

FEDERAL POLICY AND LEGISLATION FOR ARCHAEOLOGICAL CONSERVATION

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Expanding federal legislation reflects a growth of public involvement in archaeology and historic preservation. Through necessity or interest, more and more people are becoming concerned with preserving the nation's archaeological heritage. Federal and state agencies, city planners, businessmen, local school teachers, and private citizens are among those who are finding it necessary or desirable to deal with the physical remains of the country's previous inhabitants. Some of these organizations and individuals have been acquainted for some time with the nature and extent of these remains, while others are just becoming aware of them. Legislation designed to protect this aspect of our national heritage has created a need for familiarity with archaeological methods and goals among a broad segment of the American public.

WHAT IS ARCHAEOLOGY?

Archaeology consists of techniques for recovering the physical evidence of past human societies and of a body of theory which guides the interpretation of this evidence. Archaeologists share many of the goals of historians, but they deal with different types of data and study somewhat different aspects of the past. Historians find the greatest part of their information in written documents, while archaeologists study the material remains of vanished peoples that have escaped the destruction of time. The focus of history may be on an individual person or on particular events. By contrast, the actors or basic units in archaeology are social groups and societies. The concern of archaeologists with social patterns and processes follows from the close association of archae-

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ology, as it has developed in this country, with anthropology, the more broadly based study of man.

Archaeology can be divided generally into two categories: prehistoric and historic. Prehistoric archaeology is the study of that part of man's history before the use of written records. In the United States, the Indians did not develop a system of writing. Therefore, prehistoric archaeology is the only source of information about Indian groups before the coming of Europeans. Historic archaeology deals with the remains of both Indians and non-Indians in colonial times and later. Although documents are available for these periods, archaeology can provide insight into many aspects of life not mentioned in written records.

The Relevance of Archaeology in the Modern Community

It may not be apparent to everyone why archaeological remains should be termed a public resource or deserve the attention of governmental decisionmakers. Citizens of modern communities must divide their attention and energy among many different undertakings. There are many reasons why archaeological resources should receive a part of this attention.

Archaeology makes important contributions in the areas of recreation and entertainment. Active amateur societies are found almost everywhere at the local level, and most states have a statewide organization of these groups. Numerous federal and state parks are designed for the exhibition and interpretation of archaeological remains. Attendance at these parks is increasing rapidly, as is attendance at museums that feature archaeological presentations. The better-known parks, monuments, and museums draw visitors from all parts of the United States and foreign countries.¹ In addition, literature generated by archaeologists at varying levels of technical detail is widely read by the American public.

The study of history and the historical process can also be served by an archaeological approach. Many facets of even the recent past have not been preserved in written records. Those who came here from the Old World have left us documents that reveal the public and sometimes even the more personal events of national history. Archaeology can fill in the details about the unmentioned aspects of everyday life and locate or identify remains forgotten in living memory.² For the

1. For example, Mesa Verde National Park in Colorado has had one of the most rapid increases in attendance of any national park over the last 10 years. [1978] U.S. NATIONAL PARK SERVICE, ANN. REP. OF THE DIRECTOR TO THE SECRETARY OF THE INTERIOR.

2. Identification of the original townsite of Spanish St. Augustine in Florida, and the loca-

original inhabitants of the United States—the Indians—archaeology provides the major key to their past.

Archaeological sites often offer the advantage of being assignable to a very specific segment of the past. Many types of biological and geological materials recovered from archaeological contexts are therefore significant sources of data for workers in a variety of disciplines. Past climatic events, the evolution of plant and animal domesticates, movements of the earth's magnetic poles, and the effects of long term human modification of environments can be studied with archaeological materials. Direct applications have also been made of archaeologically derived knowledge of the practices of prehistoric peoples. For example, ancient agricultural techniques are being employed to reclaim currently unproductive portions of the Negev Desert in Israel and other arid regions.³

Finally, archaeology as a discipline belongs to the social sciences. It shares the goal of discovering and understanding predictable and universal patterns in human behavior and society. Archaeology makes a unique contribution to the social sciences in that it gives a broad perspective of time and circumstances and brings the long range working of human society into focus. By learning more about the development of past societies, it may be possible to evaluate and predict the directions in which our own society is going and to better plan for the future.

Investigating the Past: Archaeological Techniques

For many people, archaeology implies a study of objects or artifacts such as arrowheads and pottery. Representative and unique objects are valued for museum presentations and for the insight they offer into the lives of their users, but the real goal of archaeology is the reconstruction of past cultures. Just as important as the artifacts themselves are the contexts in which they are found.

“Context” is the environment within which objects were deposited or within which they operated. An arrowhead, for example, has little informational value if it cannot be associated with a particular locality and with the other artifacts that were found with it. An arrowhead out of context might be identifiable as belonging to the style of the Archaic period dating four to five thousand years ago. If all the information

tion of the initial attempt by Spanish colonists to settle the Georgia-South Carolina coast, are just two examples from archaeological work occurring in the past year.

3. From 1959 to present, Michael Evenari and his associates have reconstructed and planted ancient Nebatean farm plots in order to evaluate the commercial practicality of desert runoff farming. The results identified the most profitable techniques and crops and have stimulated projects in Africa, Southern Asia, and Australia. *See generally* M. EVENARI, L. SHANAN & N. TADMOR, *THE NEGEV: THE CHALLENGE OF A DESERT* (1971).

concerning its context were known, a much richer picture would emerge. For example, a spearhead was determined to be from the Archaic period, reused by later Indian peoples, and finally placed with other sacred paraphernalia in the grave of a religious leader between A.D. 1200 and 1450 at Elden Pueblo near Flagstaff, Arizona.

The two major means of undertaking archaeological studies are survey and excavation. Survey is usually the first technique employed in characterizing the archaeology of a region, and the less that is known about the region, the more useful it is to begin with a survey. In a survey, the archaeologist identifies sites by the presence of artifacts on the surface or by other visible remains such as architectural foundations. A site is any locality where people lived or carried on activities in the past and left behind traces of their presence. A preliminary survey or reconnaissance may cover only parts of a given area for the purpose of establishing the kinds of archaeological remains to be expected. In a more intensive survey, the archaeologist may attempt to walk over all or a predetermined percentage of the area to be studied. From the artifacts collected and the data recorded, the archaeologist can obtain such information as site size, dates of site occupation, and environmental settings where particular kinds of sites are likely to occur. An understanding of the spatial and temporal contexts of sites within a region allows the archaeologist to make inferences concerning such aspects as the population density and the structure of past cultural systems.

Excavation is undertaken to recover a much more detailed picture of particular sites than is available from artifacts on the surface. Artifacts found on the surface of the ground may have been moved about by wind, water, or modern activities such as plowing. In many cases, excavation allows the archaeologist to examine the original context in which artifacts were used by a site's inhabitants. If a house outline can be identified from postholes definable in the soil, and the floor can be located from a plastered surface, it is evident which artifacts were used in that house. Excavation yields much more than just additional artifacts; careful recording of spatial relationships of artifacts and structural remains allows more complete reconstruction of past activities.

THE NEED FOR CONSERVATION

An Immediate Problem

The archaeological record of past human activities lies buried in the ground. When agriculture, construction, or other present-day activities disturb or alter the ground, a portion of this record is destroyed. In most parts of the country, the rate of land alteration brought about

by highway and dam construction, urban development, land leveling, subsoiling, and clear cutting is increasing at an alarming pace.

A second threat to archaeological remains is also related to growth and development. Persons desiring relics for their personal collections and those who are just curious have long destroyed sites by careless digging. With values for aboriginal art skyrocketing during the past decade, the commercial looters with large-scale mechanical equipment at their disposal represent a more devastating and systematic threat than development itself.⁴ Population growth and improved access have led to more frequent occurrences of these destructive activities.

With these combined forces of attrition, it can be shown that archaeological sites are disappearing by the tens of thousands annually. Only a fraction of one percent of these sites is studied by an archaeologist in even a preliminary fashion prior to destruction. While study is a desirable alternative to complete loss of a site record, long-range planning to preserve representative sites is also necessary. Archaeology continues to develop new investigative technology and to expand the set of problems to be pursued. Archaeological study is itself destructive in the sense that sites must be altered from their original state. Some sites must be preserved intact to await an improved archaeology of the future. The distressing fact is that entire areas may be stripped of their archaeological remains before any thoughtful investigation can proceed. In many large regions of the nation, it is not overstating the situation to predict that no undisturbed sites will remain by the end of this decade.⁵

A Public Resource

The record of the past is part of our national heritage. When any segment of it is removed or destroyed, an irreplaceable resource is reduced. As with any other recognized resource, the preservation of archaeological remains may sometimes conflict with other priorities.

4. See Rippeteau, *Antiquities Enforcement in Colorado*, 6 J. FIELD ARCHAEOLOGY 85, 85-92 (1979). Rippeteau describes and photographically documents the widespread destruction of archaeological remains in a small portion of southwestern Colorado. *Id.* Similarly, Morse discusses the dependence on archaeological looting by a very large number of people in a seven-county area in northwestern Arkansas. Morse has identified over 250 people who are involved fulltime in the excavation of artifacts for profit and nearly 1,000 who derived part of their income from surface collection. Morse, *Natives and Anthropologists in Arkansas*, in ANTHROPOLOGY BEYOND THE UNIVERSITY 81-84 (A. Redfield ed. 1973).

5. As the result of a long-term study conducted by Donald A. Graybill, destruction of regional potential for archaeological research is best documented for the Mimbres Valley. At the time of Graybill's work, more than 60% of the pueblo architecture in one surveyed area of the Gila National Forest in New Mexico had been lost. Graybill estimates that if the accelerated rate of destruction recorded for the last decade continues, no undisturbed archaeological remains will be left by the end of the 1980s. Graybill, *Illegal Site Destruction in SW New Mexico*, 4 J. FIELD ARCHAEOLOGY 481, 481-83 (1977).

The right of access to the past for those who are interested, however, can be maintained only by governmental action. A recognition of the diversity of interests within the country's population is similarly expressed in the designation of areas suitable to the pursuits of hunters, hikers, skiers, and campers and in the maintenance of historic structures and landmarks.

In recognition of archaeological remains as public resources, both federal and state governments have taken steps to insure their preservation and study. Many governmental agencies have begun to include archaeologists on their staffs to better implement these goals. Although the first federal legislative protection dates to 1906, involvement with respect to archaeological remains has been developing more rapidly over the past 15 years.

NATIONAL LEGISLATIVE CONCERN FOR ARCHAEOLOGY

The Antiquities Act of 1906

The 1906 Antiquities Act⁶ represents the first major federal commitment to archaeological preservation.⁷ Prior to the turn of the century, there were a number of successful attempts on a national scale to preserve specific archaeological sites in the western United States.⁸ The Antiquities Act, as in the case of many later legislative efforts in archaeological preservation, was the direct result of an intensive lobbying effort on the part of concerned individuals from the West.

The Antiquities Act committed the government to protection of "any object of antiquity" on federal lands.⁹ It gave to the Executive Branch the right to determine the importance of particular archaeological sites on these lands.¹⁰ In addition, the statute gave the President the power to reserve as national monuments those public lands having historic, prehistoric, or scientific significance.¹¹ It also authorized a permit

6. Pub. L. No. 34-209, ch. 3060, 34 Stat. 225 (1906) (current version codified at 16 U.S.C. §§ 431-433 (1976 & Supp. III 1979)).

7. R. LEE, THE ANTIQUITIES ACT OF 1906 (1970), provides a thorough review of the early history of antiquities legislation in this country.

8. The withdrawal of Chaco Canyon from public use and the acquisition of Casa Grande National Monument are two important examples of federal preservation efforts prior to the turn of the century. T. KING, P. HICKMAN & G. BERG, ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE'S CLUTTER 15-18 (1977).

9. 16 U.S.C. § 433 (1976).

10. *Id.* § 431 (1976 & Supp. III 1979).

11. *See id.* This authority has been used to create over 100 national monuments. The most important recent instance was in 1978 when President Carter created 15 new monuments and expanded the boundaries of two existing monuments—totaling over 56 million acres—in Alaska. The executive power to set aside significant archaeological and historical properties has been the most important preservation aspect of the 1906 Act. Despite an intensive lobbying effort against this authority during debate over the Archaeological Resources Protection Act of 1979, the power remains intact today.

system for sanctioning scientific investigations on lands owned or controlled by the United States.¹² This permit system provides general guidelines for undertaking research, submitting reports, and curating collections.¹³ Finally, the Act established criminal sanctions for unauthorized destruction of archaeological remains.¹⁴

The 1906 Act recognized archaeological remains as a resource having primarily scientific significance, and provided procedures for conducting archaeological investigations in accordance with this perspective. It thereby established the basis for subsequent federal legislation promoting a role for archaeology in land-use planning. All of the additional legislation passed between 1906 and 1979 has been aimed at protecting archaeological remains from the activities of the federal government or private organizations operating on government lands. The original Act served as the only statute under which criminal penalties for vandalism could be imposed. In 1974, however, the constitutionality of the penal provision of the 1906 Act was challenged.

In *United States v. Diaz*,¹⁵ the Ninth Circuit Court of Appeals reversed a conviction under the Antiquities Act on grounds of vagueness.¹⁶ Diaz had removed several Apache ceremonial masks manufactured in 1969 or 1970 from a cave on the San Carlos Indian Reservation. The case was argued on the basis of the antiquity of the ceremonies represented by the masks rather than the age of the stolen objects.¹⁷ The court held that the statute was "fatally vague in violation of the due process clause of the Constitution,"¹⁸ observing that "[n]owhere here do we find any definition of such terms as 'ruin' or 'monument' (whether historic or prehistoric) or 'object of antiquity.'"¹⁹

This major challenge to the Antiquities Act was based on circumstances peripheral to the issue of protecting archaeological remains in the public domain. Modern Indian ceremonial paraphernalia would not fall within the traditional definitions of "monument" or "ruin" used by archaeologists. Archaeological materials may be historic as well as prehistoric, Anglo as well as Indian. By any current definition

12. 16 U.S.C. § 432 (1976 & Supp. III 1979). The permitting, curation, and reporting requirements under the 1906 Act have long been used by federal agencies as the authority to control all types of archaeological research on public lands. While much of this activity is now referred to the Archaeological Resources Protection Act of 1979, the Antiquities Act may still be invoked for special purposes.

13. 43 C.F.R. §§ 3.1-3.17 (1979) (uniform regulations issued to the Secretaries of the Interior, Agriculture, and Army); 25 C.F.R. §§ 132.1-132.9 (1979) (regulations issued by the Bureau of Indian Affairs).

14. 16 U.S.C. § 433 (1976).

15. 499 F.2d 113 (9th Cir. 1974).

16. *Id.* at 115.

17. *Id.* at 114.

18. *Id.* at 115.

19. *Id.* at 114.

of archaeological materials, social context and ethnic origin are not the preeminent criteria. Had the recent religious objects been of Anglo manufacture, it is doubtful that the case would have involved the Antiquities Act.

In *United States v. Smyer*,²⁰ the Tenth Circuit, acknowledging that its decision was contrary to the *Diaz* ruling, rejected the defendants' contention that the penal provision of the Antiquities Act was unconstitutionally vague.²¹ An attempt to circumvent the *Diaz* interpretation was made in *United States v. Jones*.²² In *Jones*, archaeological vandalism was prosecuted as theft²³ and depredation²⁴ of government property. The United States District Court for the District of Arizona ruled, however, that the case could not be brought under these statutes since the Antiquities Act was the specific statute governing such offenses.²⁵ The trial judge noted that, given the *Diaz* holding that the penal provision of the Antiquities Act was unconstitutionally vague, there was no statute under which the defendants could be prosecuted.²⁶ On appeal, the Ninth Circuit reversed the district court and held that passage of the Antiquities Act did not preclude prosecution of the defendants under the general theft and depredation statutes.²⁷ Nonetheless, the disagreement between the Ninth and Tenth Circuits as to the constitutionality of the penal provision of the Antiquities Act remains and serves to undermine the deterrent value of the Act.

Another important problem affecting the deterrent value of the Antiquities Act lies in the magnitude of the specified penalties—a \$500 fine and/or up to 90 days in jail.²⁸ While \$500 may have been a substantial sum at the turn of the century, it represents only a minor business expense for the commercially motivated vandal in the 1980s. The threat of prosecution may be perceived as little more than a nuisance since a sentence including incarceration has been imposed under this Act only once.²⁹ It is apparent that the 1906 Antiquities Act alone cannot provide satisfactory protection for archaeological remains from commercial and avocational vandals.³⁰

20. 596 F.2d 939 (10th Cir. 1979). In *Smyer*, the objects of antiquity at issue were 500 to 900 years old. *Id.* at 940.

21. *Id.* at 941.

22. 449 F. Supp. 42 (D. Ariz. 1978), *rev'd*, 607 F.2d 269 (9th Cir. 1979).

23. 18 U.S.C. § 641 (1976).

24. 18 U.S.C. § 1361 (1976).

25. 449 F. Supp. at 46.

26. *Id.*

27. 607 F.2d 269, 273 (9th Cir. 1979).

28. 16 U.S.C. § 433 (1976).

29. See *United States v. Smyer*, 596 F.2d at 940.

30. Collins & Green, *A Proposal to Modernize the American Antiquities Act*, 202 Sci. 1055, 1058-59 (1978).

The Historic Sites Act of 1935

The Historic Sites Act of 1935³¹ has been important as a declaration of national policy regarding historic preservation. Earlier legislation had reflected a policy that regulated the study of sites and prevented unauthorized disturbance.³² A change in policy was evident in the 1935 Act, which advocated in-place preservation of remains. This emphasis was prompted by concern for the preservation of historic buildings. Preservation in lieu of continuing study, however, was not the theme of archaeology during that period.

The Historic Sites Act called for the preservation of properties of national, historical, or archaeological significance, the designation and acquisition of national historical landmarks, and intergovernmental and interdisciplinary efforts in historic preservation.³³ It provided for a survey or inventory of valuable historic and prehistoric sites and created an Advisory Board of National Parks, Historic Sites, Buildings, and Monuments for the evaluation of these sites.³⁴ This Act serves as the basis for many of the historic preservation programs actually operating in the United States today and provides the direct legal foundation for the National Historic Preservation Act of 1966.³⁵ It designates the Department of the Interior, through the National Park Service, as the federal agency responsible for archaeological and historic protection.³⁶ Through this Act and other legislation—particularly Executive Order 11,593³⁷ and the National Historic Preservation Act—the National Park Service acquired considerable authority over archaeological remains under federal jurisdiction.

A unique aspect of the Historic Sites Act was its recognition of significant historic sites outside of public ownership.³⁸ The Act's policy of preservation was extended to privately owned historic remains by authorizing the Secretary of the Interior to encourage preservation through financial aid and cooperative agreements regardless of ownership.³⁹

31. Pub. L. No. 74-292, ch. 593, 49 Stat. 666 (codified at 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979)).

32. See text & notes 6-15 *supra*.

33. 16 U.S.C. §§ 461, 462, 464 (1976 & Supp. III 1979).

34. *Id.* §§ 462(b), 463. The Act of Oct. 7, 1976, Pub. L. No. 94-458, § 2, 90 Stat. 1940, amended 16 U.S.C. § 463, changing, *inter alia*, the name of the board to the National Park System Advisory Board.

35. Pub. L. No. 89-665, 80 Stat. 915 (current version codified at 16 U.S.C. §§ 470a-470n (1976 & Supp. III 1979)). See text & notes 46-53 *infra*.

36. 16 U.S.C. § 462 (1976).

37. 3 C.F.R. 154 (1971), reprinted in 16 U.S.C. § 470 app., at 429 (1976). See text & notes 58-61 *infra*.

38. Fowler, *Protection of the Cultural Environment in Federal Law*, in FEDERAL ENVIRONMENTAL LAW 1466, 1479-80 (E. Dolgin & T. Guilbert eds. 1974).

39. 16 U.S.C. § 462(e) (1976).

The Reservoir Salvage Act of 1960

The Reservoir Salvage Act of 1960⁴⁰ was designed to further the purposes of the Historic Sites Act by specifically extending the policy of preservation of historical and archaeological data to remains that would be lost or destroyed as the result of dam construction.⁴¹ The restrictions applied to any private person or corporation holding a license issued by a federal agency as well as to any federal agency.⁴²

Although archaeological salvage processes were well established by 1960,⁴³ the Reservoir Salvage Act was the first legislation to call explicitly for such measures on a national scale.⁴⁴ It was also the first legislation to prescribe methods for dealing with destruction caused by construction: 1) the agency licensing or undertaking construction of any dam or related activity must give notice to the Department of the Interior; 2) the Department of the Interior then authorizes a survey of the affected areas; and 3) the need for subsequent salvage operations is determined by the Department of the Interior.⁴⁵

The Reservoir Salvage Act codified an approach to archaeological remains that diverged from the treatment encouraged by the Historic Sites Act of 1935. The 1935 Act emphasized the preservation of the physical structure of a historic site; but for some time preservation in response to the threat of development had in fact most often taken the form of study of the sites and preservation of site records. The Reservoir Salvage Act recognized the legitimacy of such study as a form of preservation and regulated it.

The National Historic Preservation Act of 1966

The National Historic Preservation Act of 1966⁴⁶ is a direct outgrowth of a study conducted by the Special Committee on Historic Preservation of the United States Conference of Mayors under a grant provided by the Ford Foundation in 1965.⁴⁷ Because of the Committee's findings, Congress recognized the need for a renewed national effort to insure the preservation of important historic and archaeological

40. Pub. L. No. 86-523, 74 Stat. 220 (current version codified at 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979)).

41. 16 U.S.C. § 469 (1976 & Supp. III 1979).

42. *Id.*

43. For example, the Committee for the Recovery of Archaeological Remains; an inter-agency archaeological program in the National Park Service; highway salvage programs in New Mexico and Arizona; and the Federal Aid Highway Act of 1956, which requires salvage of significant and endangered archaeological sites, were all unilateral prior to 1960.

44. T. KING, P. HICKMAN & G. BERG, *supra* note 8, at 26.

45. 16 U.S.C. §§ 469a to 469a-2 (1976).

46. Pub. L. No. 89-665, 80 Stat. 915 (1966) (current version codified at 16 U.S.C. §§ 470-470n (1976 & Supp. III 1979)).

47. SPECIAL COMMITTEE ON HISTORIC PRESERVATION, *WITH HERITAGE SO RICH* (1966).

properties. Further, a lack of integration in national preservation efforts was identified as one of the most important problem areas to be addressed by new legislation.

The Act built on the foundation provided by the Historic Sites Act of 1935. It enlarged the National Register of Historic Places to include sites of state and local significance as well as those of national importance. It also expanded the Register to include properties significant in American architecture and culture.⁴⁸ In order to support this broadened Register, the Act authorized matching grants to states for the creation of state preservation plans, for conducting inventories, and for specific preservation projects.⁴⁹

The Advisory Council on Historic Preservation was also established under this Act.⁵⁰ This body was formed to draft guidelines for implementing the National Register programs and to assist state and local governments in drafting historic preservation legislation.⁵¹ Finally, the Act required any federal agency having jurisdiction over a project that could affect a property listed on the National Register of Historic Places, prior to approval of the project, to take into account the project's effect on the National Register property and provide the Advisory Council with a reasonable opportunity to comment.⁵² Later actions expanded this responsibility to include not only sites already on the Register but those eligible for nomination to it.⁵³

48. Compare 16 U.S.C. § 462(b) (1976) with 16 U.S.C. § 470a(a)(1) (1976). Regulations implementing the Act define the appropriate terms and spell out in detail the procedures for nominating sites to the National Register of Historic Places. 36 C.F.R. §§ 60.1-60.17 (1976). Sites must meet one or more "National Register Criteria." Although there are five broad criteria enumerated in the regulations, the one most often used by archaeologists pertains to sites "[t]hat have yielded, or may be likely to yield, information important in prehistory or history." *Id.* § 60.6.

49. See 16 U.S.C. § 470(a)(2) (1976). Funding for the historic preservation program was extended only to 1970 by the 1966 Act. Pub. L. No. 89-665, tit. I, § 108, 80 Stat. 917 (1966) (current version at 16 U.S.C. § 470h (1976)). As a result, the funding provisions have been significantly amended three times—in 1970, 1973, and 1976. Pub. L. No. 91-243, § 1(a), 84 Stat. 204 (1970); Pub. L. No. 93-54, § 1(a), 87 Stat. 139 (1973); Pub. L. No. 94-422, tit. II, § 201(1), (2), (4), 90 Stat. 1320 (1976). The latest amendment—in the Land and Water Conservation Act of 1976—gives the Secretary of the Interior discretion to increase the federal matching share from 50% up to 70% for grants for the preparation of statewide historic preservation plans and surveys and project plans. Pub. L. No. 94-422, tit. II, § 201(1), 90 Stat. 1320 (1976) (amending 16 U.S.C. § 470(b) (1976)).

The 1976 amendment also establishes the Historic Preservation Fund in the U.S. Treasury and permits authorizations of up to \$150 million for 1980 and 1981. The fund is supported by revenues from oil shale development and from development of the outer continental shelf. 16 U.S.C. § 470h (1976). Although the Advisory Council must submit annual budgets to Congress through the Department of the Interior, the fund represents a substantial source of support for archaeological preservation and is one that, until very recently, received little notice from archaeologists.

50. 16 U.S.C. § 470i (1976).

51. *Id.* § 470j.

52. *Id.* § 470f. The regulations implementing this section are found in 36 C.F.R. §§ 800.1-800.15 (1979). They set forth procedures for reviewing federally sponsored projects to determine whether they affect National Register properties. *Id.* § 800.4.

53. See text & notes 58-61 *infra*.

The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969⁵⁴ brought protection of archaeological resources within the scope of a more comprehensive plan dealing with all aspects of the human environment. The Council on Environmental Quality was created to formulate procedures to implement the Act and to provide an independent overview of the immediate and long-term trends in environmental quality.⁵⁵ The Act also called for the preparation of an environmental impact statement on any major federal action that significantly affects the environment.⁵⁶ Equally important is the requirement that an environmental impact statement contain information on "any irreversible and irretrievable commitments of resources which would be involved" in a proposed project.⁵⁷ Archaeological remains, of course, fit this classification well, being both fragile and nonrenewable. One important outcome of the 1969 legislation was the inclusion of archaeologists in the initial stages of planning for federal projects, permitting potential preservation plans to be considered as alternatives to stopgap salvage operations.

Executive Order No. 11,593

Executive Order No. 11,593,⁵⁸ entitled "Protection and Enhancement of the Cultural Environment," was issued in 1971. This document expanded upon the national responsibilities for archaeological and historical properties outlined in the National Historic Preservation Act of 1966 and the National Environmental Policy Act of 1969. The Order broadened federal authority in several areas: 1) it required all federal agencies to conduct inventories on lands under their jurisdiction and to report to the Secretary of the Interior by July 1, 1973 regarding all sites that appeared to qualify for the National Register of Historic Places;⁵⁹ 2) federal agencies were directed to develop policies that would contribute to the preservation of nonfederally owned properties; and 3) the Secretary of the Interior was directed to prepare standards and provide advice concerning the identification and preser-

54. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4347 (1976 & Supp. III 1979)).

55. 42 U.S.C. § 4344 (1976).

56. *Id.* § 4332(2)(C).

57. *Id.* § 4332(2)(C)(v).

58. 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 app., at 429 (1976).

59. The expectation that the National Register will eventually constitute a listing of all significant cultural properties worthy of preservation is not realistic from the point of view of most archaeologists. It is not financially or logically possible to identify and nominate all such properties to the National Register within the foreseeable future.

vation of significant properties.⁶⁰

It is important to emphasize that the Executive Order gives the prerogative to the Advisory Council to comment on the effects of federal undertakings on properties eligible for but not listed on the National Register.⁶¹ It also clearly affirms federal authority to consider privately owned archaeological resources that might be affected by federal, federally funded, or federally licensed projects. These two characteristics considerably expand the authority and effectiveness of the Advisory Council.

The Archaeological and Historic Preservation Act of 1974

The Archaeological and Historic Preservation Act of 1974,⁶² originally referred to as the Moss-Bennett Bill, amended the Reservoir Salvage Act. Its purpose was to expand the 1960 Act to include all federal, federally assisted, and federally licensed construction projects. The Act explicitly requires all federal agencies to conduct appropriate archaeological investigations prior to undertaking any project that might result in the destruction of significant remains.⁶³ The law outlines specific procedures for determining the necessary types of archaeological investigations and the timing of their application in project development.⁶⁴

The intent of this statute is to avoid the loss of archaeological data by requiring proper planning and field surveying.⁶⁵ Beyond giving all agencies clear authority to conduct necessary archaeological investigations, the Act requires that project budgets and planning processes provide sufficient time and funds for adequate archaeological survey and excavation.⁶⁶ The main thrust of the law is that timely and thoughtful scientific investigation should occur when there is no alternative to destruction. The Archaeological and Historic Preservation Act augmented previous salvage legislation by providing the authority, procedures, and funds to conduct these investigations on all federal and

60. Exec. Order No. 11,593, 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 app., at 429 (1976).

61. In 1976, the National Historic Preservation Act was amended to codify the extension of coverage to properties eligible for the National Register. Pub. L. No. 94-422, tit. II, § 201(3), 90 Stat. 1320 (1976) (amending 16 U.S.C. § 470f (1976)).

62. Pub. L. No. 93-291, 88 Stat. 174 (current version codified at 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979)).

63. 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979).

64. *Id.*

65. C. McGIMSEY & H. DAVIS, THE MANAGEMENT OF ARCHAEOLOGICAL RESOURCES: THE AIRLIE HOUSE REPORT 12-13 (1977).

66. T. KING, P. HICKMAN & C. BERG, *supra* note 8, at 38-40. Prior to passage of the 1974 Act, many federal agencies did not formally have the authority to provide funding to support archaeology. This was particularly true of agencies like the Soil Conservation Service and the Army Corps of Engineers that were involved in large-scale developments on private lands in the eastern half of the country. In many other instances, there was considerable reluctance to support the analyzing and reporting of archaeological studies as an integral part of data recovery.

federally sponsored projects.⁶⁷

The Archaeological Resources Protection Act of 1979

The Archaeological Resources Protection Act of 1979⁶⁸ was enacted in order to strengthen control over vandalism beyond the limitations of the Antiquities Act. The 1979 Act was particularly directed toward unauthorized excavations motivated by the high prices paid for prehistoric North American art. Commercial exploiters are currently destroying vast archaeological districts with virtual immunity from prosecution in many parts of the country. While attempting to curb the profiteering activities of the archaeological merchants, the law exempts from heavy penalties those citizens with only an avocational interest in the resource.

Surface collecting by amateurs is not controlled by permit as are other operations involving archaeological remains. While the collection of surface artifacts can still be controlled as a misdemeanor under the 1906 Antiquities Act, it is clear that the legislative intent is to curtail these activities through education. The Archaeological Resources Protection Act establishes a mechanism for encouraging cooperation and communication between private citizens and archaeologists.⁶⁹

67. A large body of legislation now exists that promotes and complements the primary laws for historic preservation. The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (current version codified at 42 U.S.C. §§ 5301-5316 (1976 & Supp. III 1979)), the Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (current version codified at 16 U.S.C. §§ 1451-1464 (1976 & Supp. III 1979)), and the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (current version codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979)), are three instances where consideration of cultural resources is a required part of management plans. The proliferation of cultural-resource stipulations without central coordination has created and may continue to create complications in the implementation of preservation activities or scientific study. For example, a conflict is cited by Charles McGimsey and Hester Davis:

Mitigation done under the auspices of the Department of Transportation Act must be preceded by evaluation via the environmental impact process, and section 106 [National Historic Preservation Act of 1966] procedures also must be implemented prior to data recovery activities or other land modification actions. Compliance is complicated by section 4(f) of the DOT Act, which requires that all prudent and feasible alternatives be explored before making a decision to use land from any historic site designated as such by local, state or federal authorities. Since any National Register property, or even any property determined ineligible by the Secretary of the Interior but held to be significant by a local or state government meets section 4(f) requirements, transportation agencies are required to conduct very elaborate studies of all prudent and feasible alternatives to taking any archaeological site, even in cases where project impacts can be fully and properly mitigated.

C. McGIMSEY & H. DAVIS, *supra* note 65, at 37.

68. Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-470jj (Supp. III 1979)).

69. 16 U.S.C. § 470jj (Supp. III 1979), which provides:

The Secretary of the Interior shall take such action as may be necessary, consistent with the purposes of this chapter, to foster and improve the communication, cooperation and exchange of information between—(1) private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this chapter [October 31, 1979], and (2) Federal authorities responsible for the protection of

As a powerful weapon to halt the mining of archaeological sites on public lands for individual profit, the Archaeological Resources Protection Act must be considered an important victory for the archaeological community and federal land managers. It bolsters protection in two areas where the 1906 Act was weak: definitions and penalties. Nonetheless, archaeologists will object to the exemption of unburied arrowheads from the Act's penal provisions⁷⁰ and to the 100-year minimum age requirement in the definition of an archaeological resource.⁷¹ Future amending to provide a 50-year limit is plausible.⁷² Additional restrictions on recovery of arrowheads from the surface, however, are not realistic expectations if the strong penalties are to be retained. Congress was clearly interested in stopping the profit-motivated looter through stiff felony provisions.⁷³

PROBLEMS AND PROSPECTS

Archaeology as a Public Resource

The concept of archaeological remains as a resource in the public domain is firmly entrenched in federal philosophy and legislation, but areas of conflict with other national policies do exist. Much of the physical remains of past cultures are found on privately owned property. In many other countries, private ownership of land does not override public rights of access or preservation of particularly important sites.⁷⁴ In the United States, however, no matter what the significance of any particular remains in private hands, federal protection is strictly

archaeological resources on the public lands and Indian lands and professional archaeologists and associations of professional archaeologists. In carrying out this section, the Secretary shall, to the extent practicable and consistent with the provisions of this chapter, make efforts to expand the archaeological data base for the archaeological resources of the United States through increased cooperation between private individuals referred to in paragraph (1) and professional archaeologists and archaeological organizations.

70. *Id.* § 470ee(g). In many parts of the country, buried archaeological deposits are only rarely encountered and remains are largely limited to scatters of surface artifacts. Such scatters are crucial to an appreciation of regional archaeology, and arrowheads play an important role in this understanding. As one of the few artifact types whose stylistic change serves to define diagnostic time markers, arrowheads may be the only means to date these surface remains.

71. *Id.* § 470bb(1).

72. For many areas in the American West, the historic settlement is less than 100 years old. Remains important in documenting the early growth of this region are not protected by the 1979 Act. Artifacts such as bottles and other forms of "antiques" are abundant at sites and are actively sought by collectors with a profit motive.

73. The first convictions under the 1979 legislation occurred in June, 1980, as reported in *Government Rangers Pursue Robbers of Ancient Indian Graves in Southwest*, New York Times, June 23, 1980, at A14, cols. 4-6; Morganthau, Copeland & Young, *Grave Robbers in the Southwest*, NEWSWEEK, June 23, 1980, at 31.

74. See generally UNESCO, PROTECTION OF MANKIND'S CULTURAL HERITAGE: SITES AND MONUMENTS (1970); S. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOBILE CULTURAL PROPERTY: A COMPARATIVE STUDY (1978).

limited to peripheral action, such as the withholding of federal funds or licenses to projects that might contribute to destruction.

The matching funds and grants-in-aid provided by the National Historic Preservation Act of 1966 and administered by state historic preservation offices represent a more positive approach to encouraging preservation.⁷⁵ These funds can be used by nonfederal grantees for the inventory, study, or preservation of archaeological sites. In addition, the Tax Reform Act of 1976 authorized tax incentives for historic preservation efforts (other than outright gifts), including leases, options to purchase, or easements.⁷⁶

While the indirect influences of federal regulation may protect archaeological districts in the short term, long-term preservation cannot be guaranteed without a transferral of land ownership. In recognition of this fact, privately organized conservancy groups at both the national and local levels have recently become active in the acquisition of archaeological sites. The goal of these efforts is the ultimate donation of the properties to local, state, or federal governments to preserve and develop the properties for public benefit.⁷⁷

A second potential means of extending public control over archaeological resources lies in land exchanges and condemnations. Governmental agencies of many types engage in active land exchange programs to bring desired acreage into public holdings. Preservation of archaeological resources is beginning to be considered as one of the criteria in these exchange policies.⁷⁸ Although condemnation has not yet been used for strictly archaeological purposes, it has been employed to preserve historic areas.⁷⁹ An extension of condemnation rights to create archaeological holdings for public visitation is not, therefore, without a relevant precedent.

Public access to archaeological resources has long been limited by the rights of private land ownership. In 1978, however, federal legislation acknowledged another valid claim to control over particular kinds of remains. The Native American Religious Freedoms Act⁸⁰ provided

75. 16 U.S.C. § 470a(2) (1976).

76. I.R.C. §§ 167, 191.

77. See LeBlanc, *A Proposal for an Archaeological Conservancy*, 6 J. FIELD ARCHAEOLOGY 360 *passim* (1979).

78. For example, The Federal Land Policy and Management Act of 1976 directs federal agencies to consider the withdrawal of public lands containing significant cultural resources from settlement, sale, or other development. 43 U.S.C. § 1701 (Supp. III 1979).

79. Condemnation for the purposes of historic preservation has been well established since the acquisition in 1896 of the Gettysburg Electric Railway Company right-of-way, which crossed the Gettysburg battlefield. Condemnation was accomplished through the authority of the Act of August 1, 1888, ch. 728, 25 Stat. 357—a statute permitting federal officials to condemn real property provided such acquisition is for public use and has been previously authorized. See 40 U.S.C. § 257 (1976); FED. R. CIV. P. 71A.

80. 42 U.S.C. § 1996 (Supp. III 1979).

for the participation of Indian groups in policymaking concerning the disposition of sacred objects on federal land. If archaeological resources as a whole are part of our national heritage, the physical remains of ancestral groups are even more directly a part of the heritage of living Indians. This Act has already provided the grounds for recall of sensitive religious objects from museum collections. The reconciliation of the sometimes conflicting claims to jurisdiction over archaeological resources is almost certain to become an important issue in the next decade.⁸¹

Enforcement of Existing Laws

Federal agencies control vast, scattered, and often isolated and inaccessible holdings. The logistics of enforcing existing laws are such that destruction can only occasionally be detected in a timely manner and prosecuted in even fewer instances. Many of the personnel who are active in land management in the field do not have enforcement training or jurisdiction. Existing regulations are in practical terms most applicable to the large scale, persistent marketer of archaeological remains.

The focus of enforcement on the commercial exploiter of archaeological sites reflects the view that the magnitude of the offense depends upon the magnitude of the interference and removal of archaeological material. The Archaeological Resources Protection Act of 1979 specifically exempts the arrowhead collector and small time hobbyist.⁸² While the Antiquities Act of 1906 theoretically might still allow prosecution of these individual offenses,⁸³ it is doubtful that enforcement officers would be inclined to pursue the legal possibilities. The removal of even a few objects on the surface could in many instances result in a major loss of knowledge, but the burden of prevention in these cases must rest on public education. To this end, the 1979 Act directs federal agencies to initiate programs to foster cooperation and communication between private citizens, land managers, and professional archaeologists.⁸⁴ It is safe to forecast that such educational efforts will receive

81. The scientific excavation, as well as the desecration, of prehistoric and historic American Indian burial sites has been the subject of much litigation and legislation. See Rosen, *The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility*, 82 AM. ANTHROPOLOGIST 5, *passim* (1979). Like cemeteries, sacred objects held by museums represent another class of archaeological resources formerly in the public domain and now increasingly the object of claims by American Indians. The Denver Art Museum's return to the Zuni bow priests of a war god and the Zuni's negotiations with the Smithsonian for the return of another war god illustrate this point. AMERICAN INDIAN LAW CENTER, INDIAN RELIGIOUS FREEDOM ACT PROJECT: RESULTS OF PRELIMINARY LEGAL SURVEY OF INDIAN RELIGIOUS ISSUES (1978).

82. 16 U.S.C. § 470ee(g) (Supp. III 1979).

83. *Id.* § 432 (1976 & Supp. III 1979).

84. *Id.* § 470jj (Supp. III 1979).

significant federal attention and funding in the near future.

Integration of Federal Archaeological Efforts

As a result of the various federal laws and the needs of a number of federal agencies, a fairly complex and diversified set of programs has come into being to deal with archaeological resources. Land management agencies—the National Park Service, Bureau of Land Management, Bureau of Indian Affairs, and United States Forest Service; construction agencies—the Water and Power Services Corps of Engineers and Federal Highway Administration; and historic preservation agencies—the Advisory Council on Historic Preservation and the Heritage Conservation and Recreation Service, have each developed internal guidelines. The historic preservation agencies have developed interagency policies as well. No unified national program for handling archaeological affairs exists at the present time.

One of the mechanisms for standardizing preservation activities consists of the National Register system with associated review by the Advisory Council on Historic Preservation.⁸⁵ The Advisory Council and the Department of the Interior anticipate that the National Register will eventually become a true inventory of significant archaeological remains. That view, however, is unduly optimistic. The procedures for the nomination of sites to the Register are lengthy and cumbersome, demanding too large a share of the resources available to support archaeology. An attempt to inventory all significant remains is unrealistic, since almost any site can be considered crucial to one problem or another. Furthermore, with the continuing development of archaeological knowledge and technology, it is impossible to establish a static listing of the kinds of data that might eventually be retrieved from any given site. Both on the basis of the unreasonable expense involved in nomination of a site to the National Register and in the failure to meet professional needs for a definition of significance,⁸⁶ the present National Register system cannot be relied upon as the sole integrating mechanism for federal programs.

Two agencies have had policy involvement of a somewhat integrative nature. The Interagency Archaeological Services of the National Park Service has produced guidelines and offered practical consultation services to other federal agencies. More recently, the Department of

85. *Id.* §§ 470a-470n (1976 & Supp. III 1979).

86. See generally Glassow, *Issues in Evaluating the Significance of Archaeological Resources*, 42 AM. ANTIQUITY 413 (1977); Raab & Klinger, *A Critical Appraisal of 'Significance' in Contract Archaeology*, 42 AM. ANTIQUITY 629 (1977). Many of the specific issues associated with the failure of the "legal significance" definition to meet professional archaeological needs are discussed in Thompson, *Beyond Significance*, 7 AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY 1-11 (1979).

the Interior has combined the interagency archaeological programs with other historical preservation and recreation branches to form the Heritage Conservation and Recreation Service. Perhaps unfortunately, archaeology now has been joined in a conglomerate agency containing rather distantly related branches such as the Historic American Engineering Record and the Bureau of Outdoor Recreation. Separate status, analogous to that of the United States Geological Survey, would be a potential solution attractive to most archaeologists.

CONCLUSION

In recognition of the disparate handling of archaeological and historical matters by various levels and agencies of the federal government, several legislative remedies were proposed in the 96th Congress.⁸⁷ The need for consistency in federal policy and procedures is widely acknowledged among the various parties involved: the federal agencies, the business sector, the professional archaeologist, and the public. It is hoped that an integrated and consistent policy will be attained without stifling creative and innovative research as a viable part of government-sponsored archaeology. The quality of archaeological remains—a public resource—depends on the outcome.

87. Four different legislative alternatives designed to integrate federal policy and procedure regarding historic preservation are currently being considered by Congress. The best known of these are the Seiberling bill, H.R. 5496, which calls for an independent preservation agency, and the Carter Administration's bill, H.R. 6504, which sets up a heritage program in the Department of the Interior with historic preservation and natural area conservation components.

