companies can be construed as favoritism -- an endorsement of some consultants over others. This is true even if a company asks BLM which cultural resource consultants have recently worked in a particular state or in a particular area. You should never put yourself in a position of even appearing to recommend some consultants as opposed to others. One way to handle such requests is to refer the companies to lists of consultants that State Historic Preservation Offices maintain.

Because Survey and Recordation permits issued on a general basis were being perceived as an endorsement of cultural resource consultants, many States were becoming besieged with applications for speculative permits from consultants who would never end up working in those States. It was creating a nuisance workload for BLM, and was perpetuating the mistaken impression that consultants needed to be always holding a permit with BLM in order to be competitive for jobs.

To address that problem, language was added to the 8150 Manual discouraging the issuance of speculative permits. Some states have stopped issuing general permits altogether and only issue permits for specific projects. Other states still find general survey and recordation permits useful and continue to issue them. But no state issues general permits that cover more than one excavation or collection project. All permits issued for excavation or collection must be project-specific.

Limited Testing and/or Collection Permits. Limited Testing and/or Collection permits are issued to applicants who want to do small-scale testing or systematic collection of artifacts during field survey, so that the significance of sites can be better evaluated in the

field without substantially disturbing them. Often, such limited testing or collection is done to determine future mitigation strategies.

Limited Testing and/or Collection permits are issued for specific sites or projects and for a specific point in time, and the sites to be tested or collected must be identified in the permit application. These permits are never issued as general permits covering more than one testing or collecting project.

The Manual guidance pertaining to Limited Testing and/or Collection permits is somewhat broad. It's flexible enough to allow for differences in testing and collection guidelines that individual BLM offices may have agreed upon with their State Historic Preservation Officers.

Excavation and/or Removal Permits. Excavation and/or Removal permits are issued to applicants who want to excavate or collect materials at a greater scale than the limited testing we just discussed. This kind of work would result in substantially altering the sites involved, perhaps even diminishing or destroying their future research potential. Work under this kind of permit would include excavation of sites and would also include major testing programs designed to answer research questions and guide future data recovery efforts. Excavation and/or Removal permits are issued for specific sites or projects and for a specific point in time. They are never issued as general permits covering more than one project.

Recap of permit types.

BLM issues three types of permits:

1. Survey and Recordation permits. These can be either general or project specific. If they are issued as general permits covering more than one project within a large area over an extended period of time, each individual project done under the permit must be accompanied by its own Fieldwork Authorization.
2. Limited Testing and/or Collection permits. These are always project specific, and
3. Excavation and/or Removal permits. These are always project specific.

Sometimes, project-specific permits for testing, collection or excavation are issued for field work that will be carried out in more than one episode. For example, a single data recovery project may involve the excavation of several sites carried out a few weeks at a time in several discontinuous episodes over the course of an entire year. In such cases, each separate episode of field work done under the project permit will require an authorization.

Processing Permit Applications

Who reviews permit applications and signs permits? The process we follow to evaluate and issue Cultural Resource Use Permits is described in BLM's 8150 Manual Section. The State Director is responsible for receiving permit applications, preparing and maintaining a permanent file for them, ensuring that qualification requirements are met, and for issuing, denying, modifying, suspending and revoking permits. The authority to perform these tasks, however, may be delegated to another person in the State Office at the State Director's discretion, and it usually is.

The responsibility for reviewing permit applications usually falls to the Deputy Preservation Officers, although in some States other cultural heritage personnel in the State Office perform that duty. In most states, the Deputy State Director signs the permits, but a few states allow their Deputy Preservation Officers to sign them.

BLM recently spearheaded the development of Department-wide application and permit forms that are more useful than the old forms used by the National Park Service, and succeeded in getting the forms approved by the Office of Management and Budget in 2004. So all federal permits issued by any agency under the authority of the Antiquities Act and ARPA can now use the Department of Interior application and permit forms, numbered DI 1926 and DI 1991, respectively. Some BLM states continue to use the earlier Cultural Resource Use Permit form.

Whether a particular state uses the Department of Interior form or the earlier Cultural Resource Use Permit form, only one form is used to approve all three types of permits – Survey and Recordation, Limited Testing and/or Collection and Excavation and/or Removal. That form is issued under the authority of both the Archaeological Resources Protection Act and the Federal Land Policy and Management Act.

How are the qualifications of applicants evaluated? The qualifications standards for personnel working under BLM Cultural Resource Use Permits are based on those in the 43 CFR 7 regulations. A Project Director, or Principal Investigator, must have a graduate degree or a Bachelor's degree plus 2 years of equivalent training and professionally supervised experience. A Project Director must also have completed at least 16 months of professional experience or training in field, laboratory or library research, administration or management. A Field Supervisor, or Crew Chief, must have a Bachelor's degree and at least 1 year of professionally supervised experience, or at least 2 ½ years of equivalent professionally supervised training and experience.

The qualifications of all these individuals are evaluated in relation to the work being proposed. For example, if the application proposes work in historical archaeology, the personnel named in the application should have training and experience in that emphasis. Manual Section 8150.12B contains a detailed description of the qualifications standards.

The “geographic or culture area” qualification. Both Project Directors and Field Supervisors must have at least 4 months of experience in the geographic and/or culture

area involved. We see considerable variation among States in the interpretation of this requirement. What is the geographic or culture area? Is it western Oregon, or is it the Pacific Northwest? Is it the Anasazi, or is it Puebloan culture? Is it central Nevada, or is it the entire Great Basin?

As an illustration of the variation we see in the way this requirement is applied, New Mexico interprets the “geographic or culture area” qualification by dividing their state into several parts. Consultants must have 4 months of experience in those parts of the state before they can obtain a permit to work in those areas. Neighboring Arizona interprets the geographic area requirement more broadly, accepting experience within the wider American Southwest as relevant, including experience in adjacent portions of the Four Corners States, southern California and southeast Nevada.

Unless this inconsistency becomes an issue in the future, the important point is whether a particular state’s interpretation of this requirement is working in terms of getting acceptable results from permittees, or whether it is creating problems. If it is creating problems in your state, you may wish to tighten up your interpretation of the geographic or culture area definition. If it is working well for you, you may want to retain flexibility and give more consultants the opportunity to work in your state.

Qualifications of applicant’s organization. In addition to evaluating the qualifications of the personnel who will do the work, the company or organization applying for the permit must provide information about itself, so that BLM can ensure that it is capable of accomplishing the work. The application must include information on the location of the facility, description of the facility and equipment, and its history in completing the type of work proposed, including past projects, reports and publications.

Curation agreements. Every applicant for a permit is required to obtain a curation agreement, also known as a repository agreement, and submit this as part of the permit application. A curation agreement is required even for non-collection survey permits, because even if no artifacts will be collected, the permittee will still be required to deposit copies of the records, data, photographs and other documents that were generated by the work done under the permit. BLM offices are not proper facilities to curate collections or records in perpetuity, so all permittees are required to arrange for the permanent curation of these materials in a facility approved by BLM. In some states, the State Historic Preservation Office serves as a repository of BLM site records.

Notifying and consulting Indian tribes. Before any permit is issued, we must consider whether the proposed work could harm or destroy sites of religious or cultural importance to Indian tribes. In general, and under current guidance, only permits for major testing programs, excavation or collection would require tribal notification and consultation before being issued. But whatever the proposed work is, if the Field Manager determines that it has the potential to harm or destroy sites of religious or cultural importance to tribes, we must notify the appropriate tribes and give them an opportunity to request consultation with us.

We ordinarily allow a tribe 30 days to respond to our notification letter. If the tribe asks to consult with the Field Manager within 30 days, the Field Manager should arrange a meeting, explain the proposed work, listen to the tribe's concerns, and consider whether to modify the proposed work to accommodate those concerns, or even deny the permit application altogether.

Monitoring Work Conducted under Permits

Monitoring fieldwork. Although we may have confidence in the professional abilities of the contractors to whom we issue permits, BLM is ultimately responsible for the quality of Section 106 compliance work that is done on BLM lands. It isn't enough to just issue a permit and assume the fieldwork will be done properly. Field Offices should try to do at least occasional spot checking of a permittees' fieldwork.

Obviously, if we have had problems with a permittee's quality of work, we will be inclined to monitor that person more closely. But even highly regarded firms employ field crew members who may not be as skilled or attentive in their fieldwork as we would like. And everyone misses things from time to time.

Keep in mind, too, that when we evaluate a permit application, we are only looking at the resumes of Project Directors and Field Supervisors. We don't evaluate crew members, and they, after all, do most of the fieldwork. We don't know who they are, where they came from, or how much experience they have had. This is another good reason to monitor the performance of our permittees.

Field Offices are responsible for monitoring the permittee's performance throughout the life of the permit. Bureauwide, work is conducted under about 740 permits every year, and nearly a third of those permittees are field checked each year. Considering how little time BLM Field Office staffs have, that represents a good effort to monitor the performance of permittees.

Monitoring of performance and compliance with permit conditions. All permits have conditions, or stipulations, attached to them. These range from environmental safeguards such as prohibiting the cutting of live trees and requiring vehicles to stay on existing roads, to requirements for using certain site recording forms, to timeframes for submitting reports and curating artifacts. Field Office staffs are responsible for monitoring compliance with the permit stipulations. This can be difficult after the fieldwork is done, because analysis of the artifacts collected and preparation of draft and final reports can take years to complete after the project is constructed or installed on the ground.

Tracking collections. Tracking collections has been especially difficult because of the long timeframes involved from when they are taken from the ground to the time they are accessioned into a curatorial facility years later. Some States are using their own automated databases to track collections.

In 2001, BLM began requiring permittees to complete and return a form confirming that collections have been deposited in a curatorial facility. The form, called a Confirmation of Museum Collections Deposition Statement, includes a brief list of the collections and is signed by an official from the curatorial facility. In theory, this form should help keep track of collections, but of course, it depends on whether the permittee actually remembers to get it signed and returned to BLM. In practice, keeping track of these forms has become another responsibility of the Field Office staff.

Wyoming is using a web-based project tracking system to make it easier for BLM, the State Historic Preservation Officer and contractors to keep tabs on what has been done on a project, what still needs to be done, what products are required, and what the timeframes are for delivering them. This project tracking system may be used Bureau-wide in the coming years.

Responding to Performance Problems

Monitoring fieldwork and compliance with permit stipulations is important because if a contractor is not performing, we need to know that so that we can take appropriate action. The 8150 Manual requires us to monitor a permittee's performance at various intervals throughout the life of the permit, and to review the performance of every permittee at least once a year.

What actions can we take if we find that a permittee is not performing adequately or has violated the conditions of a permit? The State Director can issue a warning, suspend the permit for a time, or revoke the permit entirely.

Warnings. Suspending or revoking a permit is a very serious thing to do because it not only affects an individual's livelihood and ability to practice his or her profession, but it also affects the entire organization for whom that individual works. Violations of some permit conditions are not as serious as violations of others, and we have to use good judgment in deciding how serious an action to take against a permittee for a given infraction. Less serious performance problems should be handled by a written warning from the State Director. Such warnings should describe the problem clearly, state what actions are needed to correct the problem, and set a timeframe for the permittee to correct the problem.

Suspending a Permit. A State Director may suspend a permit for serious or irresponsible infringements of permit conditions. If a permittee does something, or fails to do something, that results in damage to cultural or natural resources or threatens public safety, that would be cause for suspension. If a permittee is charged with violating ARPA or its implementing regulations, that would be cause for suspension, even if there has not yet been a conviction. A suspended permit may be reinstated.

Revoking a permit. The State Director *must* revoke a permit if the permittee is convicted of a criminal violation of ARPA or was assessed a civil penalty under ARPA. The State Director *must* revoke a permit upon determining that a permittee knowingly

provided false information in a permit application, a Fieldwork Authorization Request, or a report. The State Director may revoke a permit if the permittee fails after a reasonable time to correct the situation that led to suspending the permit. A revoked permit cannot be reinstated.

A permit can also be suspended or revoked if new management conditions arise such as the need to protect other resources, or if public safety concerns require that the permitted work be temporarily or permanently stopped.

Disputing BLM decisions

Administrative review process. An applicant or permittee can dispute BLM's decision to deny a permit application, or to suspend or revoke a permit. The ARPA regulations provide for an administrative appeals process, and the 8150 Manual offers a common-sense internal review process so that a permittee or a rejected applicant can ask "Why?" and receive an answer, short of going to the Interior Board of Land Appeals or the courts.

A dispute, following BLM's internal review process, can end up going all the way up the line to the Director. And after the dispute process has ended, the disputant can take it further by filing a formal appeal with the Interior Board of Land Appeals (by following 43 CFR 4, Subpart E). And aside from this administrative dispute and appeal process, the disputant can take BLM to court over the decision at any time. Nothing stands in the way of a citizen's right to seek a judicial remedy.

Documenting BLM decisions. Something as serious as suspending or revoking a permit must be carefully documented and entered into the permanent permit file maintained by the State Office. Our ability to support our decision and prevail in disputes, appeals or lawsuits will depend a great deal on how well we can defend our actions leading up to our decision and how well we have documented the basis for our decision. People who stand to lose their livelihoods *will* challenge us legally, as they have a right to. So going by the book, and documenting it, is critical for Field Office staffs as well as State Office staffs.

Field Office staffs play a critical role in developing the information that will support a BLM decision to suspend or revoke a permit. In particular, objectively monitoring the performance of permittees and carefully documenting any infractions of permit conditions are Field Office responsibilities. The State Director and Director will depend on the work of Field Office cultural resource staffs and their managers in the event of an internal review, an appeal to the IBLA, or a lawsuit.

Since BLM started issuing permits in 1984, only about a dozen disputes have made it all the way up to the Director's level --- the rest were resolved at the State Director level. That shows that BLM's internal review process works well and has taken a lot of workload off of the IBLA. And of those dozen or so disputes that made it all the way to the Director, all but two were decided in the State Director's favor. The disputes that have gone through BLM's internal review process and were then taken to IBLA have all

been decided in BLM's favor. The reason we have prevailed in these disputes to the extent we have can be attributed in large part to making sound decisions consistent with our policies and procedures, and documenting those decisions in the permit case files.

The most recent example of BLM's ability to prevail when its permit decisions are disputed comes from Montana in 2009. In that case, the Montana State Director decided not to issue a new permit to a consultant when that individual's previous permit expired. When it received an application for the new permit, the State Office asked the Field Office for its recommendation, and the Field Office responded by providing documentation on compliance checks that it had performed on that permittee's work during the previous year.

The Field Office was able to show that the permittee missed cultural properties in 20 percent of the surveys where no cultural properties were reported, and 50 percent of the surveys where cultural properties were reported. The Field Office was also able to document that those problems were not new, and that they had been continually discussed with the permittee in several face-to-face meetings over the previous 6 years.

Because of this pattern of well-documented deficiencies, the Director upheld the State Director's decision not to grant a new permit when that decision was disputed. When the permittee subsequently appealed the decision to the IBLA, the IBLA affirmed the Director's decision.

Another indication of BLM's success in enforcing its permit decisions through its internal review process and in IBLA appeals is that BLM has never had a permit-related case go to court.