

FEDERAL PROTECTION FOR ARCHAEOLOGICAL RESOURCES

Ronald H. Rosenberg*

A nation's cultural history is a precious component of its identity. Knowledge of past civilizations and lifeways becomes intertwined with a national self-image. But history as a series of events cannot be recreated and prior civilizations cannot be reestablished in the present. What remains of the country's patrimony is the physical evidence of earlier societies—abandoned sites of past human activity and artifacts reflecting preexisting patterns of living. For nearly a century American national policy has recognized the value of protecting archaeologically significant sites, particularly when they reflect major social or architectural accomplishments.¹ As will be discussed at length below, domestic policy was initially directed to the preservation of particular sites located on federal land by removing them from the public domain and thus the possibility of private ownership.² Next, the legislative approach shifted to provide a criminal law sanction against those who

* Associate Professor of Law, Cleveland State University, Cleveland-Marshall College of Law. B.A., 1971, Columbia University; Master of Regional Planning, 1974, University of North Carolina at Chapel Hill; J.D., 1975, University of North Carolina at Chapel Hill.

1. In 1889, Congress appropriated funds to protect and repair the Casa Grande ruin located in Pinal County, Arizona, and to permit the President to reserve the land from settlement and sale. Act of March 2, 1889, ch. 411, 25 Stat. 961. This provision, a relatively insignificant portion of the Interior Department's appropriation, allotted \$2,000 for the project. On June 22, 1892, President Benjamin Harrison formally reserved the ruin and 480 acres around it; the legal description of the protected federal land, however, was incorrect, and President William H. Taft had to correct it by Presidential Proclamation in 1910. 36 Stat. 2505. It was officially made a national monument by President Woodrow Wilson in 1918. 40 Stat. 1818.

2. The removal of a particular parcel of public land from developmental pressure has been viewed as an effective method of preserving archaeologically significant and other important properties. The early inclusion of Presidential power to reserve federal lands for "national monuments" in the 1906 Antiquities Act reflects the importance of this technique in the development of federal preservation policy. See Act of June 8, 1906, Pub. L. No. 34-209, ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§ 431-433 (1976 & Supp. III 1979)). The intergovernmental friction inherent in the exercise of such a power is well illustrated by *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978), where the State of Alaska challenged a Presidential declaration setting aside a large number of acres in the state as a national monument. *Id.* at 1159-60.

would disrupt or damage archaeological sites.³ Most recently the idea of cultural value has been integrated into the expanding conception of environmental quality, with the result that cultural resources have received the same protections available to natural environmental interests.⁴ This final development reflects the view that a desirable quality of life requires not only clean air and water but also the availability of cultural resources. In an age when it is argued that the protection of many environmental assets must be justified on the basis of economic efficiency, the support for cultural resources represents a recognition that certain objects and places hold an intrinsic value to society and must be preserved for their uniqueness and the information they can provide.

This Article is concerned with the emerging federal law protecting sites and objects having archaeological significance. Today, archaeological resources are vulnerable to damage or obliteration by a number of forces. Some of these factors are subject to governmental control, and some are not. Most obviously, archaeological sites and artifacts can be adversely affected as a direct or an indirect result of public or private development activity. For example, an archaeologically significant site or artifact may be destroyed or damaged as a by-product of construction activity. A broad range of statutory provisions require that advance planning consideration be given to the cultural impact of federal or federally related actions.⁵ These specialized federal review statutes have done much to sensitize agencies to the need to plan projects and programs that will not adversely affect cultural resources.⁶

3. See 16 U.S.C. § 433 (1976).

4. See 42 U.S.C. § 4331(b)(4) (1976) (National Environmental Policy Act of 1969 [NEPA]) which states in part:

[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . (4) preserve important historic, cultural, and natural aspects of our national heritage. . . .

Id.

5. See 16 U.S.C. § 470(f) (1976) (National Historic Preservation Act [NHPA]); 42 U.S.C. § 4332 (1976) (National Environmental Policy Act of 1969); 49 U.S.C. § 1653(f) (1976) (Department of Transportation Act); 40 C.F.R. §§ 1500.1-1500.6 (1980) (Council on Environmental Quality regulations implementing NEPA); Exec. Order No. 11,593, 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 app., at 429 (1976); Advisory Council on Historic Preservation regulations, 36 C.F.R. §§ 800.1-800.15 (1979). Of the listed materials, the Council on Environmental Quality's regulations implementing NEPA and the regulations of the Advisory Council on Historic Preservation are the most important federal provisions requiring prior review of potentially harmful federal actions. Specialized environmental review statutes are increasingly the focus of litigation challenging a variety of federal actions. See Rosenberg, *Federal Protection of Unique Environmental Interests: Endangered and Threatened Species*, 58 N.C. L. Rev. 491, 508-16 (1980).

6. Undoubtedly federal court decisions that have enjoined federal agency actions not in compliance with the review requirements of 16 U.S.C. § 470(f) (1976 & Supp. III 1979) have been partly responsible for this new agency awareness. See *WATCH v. Harris*, 603 F.2d 310 (2d Cir. 1979); *Wisconsin Heritages, Inc. v. Harris*, 460 F.Supp. 1120 (E.D. Wis. 1978); *Weintraub v. Rural Electrification Administration*, 457 F.Supp. 78 (M.D. Pa. 1978), *Hall County Historical Soc'y v.*

Other state or local requirements can be imposed to regulate the proposed activity.⁷ In these ways, the legal system has protected archaeological values in much the same fashion as it protects more commonly recognized environmental interests.⁸

The fact that many archaeological resources are considered highly valuable art objects creates an additional threat to their existence. With the value of artifacts on the domestic and international art markets rapidly escalating, the search for these highly prized objects has been pursued on the vast federally owned or controlled landholdings located mainly in the southwestern portion of the nation.⁹ Private collectors have enhanced their own collections at the expense of the general public by illegally taking artifacts from public lands. Vandals, as always, have done their damage through wanton destruction even though not motivated by economic gain. These acts have resulted in the pillage of important archaeological sites which often have substantial religious significance to American Indian tribes. This phenomenon has resulted not only in the loss of valuable objects¹⁰ but also in the destruction of scientific information concerning the existence of prior societies who lived on the North American continent. This exploitation of archaeological artifacts and sites, when considered in combination with the damage caused by developmental activities and the forces of nature, represents a serious threat to the national cultural heritage. When an archaeological resource is lost by reason of theft or damage, unique data of a truly irreplaceable nature are lost forever.¹¹

Georgia Dep't of Transp., 447 F.Supp. 741 (N.D. Ga. 1978); *Aluli v. Brown*, 437 F.Supp. 602 (D. Hawaii 1977). At least two federal agencies have issued regulations pertaining to cultural resources protection and compliance with the regulatory statutes mentioned above. See 7 C.F.R. §§ 656.1-656.9 (1980) (Soil Conservation Service); 33 C.F.R. §§ 305.1-305.20 (1979) (Army Corps of Engineers).

7. A number of state and local governments have acted to protect archaeological resources. See C. MCGIMSEY, *PUBLIC ARCHEOLOGY* 125-234 (1972); Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 188-203 (1976).

8. Even the general purpose environmental review statute (NEPA) requires a consideration of cultural effects within the framework of the federal environmental impact statement [EIS]. See note 4 *supra*. The Council on Environmental Quality's [CEQ's] impact statement regulations implicitly recognize the overlap in coverage between NEPA and NHPA. See 40 C.F.R. § 1500.9(A)(1) (1980) (coordination of review provisions).

9. For example, in 1977, two Mimbres bowls taken from a site in the Gila National Forest in southwestern New Mexico were sold by the apprehended site looters for \$4,000. *United States v. Smyer*, 596 F.2d 939, 943 (10th Cir. 1979).

10. Since these valuable artifacts are buried under the surface of lands owned or controlled by the federal government, the position consistently taken by Congress and federal land management agencies has been that artifacts are items of personalty under federal ownership. As both the owner of the *locus in quo* and the sovereign, the federal government has claimed comprehensive rights to property under its control. In *California ex rel. Younger v. Mead*, 618 F.2d 618 (9th Cir. 1980), the Ninth Circuit held that a large meteorite discovered on federal land in the Old Woman Mountain Range in California could be removed and studied by the Smithsonian Institution under a permit issued pursuant to the 1906 Antiquities Act. *Id.* at 620. The court added: "[W]e interpret the Act and its legislative history to give the Secretary of Interior broad discretionary power to dispose of objects of antiquity found on federal land under his jurisdiction." *Id.* at 621.

11. The loss is much the same as the extinction of an endangered plant or animal species: a

Although government may directly control or limit its own actions or those of a private entity using a federal permit, license, or support,¹² it may only deter nongovernmental activities indirectly by the use of civil or criminal sanctions. No matter how effective federal policy is in regulating actions of the federal government itself, it is of little value if commercially motivated abuses remained unchecked. As will be discussed below, a 1974 Ninth Circuit decision invalidated the criminal sanctions of the 1906 Antiquities Act which prohibited the looting of "objects of antiquity" upon federal lands.¹³ Consequently, cultural resources located on federal lands were immediately exposed to a greater danger—increasing commercial excavation for valuable artifacts. Congress, in enacting the Archaeological Resources Protection Act of 1979,¹⁴ sought to deter the continued commercial pilfering of federal lands by defining a narrow permit program for allowable archaeological excavation and by reinforcing it with the imposition of strengthened civil and criminal penalties for unauthorized activities.¹⁵ An examination of this statute will reveal the subtle and complex issues confronted by Congress in attempting to apply traditional administrative and criminal law principles to the novel problem of archaeological resource protection. This Article will discuss the following questions: (1) What was the preexisting legal structure and federal policy concerning the protection of archaeological resources located on federal lands? (2) Why was there a need for new federal legislation in this area? (3) How did Congress perceive the issue of cultural resource protections on federal lands? (4) What specific action did Congress take to remedy the insufficiencies in federal law? (5) How adequate was the congressional response to the perceived need to act? The analysis of these issues will reflect the emerging importance of cultural interests in federal land management decisionmaking. On a broader plane, this Article will examine the development of federal policy protecting historical and archaeological assets from both inadvertent and intentional actions of the federal government and private individuals.

unique element of the world has been eliminated. In the context of archaeology, the loss of an artifact or the destruction of a site can remove critical and rapidly diminishing data from present and future evaluation.

12. See 16 U.S.C. § 470f (1976 & Supp. III 1979).

13. *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974). Cf. *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979).

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

15. See text & notes 125-51 *infra*.

THE HISTORICAL DEVELOPMENT OF FEDERAL INVOLVEMENT IN THE PROTECTION OF CULTURAL RESOURCES

The history of federal involvement in the area of archaeological preservation must be considered in conjunction with the growth of public interest in and support for the protection of historic monuments and structures. At an early stage in our nation's history, concern was expressed over the deteriorating condition of sites having historical significance, particularly those related to persons or events significant to the history of the American Revolution.¹⁶ In the nineteenth century, local and national organizations were formed for the purpose of identifying historically important structures and preserving them from destruction.¹⁷ More often than not, however, little notice was taken of buildings, districts, or sites which may have represented an architectural style or a life style of the past. In a growing nation which prided itself on material progress and modernization, it is not difficult to understand this lack of interest in and sensitivity for the past. The nation was rapidly expanding westward and the country looked ahead to the new and better life of the future. Furthermore, if little attention was given to the preservation of seventeenth and eighteenth century European settlements, even less was accorded to the remaining evidence of pre-European civilization on the North American continent. During the second half of the nineteenth century, the public considered the American Indian to be a recently subjugated adversary whose unfamiliar lifeways and troublesome presence interfered with national development. It is not surprising that there was no widespread public interest in preserving the culture of this defeated enemy.

During the last quarter of the nineteenth century, scientific organizations were active in focusing the attention of the federal government and the general public upon American archaeological resources.¹⁸ Privately funded expeditions traveled to the Southwest to ascertain the condition of the Indian ruins in that region. They discovered the sites

16. T. KING, P. HICKMAN & G. BERG, *ANTHROPOLOGY IN HISTORIC PRESERVATION* 12-15 (1977).

17. At an early stage the courts upheld the use of eminent domain powers to permit federal and state governments to acquire historic properties. In 1896, the United States Supreme Court found that congressional action establishing the Gettysburg civil war battlefield site constituted a valid exercise of federal eminent domain powers. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896). Federal action establishing the commemorative part, in the opinion of Justice Peckham, was clearly a valid public purpose upon which "there can be no well founded doubt." *Id.* at 680. In 1929, relying upon the *Gettysburg Electric* case, the Court upheld a Kansas statute permitting the use of state condemnation authority "for any tract or parcel of land in the State of Kansas, which possess unusual historical interest." *Roe v. Kansas ex rel. Smith*, 278 U.S. 191, 193 (1929). Consequently, public authority to acquire culturally significant property through eminent domain has been clear for many years.

18. R. LEE, *THE ANTIQUITIES ACT OF 1906* 1-12 (1970) (published by the National Park Service, Washington, D.C.) (hereinafter cited as LEE.)

had been seriously damaged by looters and vandals.¹⁹ The reports reaching the East were so disturbing that prominent archaeologists and their sponsors approached both Congress and the Department of the Interior as early as 1882 for assistance in protecting the imperiled sites through reservation from public sale and preservation of artifacts.²⁰ Unfortunately, public support had not yet coalesced sufficiently to produce meaningful protective legislative action. Even at this early stage, the conflicting goals of the conservationists and the interests favoring unrestrained acquisition and use of the public domain were readily apparent. The issue remains with us today.²¹ In the latter part of the nineteenth century and the early years of the twentieth century, public exposure to American archaeology was greatly expanded by museum displays and other exhibitions of artifacts. With the rising interest in Indian artifacts, however, came increased pothunting and damage to sites. It was clear that the disturbing trends would have to be met by federal action if the cultural resources of the nation were to be preserved.

After six years of consideration, Congress enacted the Antiquities Act of 1906²² in an effort to regulate the unauthorized looting of sites having significant Indian artifacts and structures. As early as 1900, legislative proposals had been introduced in Congress directing the President to reserve selected archaeological sites and prohibiting the unauthorized disturbance of archaeological resources.²³ A lack of con-

19. LEE, *supra* note 18, at 14-18.

20. Sen. Charles F. Hoar of Massachusetts presented a petition from the New England Historic Genealogical Society requesting Congress to withhold lands in the southwest from public sale. Although the petition formally brought the question of antiquities protection before Congress, it did not arouse sufficient interest in the issue to save the matter from an anonymous death in the Senate Committee on Public Lands. See 13 CONG. REC. 3777 (1882).

21. In the present context, this conflict has materialized in the extraordinary effort expended by Sen. Mike Gravel to limit the unlimited Presidential power—derived from the Antiquities Act, 16 U.S.C. § 431 (1976)—to declare national monuments, thereby removing them from development and use. See *The Archaeological Resources Protection Act of 1979: Hearings on S. 490 Before the Subcomm. on Parks, Recreation, and Renewable Resources of the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 1, 137-45 (1979) [hereinafter cited as *Senate Hearings*]; 125 CONG. REC. S10,836-42 (daily ed. July 30, 1979) (remarks of Sen. Gravel). Sen. Gravel of Alaska offered a bill—S. 1176—which would have amended the Antiquities Act to require congressional approval, by concurrent resolution, for withdrawals of more than 5,000 acres. S. 1176, 96th Cong., 1st Sess., 125 CONG. REC. S10,837 (daily ed. July 30, 1979). Sen. Gravel was concerned about the recent creation of 17 national monuments in Alaska totalling 56,000,000 acres. National monument status removes those federal lands from oil and gas exploration. See 15 WEEKLY COMP. OF PRES. DOCS. 151 (January 29, 1979). S. 1176 would have applied retroactively to invalidate the Presidential declaration of Alaskan monuments. 125 CONG. REC. S10,837 (daily ed. July 30, 1979).

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

23. On February 5, 1900, Rep. Jonathan P. Dolliver of Iowa introduced a bill granting regulatory power to the Secretary of the Interior and creating a criminal sanction for unauthorized excavations. H.R. 8066, 56th Cong., 1st Sess., 33 CONG. REC. 1529 (1900). The next day, Rep. John F. Shafroth of Colorado submitted a bill which merely created the criminal sanction for harming antiquities. H.R. 8195, 56th Cong., 1st Sess., 33 CONG. REC. 2637 (1900). On March 7,

sensus both within and without Congress resulted in delay. During this period of legislative inaction, federal land managers used their administrative authority to withdraw lands under their control from public sale, settlement, or entry. This interim action served to temporarily protect identified sites until more formal action could be taken. The sites located in the southwestern portion of the nation, however, were the most vulnerable due to the tremendous acreage under federal ownership, the concentration of significant sites within the region, and the small number of federal officials available to supervise the federal lands.

The 1906 Act, in direct terms, prohibited the appropriating, excavating, injuring, or destroying of any "historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States" without first obtaining permission from the federal land manager.²⁴ These terms were never defined in the statute and, as a result, the enforcement of the prohibitions would later be barred in one federal circuit court on constitutional grounds.²⁵ As a deterrent to the objectionable conduct, the Act established a criminal penalty of up to five hundred dollars in fines or ninety days imprisonment or both.²⁶ Congress anticipated the need for expert examination and possible excavation of archaeological sites, and allowed institutions "properly qualified" to undertake the task pursuant to a federal permit.²⁷ Thus, as a matter of federal policy, as early as 1906 archaeological resources were viewed as being important to the nation and worth protecting with a federal regulatory system reinforced by modest criminal law sanctions. In addition, the 1906 legislation gave the President broad discretionary power to create national monuments by reserving lands on the public domain containing "historic

1900, he introduced a bill which went beyond his prior proposal and authorized the Secretary of Interior to withdraw important sites of up to 320 acres to be placed in the custody of the Bureau of American Ethnology of the Smithsonian Institution. H.R. 9245, 56th Cong., 1st Sess., 33 CONG. REC. 2637 (1900). The Department of Interior, through Rep. John F. Lacey of Iowa, offered H.R. 11021 on April 26, 1900, which would have vested that agency with broad power. H.R. 11021, 56th Cong., 1st Sess., 33 CONG. REC. 4738 (1900). Rep. Shafroth responded to the Interior Department proposal with a considerably narrower bill. H.R. 10451, 56th Cong., 1st Sess., 33 CONG. REC. 4738 (1900). These bills were followed by others but none were successful. Finally, archaeologist Edgar Lee Hewitt drafted a bill which, having the support of Rep. John F. Lacey and Sen. Thomas M. Pateson, eventually became the 1906 Antiquities Act. See LEE, *supra* note 18, at 47-77.

24. 16 U.S.C. § 433 (1976).

25. See *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). But see *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979).

26. 16 U.S.C. § 431 (1976 & Supp. III 1979). For a discussion of the civil and criminal penalties under the 1979 Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470ff (Supp. III 1979), see text & notes 125-59 *infra*.

27. 16 U.S.C. § 432 (1976) (amended 1979). The administrative regulations issued under the 1906 Act defined "properly qualified" as "reputable museums, universities, colleges, or other recognized scientific or educational institutions or their duly authorized agents." 43 C.F.R. § 3.3 (1979). See note 31 *infra*.

landmarks, historic and prehistoric structures and other objects of historic or scientific interest."²⁸ This power has been exercised to create at least eighty-four²⁹ such monuments and has been employed in such a way as to foster serious discord between at least one state and the federal government.³⁰

After the 1906 Act was signed by President Theodore Roosevelt, the federal bureaucracy began to address the problems involved in regulating archaeological resources situated on federal lands. Shortly after enactment, a brief set of administrative regulations was jointly issued by the Secretaries of War, Agriculture, and the Interior to implement the authority created by the Antiquities Act.³¹ These rules provided that site examination and excavation would be available only to a narrow group of experts, that each federal agency would monitor ongoing work, and that the Smithsonian Institution would serve as both an advisor on permit applications and a repository for the data developed by permitted work. Each of the federal agencies with major land management responsibilities was authorized to issue permits for archaeological activities on lands under their administration. In the three decades following the passage of the 1906 Act, however, the Department of the Interior emerged as the manager of federally owned historic sites, parks, and monuments.

The Antiquities Act was the first and only federal law, until the 1979 Archaeological Resources Protection Act,³² to preserve archaeological sites and artifacts from the destructive actions of private individuals. Other statutes, executive orders, and administrative regulations discussed below will illustrate the development of federal policy controlling the potentially damaging impact of government actions upon cultural resources.³³ Even though it is an early recognition of the importance of cultural values, the 1906 Act has proven inadequate to the task of protecting archaeological sites and artifacts. The statute sought only to regulate resources located on federal land and did not attempt to extend federal regulatory power to state or privately

28. 16 U.S.C. § 431 (1976 & Supp. III 1979).

29. *See id.*

30. *See* note 21 *supra*.

31. LEE, *supra* note 18, at 118-20. Formal regulations implementing the permitting functions of the 1906 Act appear at 43 C.F.R. §§ 3.1-3.17 (1979). These brief regulations describe a permit application process controlled by the Secretary having authority over the land in question. *Id.* §§ 3.1, 3.3. The only external review to be accorded permit requests is to be performed by the Smithsonian Institution. The regulations, however, specify no standards for evaluation. *Id.* § 3.8. Although the 1979 Act requires a new set of regulations to effectuate the policy of the Act, no federal agency has issued revised rules. The Departments of the Interior and Agriculture have recently stated that they will continue to use the procedures of the existing regulations to implement the substantive policy of the new statute. 45 Fed. Reg. 13,433 (1980).

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

33. *See* note 5 *supra*.

held property. As a matter of legal theory, the drafters of the Antiquities Act approached the problem of archaeological plunder more as a question of federal land management than as a matter of cultural resource protection. The Act's regulatory function was made effective through the potential imposition of judicial sanctions. By design, such a system relied upon the issuance of permits and the supervision of federal officials to ensure compliance. The vast expanse of territory under federal control, the limited number of federal officials, and the low priority given by the federal government to administrative responsibilities under the Antiquities Act all combined to reduce the usefulness of the statute. Finally, as time passed it became apparent that the penalties provided for in the Act, coupled with its lax enforcement,³⁴ did not act as a sufficient deterrent to potential violators of the law.

For nearly thirty years following the passage of the Antiquities Act there was no federal legislative action for the protection of archaeological sites and objects. During that period, however, several significant events occurred which influenced the course of cultural resource preservation. In the 1920s, with the substantial financial support of John D. Rockefeller, Jr., the town of Williamsburg, Virginia was restored to its pre-Revolutionary War condition as the capital of Virginia.³⁵ This project was important because it resulted in the development of improved archaeological field methods and also because it drew public attention to the historic site and the careful restoration techniques employed. Next, the economic disaster of the 1930's ironically served to bolster the federal government's role in surveying and salvaging historically and archaeologically significant properties. As part of its national recovery program, the administration of President Franklin D. Roosevelt employed a large number of architects to undertake the Historic American Building Survey which preserved data concerning historic structures. Also, the Works Progress Administration [WPA] hired a large number of unemployed persons to examine and excavate archaeological sites. This work was conducted under the supervision of the Smithsonian Institution and focused mainly upon the area of the nation affected by the activities of the newly created Tennessee Valley Authority. Under this program, archaeologists employed by the federal government engaged in a large-scale salvage operation, attempting to rescue and remove significant archaeological remains before a devel-

34. This lack of enforcement is best reflected in the reference by Judge Merrill in *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), that "[c]ounsel on neither side was able to cite any instances prior to this in which conviction under the [1906] statute was sought by the United States." *Id.* at 113-14.

35. T. KING, P. HICKMAN & G. BERG, *supra* note 16, at 21.

opment project could destroy them.³⁶

In 1935, Congress passed the Historic Sites Act³⁷ which expanded federal cultural resources policy from the initial position taken by the Antiquities Act twenty-nine years earlier. The 1935 statute declared that it was the "national policy to preserve historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."³⁸ By emphasizing the preservation of historic and prehistoric sites, the Act apparently rejected the salvage approach embraced by the federally sponsored WPA program. The Historic Sites Act was also significant because it accorded the National Parks Service [NPS] of the Department of the Interior central authority to carry out the federal government's program of historic and archaeological preservation.³⁹ Specifically, the NPS was directed to survey and examine such sites and to acquire pertinent documentary information concerning those cultural assets.⁴⁰ To achieve the purposes of the Act the agency also was permitted to acquire "by gift, purchase, or otherwise" both real and personal property and to restore significant properties for the public's benefit.⁴¹ Possibly because of the fact that the Williamsburg restoration project had been undertaken, there was considerable emphasis in the statute on encouraging the development of historic or archaeological sites as public museums. Although the actual accomplishments of the 1935 Act may have been more theoretical than real, it did serve to reinforce the federal involvement in cultural resource protection and to focus the primary responsibility for federal historic preservation activities in the Department of the Interior.

During the period immediately following World War II there was little legislative activity in the area of cultural resources protection.⁴² In that era, however, federal developmental activities were rapidly expanding in number and scope. These activities often affected areas of

36. Compare this federal activity with that authorized under 16 U.S.C. § 469 (1976) (amended 1979).

37. Act of August 21, 1935, 49 Stat. 666 (current version codified at 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979)).

38. *Id.* § 461 (1976 & Supp. III 1979).

39. *See id.* § 462 (1976).

40. *See id.* § 462(a), (b).

41. *Id.* § 462(d). The holding in *Gettysburg Electric* would apparently permit federal condemnation in order to accomplish the purposes of the Act. *See* note 17 *supra*.

42. In 1949, Congress enacted legislation creating the National Trust for Historic Preservation in the United States. 16 U.S.C. § 468 (1976). The Trust, established as a "charitable, educational, and nonprofit corporation," was expected to acquire through a variety of means "sites, buildings and objects significant in American history or culture" and to undertake a preservation program. *Id.* § 468(a). In part modeled after the British National Trust, the American organization was intended to supplement federal preservation efforts and to serve as the recipient of private contributions that might never be made to the federal government. *See* Letter from J.A. Krug, Secretary of Interior, to Rep. Hardin Peterson, Chairman House Committee on Public Lands, reprinted in [1949] U.S. CODE CONG. & AD. NEWS 2287-88.

archaeological significance.⁴³ As a reaction to this expansion, federal agencies began to require archaeological salvage operations as a component of their own or their funded operations. This trend was reflected in federal highway legislation⁴⁴ and most notably in the Reservoir Salvage Act of 1960.⁴⁵ The 1960 Act provided for a system of interagency notification and funding for salvage activities in the face of federal dam construction that might "cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archaeological data. . . ."⁴⁶ The potential coverage of this survey and salvage program was broadened in 1974 by the enactment of the Archeological and Historical Preservation Act [AHPA]⁴⁷ which extended the prior law to encompass "any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program."⁴⁸ It is clear that the primary purpose of the federal program authorized by these two statutes is the preservation of data by salvage techniques rather than by agency project planning processes that are sensitive to cultural resource protection and designed to avoid the use of significant lands.⁴⁹ This statutory action illustrates a partial accommodation made by Congress to the cultural interest. Funding is intended to lessen the destructive effects of developmental agency actions

43. The Senate committee report on H.R. 5170—the legislation establishing the National Trust—aptly described the effect of the post-war developmental surge upon cultural properties:

Recent years have witnessed the neglect, destruction, and loss of a rapidly growing number of the important historic sites and buildings of America. Some of these are historic houses on the outskirts of expanding cities where modern industrial or real estate developments engulf them. Other places, associated with great men and events, happen to be in the way of highway, turnpike, or bridge construction. Still others, such as the ancient Spanish trails of the Southeast, or the pioneer trails of the West, are being neglected and gradually forgotten.

S. REP. NO. 1110, 81st Cong., 1st Sess., reprinted in [1949] U.S. CODE CONG. & AD. NEWS 2285-86.

44. 23 U.S.C. § 305 (1976). This statute makes federal funding available as part of the highway project for survey and salvage work for archaeological and paleontological objects "having National, State, or local historical or scientific significance. . . ." 23 C.F.R. 765.1 (1980). This statute did not reflect a legislative attitude favoring the avoidance of such sites in project planning but rather a funding system to support salvage activities.

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

46. 16 U.S.C. § 469a-1(a) (1976).

47. Act of May 24, 1974, Pub. L. No. 93-29, 88 Stat. 174 (amending 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979)).

48. 16 U.S.C. § 469 (1976 & Supp. III 1979). The Heritage Conservation and Recreation Service [HCRS] of the Department of the Interior issued a "statement of program approach" regarding AHPA. See 44 Fed. Reg. 18,117-18 (1979). This statement explained that the intent of AHPA "is to make authorized Federal construction programs and all projects licensed or assisted by Federal agencies responsive to the damage they will cause to scientific, prehistoric, historic, and archeological resources." *Id.* The HCRS announcement made clear that the 1974 Act did not relieve federal agencies of their duties under the National Historical Preservation Act and Executive Order No. 11,593. *Id.* at 18,118.

49. HCRS, however, specifically noted in its program statement that "resource salvage generally is less preferable than preservation *in situ*. After identification of resources during the initial planning stages of a project, Federal agencies should give full consideration to courses of action that will not necessitate salvage." 44 Fed. Reg. 18,118 (1979). It is possible that the preservation attitude has found an advocate within the Department of the Interior.

by locating, identifying, and removing culturally significant items. The preservation of the site itself, however, is not accomplished under this approach.

The environmental movement of the late 1960's led to the enactment of the National Environmental Policy Act [NEPA]⁵⁰ in 1969 and greatly influenced the passage of a broad range of special environmental laws⁵¹ and executive orders. Within the developing theory of environmental quality, cultural values were explicitly recognized as being a component of the conception of a desirable quality of life. Many of the protections available to environmental interests in general have been extended to cultural resources.⁵² The new environmental consciousness also regenerated an interest in older laws that previously had little or no effect on federal programs. These laws have recently regained vitality due to legislative amendments and new judicial interpretations.⁵³ The National Historic Preservation Act of 1966 [NHPA]⁵⁴ is a prime example of this development and potentially one of the most important federal statutes.

NHPA established the National Register of Historic Places.⁵⁵ Most importantly, the Act required all federal agencies to consult with the newly created Advisory Council on Historic Preservation whenever federal projects might have adverse impacts on historic or archaeological sites listed on the National Register.⁵⁶ Executive Order No.

50. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4331 (1976)).

51. 16 U.S.C. § 661 (1976) (Fish and Wildlife Coordination Act); 16 U.S.C. § 1531 (1976) (Endangered Species Act); 16 U.S.C. § 1271 (1976) (Wild and Scenic Rivers Act).

52. The most obvious protection is the inclusion of cultural resource issues within the environmental impact statement required under NEPA. See *Environmental Defense Fund v. Hoffman*, 566 F.2d 1060 (8th Cir. 1977); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549 (9th Cir. 1977); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977); *Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976).

53. *TVA v. Hill*, 437 U.S. 153 (1978), reflects this phenomenon. See W. RODGERS, *ENVIRONMENTAL LAW* § 7.12, at 822-34 (1977); Rosenberg & Olson, *Federal Environmental Review Requirements Other Than NEPA: The Emerging Challenge*, 27 CLEV. ST. L. REV. 195, *passim* (1978).

54. Pub. L. No. 89-665, 80 Stat. 915 (current version codified at 16 U.S.C. §§ 470-470i (1976 & Supp. III 1979)). The Act has been amended several times. Act of Aug. 18, 1970, Pub. L. No. 91-383, 84 Stat. 825; Act of Sept. 28, 1976, Pub. L. No. 94-422, 90 Stat. 1313; Act of Oct. 7, 1976, Pub. L. No. 94-458, 90 Stat. 1939.

55. 16 U.S.C. § 470a (1976 & Supp. III 1979).

56. 16 U.S.C. § 470f (1976 & Supp. III 1979). This subsection would seem to apply to both detrimental and beneficial effects of federal actions. Section 470f provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking *shall*, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, *take into account the effect of the undertaking* on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470t of this title a reasonable opportunity to comment with regard to such undertaking. *Id.* (emphasis added).

11,593,⁵⁷ issued in 1971, was interpreted by the Advisory Council to expand the authority of the 1966 Act to include properties *eligible* for listing on the National Register of Historic Places. This order provided eligible properties the same protection accorded properties actually listed on the Register. In 1976, NHPA was amended to formally extend the protections of the Act to such eligible properties,⁵⁸ and thus the statutory authority was brought in line with the existing Executive Order. The 1966 Act created a system of federal interagency review which was intended, at a minimum, to force federal agencies to address the question of cultural resource impact prior to acting.

The full impact of the Act and Executive Order began to be felt after the Advisory Council issued regulations for carrying out the Act and the Order in early 1974.⁵⁹ In short, the Advisory Council procedures require that a federal agency consult a State Historic Preservation Officer [SHPO] when determining how its activities will affect historic or archaeological sites.⁶⁰ The procedures require that the SHPO, along with the Advisory Council and the interested federal agency, reach written agreement in certain cases on how to mitigate any adverse effects expected from a federal project.⁶¹ The Advisory Council procedures also contain minimum review periods which can cause delays for various federal projects. For instance, the Advisory Council may take thirty days to review a "no adverse effect" determination made by a federal agency.⁶² This review follows the required survey activities, consultations with the SHPO, and a determination of eligibility for the National Register of Historic Places by the Heritage Conservation and Recreation Service.⁶³

The National Historic Preservation Act and Advisory Council procedures have placed a significant additional obligation upon federal agencies. An increasing number of cases have been brought alleging damage to cultural interests and violations of NEPA, NHPA, or both.⁶⁴

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

58. Pub. L. No. 94-422, § 201(3), 90 Stat. 1320 (1976) (amending 16 U.S.C. § 470f (1976 & Supp. III 1979)).

59. *See* 36 C.F.R. §§ 800.1-800.15 (1979). On October 25, 1978, the Advisory Council proposed extensive amendments to these regulations. 43 Fed. Reg. 50,650-60 (1978). These modifications were intended to simplify Advisory Council commenting procedures and streamline the entire process. On January 30, 1979, the Advisory Council issued its final regulations which modified the previous proposal. 36 C.F.R. §§ 800.1-800.15 (1979).

60. 36 C.F.R. §§ 800.4(a), (b), 800.5 (1979). Strict time limits are imposed upon the SHPO, and if no response to a request for his opinion is received within 30 days, concurrence is presumed. *Id.* § 800.5(a), (b).

61. *Id.* § 800.6(c).

62. *Id.* § 800.6(a).

63. Eligibility for listing is determined in conjunction with the standards established in *id.* §§ 63 and 800.4(a)(3).

64. *E.g.*, *WATCH v. Harris*, 603 F.2d 310 (2d Cir. 1979); *District of Columbia Fed'n of Civic Ass'ns v. Adams*, 571 F.2d 1310 (4th Cir. 1978).

By itself, NEPA requires that agencies evaluate the impacts of their activities on cultural as well as natural and ecological resources.⁶⁵ NHPA, as implemented through the Advisory Council procedures, often requires investigations and documentation for cultural resource impacts beyond those required by NEPA.⁶⁶ These additional requirements may be particularly onerous from the agency's viewpoint when archaeological properties are involved. Archaeological properties eligible for the National Register are found in many areas of the country, and their presence and precise location usually cannot be detected without extensive field surveys that often involve subsurface excavation.

As a matter of policy development, NHPA and its related administrative rules reflect a further recognition of cultural resource values. The Act imposes a consultation and review requirement upon all federal agencies which is intended to induce them to plan their actions in such a way as not to harm historic or archaeologically significant properties. Although cultural interests are not accorded a uniform position of priority over all other social values, NHPA does enforce a procedure which demands serious consideration of any harmful effects. As a regulator of federal agency behavior, the 1966 Act is of extreme importance.

THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

The increasing frequency of looting incidents at archaeological sites during the 1970s brought the issue of the adequacy of federal legal protections before Congress. A number of criminal prosecutions arising from alleged violations of the 1906 Antiquities Act had resulted in conflicting judicial interpretations of the law.⁶⁷ In 1974, the Ninth Circuit in *United States v. Diaz*⁶⁸ declared the criminal penalty provisions

65. 42 U.S.C. § 4331(b)(4) (1976). This section states that one element of national policy will be to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." *Id.*

66. Newly issued amendments to the Advisory Council's regulations address the question of NEPA compliance. 36 C.F.R. § 800.9 (1979). These new regulations suggest that agencies should coordinate their NEPA and NHPA review processes, although at the same time flatly state that the two statutes are "independent." The newly issued Council on Environmental Quality [CEQ] regulations concerning federal EIS preparation direct that NEPA compliance should be combined with other statutory requirements "to the fullest extent possible." 40 C.F.R. § 1502.25 (1979). In the statement of policy, NEPA regulations direct federal agencies "to the fullest extent possible" to "[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." *Id.* § 1500.2(c) (1979). Although the language employed seems more fitting in the criminal law context, the intention is clearly to streamline all federal environmental review.

67. Compare *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) with *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

68. 499 F.2d 113 (9th Cir. 1974).

of the Act to be unconstitutionally vague⁶⁹ and invalidated the statute in the states comprising the judicial circuit.⁷⁰ It was clear, however, that the existing penalties provided by the Antiquities Act, even if judicially upheld, were totally inadequate to deter those who were damaging archaeological sites and pilfering artifacts.⁷¹ Since cultural resources had become extremely valuable on the domestic and international art market,⁷² the weak penalties, which were rarely imposed, were undoubtedly viewed by the profit-motivated looters as merely a cost of doing business. This lack of an effective legal sanction, when combined with the tremendous area to be supervised, created a serious threat to the future of America's cultural resources.⁷³

As in 1906, agitation for legislative reform originated in scientific journals.⁷⁴ The frustration engendered by the *Diaz* decision and the consensus of opinion that a statutory change was necessary prompted Congress to enact a new law within a period of nine months.⁷⁵ This expedited treatment of the archaeological resource protection bill reflected a common perception that immediate action was warranted. The accelerated consideration and impressive support for the legislation, however, did mask at least one significant controversy involving the Antiquities Act—the unfettered Presidential power to declare national monuments upon federal lands.⁷⁶ Leaving that issue aside, Congress was willing to address itself to the task of developing a new regulatory program for the control of archaeological exploration and recovery on federal lands. Throughout the congressional deliberations on the proposed statute a tension existed between those who advocated a legal system providing the maximum protection for archaeological

69. *Id.* at 115.

70. The Ninth Circuit includes Arizona, California, Nevada, Idaho, Oregon, Washington, and Montana. *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), however, had validated the Antiquities Act in the Tenth Circuit. That circuit is comprised of New Mexico, Colorado, Utah, Oklahoma, Kansas, and Wyoming. The split of opinion between these two judicial circuits was especially significant since a great number of archaeological sites are located in the latter six states.

71. See text & note 26 *supra*. The first reported challenge to the constitutionality of the Act occurred in *Diaz*. See text and notes 67-70 *supra*.

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

73. The entire group of witnesses who testified before the Senate Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources adopted that position concerning S. 490. Although differing slightly on specific provisions, the supportive consensus was clear. *Senate Hearings*, *supra* note 21, at 1-96.

74. *E.g.*, Collins & Green, *supra* note 72.

75. The House bill, H.R. 1825, was introduced on February 1, 1979, by Rep. Morris K. Udall of Arizona and nine other co-sponsors. H.R. REP. NO. 311, 96th Cong., 1st Sess. 7, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1709, 1709-28 [hereinafter cited as HOUSE REPORT]. The Senate bill, S. 490, was introduced on February 26, 1979, by Sen. Pete V. Domenici of New Mexico and four co-sponsors. S. REP. NO. 179, 96th Cong., 1st Sess. 8 (1979) [hereinafter cited as SENATE REPORT]. The legislation was signed into law on October 31, 1979, as Pub. L. No. 96-95, 93 Stat. 721.

76. See text & notes 2, 21 *supra*.

resources and others who wished to maintain a high level of unrestricted public use of federal lands. The resolution of this conflict is amply reflected in the enacted legislation.

The Permitting Process

The 1979 Act places primary emphasis upon a federal permit program to control the disturbance of sites located on federal lands having archaeological significance. This permitting procedure must be considered in combination with the civil and criminal sanctions⁷⁷ provided for in the Act in order to comprehend the emerging congressional protective policy regarding cultural resources. These sanctions will be discussed below. Under the permit program, an organization or an individual wishing to "excavate or remove any archaeological resource located on public lands or Indian lands"⁷⁸ must obtain formal permission from the local federal land manager. Consequently, the acts of excavating and removing archaeological resources and undertaking activities associated with those actions give rise to the need for a permit.⁷⁹

In an effort to avoid a constitutional attack based upon vagueness, as in *Diaz*,⁸⁰ the statute explicitly defines a number of important terms so as to leave no doubt when a permit is required.⁸¹ Any "person" may obtain a permit.⁸² The term "person" is broadly defined to include not only private individuals and organizations but also anyone acting for

77. See text & notes 125-59 *infra*.

78. 16 U.S.C. § 470cc(a) (Supp. III 1979). The statute specifically states:

[A]ny person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. [Such an application must] contain such information as the Federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work.

Id. The language of this provision should have more clearly indicated the mandatory nature of the application by using the word *shall*. The failure to procure such a permit could lead to the imposition of significant sanctions. See 16 U.S.C. § 470ee (Supp. III 1979).

79. It will be extremely important to draft the permits with specificity so that authorized parties do not cause more damage with their associated activities than they do with permitted excavation and removal. Also, actions in contravention of permit requirements can give rise to criminal and civil penalties. See 16 U.S.C. §§ 470ee, 470ff (Supp. III 1979). To be enforceable, the permit requirements would have to be well defined. The existing Antiquities Act regulations do not specify the composition of a permit or the acts which give rise to the need for one. See generally 43 C.F.R. §§ 3.1-3.17 (1979). Under these regulations, a permit may be used for up to three years, requires annual reporting of results to the Smithsonian Institution, and may be terminated at the discretion of the federal land manager. *Id.* §§ 3.6, 3.10, 3.12.

80. 499 F.2d at 113-14 (9th Cir. 1974).

81. See 16 U.S.C. § 470bb (Supp. III 1979). It is curious that the terms "excavate" and "remove" are left undefined by the statute. These terms may be defined by the interagency regulations mandated by the Act or by the courts. See *id.* § 470ii. Reflecting the political importance of federal regulatory action regarding public lands management and archaeology, the Act requires that all regulations issued pursuant thereto do not become effective for ninety days, during which time specified congressional committees may review their potential effect. *Id.*

82. There is but one exception to the obligation to secure such permission. The statute explicitly allows a member of an Indian tribe to excavate or remove an archaeological resource without a federal permit if it is located upon that person's tribal lands. The act must be undertaken pursuant to "tribal law regulating the excavation or removal of archaeological resources on

the federal, state or local governments, or an Indian tribe.⁸³ Theoretically, any group or individual meeting the statutorily mandated tests could receive a permit to excavate. As noted above, a permit is necessary for excavation and removal of items on federal lands but only when there is an "archaeological resource" involved. Excavation and removal of objects not coming within that classification might be regulated by other regulations or statutes,⁸⁴ but not by the Archaeological Resources Protection Act of 1979. As a result, the entire regulatory and enforcement system is activated by the existence of such an "archaeological resource." The Act defines an archaeological resource as "any material remains of past human life or activities which are of archaeological interest as determined under uniform regulations. . . ."⁸⁵ A number of categories of artifacts and structures have been specifically provided by statute to serve as the foundation of the administrative definition. As a matter of legislative policy, all archaeological resources must be at least one hundred years old.⁸⁶ In an attempt to avoid the constitutional infirmity of vagueness which resulted in the invalidation of the criminal sanction of the 1906 Antiquities Act, the new statute adds significant detail to the essential statutory term.

Finally, the new federal law only regulates activities occurring on federally owned or Indian lands⁸⁷ located in the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.⁸⁸ There is no

Indian lands." In the absence of such regulations, federal law and procedure applies. 16 U.S.C. § 470cc (Supp. III 1979).

83. See *id.* § 470bb. Due to the fact that the Act provides for a federal rather than a state permitting function, the sovereign immunity issues discussed in *Hancock v. Train*, 426 U.S. 167 (1976), are not present. See note 31 *supra*.

84. See 125 CONG. REC. S14,722 (daily ed. Oct. 17, 1979) (remarks of Sen. Hatfield). The Ninth Circuit recently held that in spite of its ruling in *Diaz* invalidating the criminal enforcement provisions of the 1906 Antiquities Act, the government may charge those who steal or damage artifacts on federal lands with violation of general criminal statutes. *United States v. Jones*, 607 F.2d 269, 271 (9th Cir. 1979). See 18 U.S.C. § 641 (1976) (theft of government property), and *id.* § 1361 (depredation of government property).

85. 16 U.S.C. § 470bb (Supp. III 1979). Although not specifically cross-indexed in the statute, the agency definition of the term "archaeological resource" is apparently a joint decision of the Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority after consulting with a variety of interest groups. See *id.* § 470ii. It is questionable whether such a group of land management agencies will agree on an expansive or highly protective definition of the term.

86. Originally the Senate bill—S. 490—had required an "archaeological resource" to be but fifty years old. See SENATE REPORT, *supra* note 75, at 2. During the Conference Committee's deliberations, the Senate conferees acceded to the House position requiring an object to be at least one hundred years old. See 125 CONG. REC. S14,721 (daily ed. Oct. 17, 1979) (remarks of Sen. Bumpers). As a result of the committee's efforts, the language used to define "archaeological resource" was substantially improved. Compare 16 U.S.C. § 470bb (Supp. III 1979) with H.R. 1825, 96th Cong., 1st Sess., § 3(1), 125 CONG. REC. H5509 (daily ed. July 9, 1979) and S. 490, 96th Cong., 1st Sess., § 3(a), 125 CONG. REC. S10,830 (daily ed. July 30, 1979).

87. 16 U.S.C. § 470bb (Supp. III 1979).

88. *Id.* § 470cc. The comments provided by the Department of the Interior concerning H.R. 1825 and S. 490 suggested the inclusion of American Samoa and the Commonwealth of the Northern Mariana Islands. See HOUSE REPORT, *supra* note 75, at 17; SENATE REPORT, *supra* note 75, at 15. This recommendation was not heeded.

attempt to extend any federal control over destructive practices taking place on state or privately owned land.⁸⁹ In fact, the statute specifically exempts those areas from coverage.⁹⁰ Regulation in this sphere, if it is ever to come, must originate with the state or local level of government under a subfederal basis of authority. Without state or local control, a private landowner is free to excavate and remove artifacts without any governmental intervention. Since a large number of archaeologically significant properties are located in the Southwest where federal land ownership is extensive, this gap in federal regulation may not be a serious defect in the protective plan.

The statute specifies two broad categories of lands to which the permit requirement attaches: public lands and Indian lands. Public lands are comprised of the national park system, the national wildlife refuge system, the national forest system, and "all other lands the fee title to which is held by the United States. . . ."⁹¹ In addition, for purposes of the Act, Indian lands are defined to mean "lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States. . . ."⁹² Although there are a number of definitional

89. See 16 U.S.C. § 470kk (Supp. III 1979). Throughout the development of this legislation there was never any effort to create a general regulatory statute empowering a federal agency to protect archaeological sites wherever they are found. At most, this legislation was viewed as necessary and reasonable federal land management authority infringing as little as possible on the public's use of federal land. See 125 CONG. REC. H5512 (daily ed. July 9, 1979) (remarks of Rep. Udall); 125 CONG. REC. H9088 (daily ed. Oct. 12, 1979) (remarks of Rep. Lagomarsino).

90. 16 U.S.C. § 470k(c) (Supp. III 1979).

91. *Id.* § 470bb(3) (Supp. III 1979). The definition of public lands curiously exempts two categories of property which otherwise would be covered by the Act: lands on the Outer Continental Shelf [OCS], and lands under the jurisdiction of the Smithsonian Institution. *Id.* It would seem as though some federal regulation of the OCS lands would be advisable in light of the common discovery of valuable and historically significant shipwrecks. See, e.g., *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 333 (5th Cir. 1978). The Fifth Circuit held in this case that the remains of the Spanish vessel *Nuestra Senora de Atocha* which was sunk off of the Florida coast in 1622 were "not situated on lands owned or controlled by the United States under the provisions of the Antiquities Act." *Id.* at 340. This ruling made the existing 1906 Act's protections unavailable in the Continental Shelf area beyond the three mile limit. The "territorial waters" or "marginal sea" within this three mile boundary, while seemingly within the control of the riparian states under the authority of the Submerged Lands Act, 43 U.S.C. §§ 1301-1343 (1976 & Supp. III 1979), are also not covered by the Antiquities Act. See *United States v. Maine*, 420 U.S. 515, 524-25 (1975). With the 1979 Archaeological Resources Protection Act, the existing state of federal nonregulation is continued. Under the holding in *Treasure Salvors*, the ownership of recovered sunken treasure is guided by the "American rule" according title to the finder. 569 F.2d at 343.

92. 16 U.S.C. § 470bb(4) (Supp. III 1979). As enacted, this subsection contained a clause that had not previously appeared in either the House or Senate drafts. The new language excepted from the definition of "Indian lands" any "subsurface interest in lands not owned or controlled by an Indian tribe or an Indian individual." *Id.* It is unclear what the effect of this provision will be. The only congressional discussion of the changed language appears in Rep. Udall's floor statement explaining the conference report. He merely stated that "'Indian' lands, is redefined to protect non-Indian owners of subsurface rights." 125 CONG. REC. H9088 (daily ed. Oct. 12, 1979) (remarks of Rep. Udall) (emphasis added). This would exempt subsurface owners of lands with surface Indian ownership from compliance with the Act while possibly subjecting the Indian surface owners to full compliance and potential liability. This is apparently a last-minute special interest provision.

questions left unresolved,⁹³ the apparent intent of Congress was to bring within the coverage of the Act large portions of the United States under federal ownership or control.

Statutory Tests for Granting Permits

When one wishes to undertake excavation, removal, or related activities involving an archaeological resource located on federal land, a permit must be secured from the federal land manager having authority over the particular site.⁹⁴ The Act clearly specifies that the "Federal land manager" is to be the Secretary of the Department or the head of any other agency having primary management authority over the land involved.⁹⁵ The Act does not specify whether the permit program is to be administered locally or in the headquarters of the land management agency. It seems likely that the permits will be issued under a framework created by regulations⁹⁶ in a decentralized system with a degree of supervision by the Washington-based agency office.

An applicant must meet four statutorily mandated tests in order to be eligible for a permit. First, it must be shown that the applicant is "qualified" to carry out the proposed activity.⁹⁷ This requirement

93. One unresolved question involves the classification of private or state lands within an Indian reservation or within the boundaries of a public land parcel. The legislative history in the House demonstrates an intent to exclude these lands from coverage. See HOUSE REPORT, *supra* note 75, at 8.

94. Since the statute describes the permit-granting decision in discretionary rather than mandatory language, it is possible that a permit could be denied even if all four statutory tests, see notes 97-107 *infra*, are met. See note 78 *supra*. The Act states that "a permit may be issued pursuant to an application under subsection (a) if the Federal land manager determines [that the statutory requirements have been met]." 16 U.S.C. § 470cc(b) (Supp. III 1979). It is possible that additional requirements could be imposed. In fact, the existing regulations under the 1906 Act require permittees "to restore lands upon which they have worked to their customary condition, to the satisfaction of the field officer in charge." 43 C.F.R. § 3.11 (1979).

95. 16 U.S.C. § 470bb(2) (Supp. III 1979). If there is no agency with "primary management authority" then the Department of the Interior is to serve as the Federal land manager. Permitting responsibilities can also be delegated to the Secretary of the Interior by federal agencies. *Id.*

96. Uniform rules and regulations governing the administration of the Act are to be jointly developed by the Secretaries of Interior, Agriculture, and Defense, and the Chairman of the Board of the Tennessee Valley Authority. See note 31 *supra*. Each Federal land manager, however, must issue independent regulations "consistent with the uniform rules and regulations." 16 U.S.C. § 470ii(b) (Supp. III 1979). No rules of any kind have presently been proposed or formally issued. The Senate Committee on Energy and Natural Resources had noted with reference to the identical § 10 requirements present in S. 490 that "[i]t is the intent of the Committee that uniform regulations be developed as expeditiously as possible. However, it should be noted that basic agreement should be reached among the departments prior to publication of proposed uniform regulations by any one department." SENATE REPORT, *supra* note 75, at 11. This latter comment may foreshadow internal policy conflicts among the major land management agencies.

97. 16 U.S.C. § 470cc(b)(1) (Supp. III 1979). The precise nature of requisite qualifications is uncertain since there was no discussion of the issue in the legislative debates. The Senate hearings on S. 490, however, yield some insight into this question. Dr. Ernest A. Connally, Associate Director of the Heritage Conservation and Recreation Service [HCRS] of the Department of the Interior, in response to a question posed by Senator Bumpers of Arkansas, noted:

[The new law] would change the definition somewhat, and would allow qualified persons rather than just institutions as such to do it. So that it would include, for example, State Historical Preservation Officers or other people who are qualified and might have the

could force the archaeological professional organizations to license or certify their members in order to make them eligible for work on federal lands. In the absence of formal professional certification, some minimal level of experience and training should be required to ensure high quality work. In addition, the permit request must describe the proposed work to enable the federal official to assess the applicant's technical competence to complete the project in a professional fashion. The Act has substantially expanded the range of persons and organizations allowed to excavate archaeological properties.⁹⁸

Under the second statutory requirement, the proposed activity must be "undertaken for the purpose of furthering archaeological knowledge in the public interest."⁹⁹ This unquestionably reserves authorized exploration on federal lands for noncommercial purposes. The nation's cultural resources should be disturbed only for the advancement of scientific knowledge and public understanding.

Third, the archaeological resources removed from the site remain the property of the United States. These items, along with associated archaeological records and data, must be preserved by a suitable institution.¹⁰⁰ This test reiterates the position that artifacts found on federal land are a national resource unavailable for private ownership.¹⁰¹ It emphasizes the importance of preserving not only the artifact itself, but also the scientific data derived in the course of the investigation of the site. This third test reflects the policy that federal lands are available to appropriate investigators for exploration and removal of important material remains of prior cultures. Nowhere in the statute is there evidence of congressional support for a preservation-oriented theory favoring the protection of significant sites whether examined or undis-

financial means of a private individual, say a philanthropist. [The bill] would give him the opportunity . . . to go in for an investigation with proper scientific personnel and equipment . . . rather than limit . . . [exploration] as strictly as we do at the present time to educational or scientific institutions and professional organizations and associations linked to recognized institutions.

Senate Hearings, *supra* note 21, at 53. See *id.* at 56.

98. Compare 16 U.S.C. § 432 (1976) (amended 1979) with *id.* §§ 470bb(6), 470cc(a). See 43 C.F.R. § 3.3 (1979).

99. 16 U.S.C. § 470cc(b)(2) (Supp. III 1979).

100. *Id.* § 470cc(b)(3). There may be difficulty in keeping the artifacts and the related data physically together since archaeological resources may be transferred between universities, museums, or other institutions. The Act invites the Secretary of the Interior to develop regulations governing both the custodial responsibilities of the keeper of resources found after enactment and the transfer of such resources to other institutions. *Id.* § 470dd(1). It also requests Interior Department rules governing the "ultimate disposition" of both newly discovered items and those found under prior authorities. *Id.* § 470dd(2). The meaning of this provision is unclear. In all cases where archaeological resources are taken from Indian lands, the consent of the Indian or Indian tribe owning the land or having jurisdiction must be received before it can be transferred. *Id.* § 470dd.

101. See 43 C.F.R. § 3.17 (1979).

turbed. In this subtle way, the 1979 Act may encourage the destruction of sites in order to preserve particular artifacts.

Fourth, the work plan proposed for federal permitting must not be "inconsistent with any management plan" applicable to the land involved.¹⁰² This provision clearly subordinates the permitting of archaeological sites to the multiple-use activities which are presently conducted on federal lands. In effect, a permit proposal may not be granted if it will interfere with another use of the land such as grazing, mining, oil and gas exploration, forestry, or land reclamation. Congress wished to make certain that the protective purposes of the Act to regulate archaeological site exploration and excavation and to deter commercially motivated looters would not be used to impose additional restrictions or review requirements on developmental activity.¹⁰³ For this reason, the permitting procedure was statutorily freed from NHPA review requirements.¹⁰⁴ On the other hand, the language of the 1979 Act¹⁰⁵ does not exempt any multiple use activity from the pre-existing legal and regulatory obligations that may independently require consideration of cultural resource interests in project planning.¹⁰⁶ Of special importance is the fact that these multiple-use activities would remain subject to the specialized review required by section 106 of NHPA.¹⁰⁷

By meeting these four threshold tests, and any other requirements considered necessary by the land manager, a permit for the investigation of a potentially significant archaeological site may be granted. It is possible that separate permits could be issued for different stages of the

102. 16 U.S.C. § 470cc(b)(4) (Supp. III 1979).

103. The House Committee report, however, referred to the fourth test as one which would result in the preservation of potentially significant sites by denying the opportunity to explore. It stated:

This section [16 U.S.C. § 470cc(b)(4)] is included with recognition that the science of archaeology, in the modern sense, is as much concerned with the conservation and protection of archaeological resources "in situ" as it is with the excavation and removal of specified archaeological resources. The protection of the integrity of an archaeological site is extremely important in that the scientific value to society . . . may be enhanced by not altering archaeological sites.

HOUSE REPORT, *supra* note 73, at 9. See note 49 *supra*. This estimate of effect is based upon the questionable assumption that multiple-use activities will not result in disruption of significant archaeological sites. See 125 CONG. REC. H5513 (daily ed. July 9, 1979) (remarks of Rep. Clausen); 125 CONG. REC. H9089 (daily ed. October 12, 1979) (remarks of Rep. Lagomarsino).

104. 16 U.S.C. § 470cc(i) (Supp. III 1979). The reference is to the Advisory Council on Historic Preservation review procedures pursuant to *id.* § 470f.

105. See 16 U.S.C. § 470kk(a) (Supp. III 1979), which states: "Nothing in this Act shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands."

106. See note 5 *supra*.

107. The regulations issued by the Advisory Council on Historic Preservation implement the authority of § 106 of NHPA and 16 U.S.C. § 470f (Supp. III 1979) and make clear the broad range of federal and federally related actions for which an evaluation of effect must be made under the mandated review process. See 36 C.F.R. § 800.2(c) (1979).

exploration, excavation, and artifact removal process in order to maintain close supervision of the activity. The land manager retains the power to either suspend or revoke any permit.¹⁰⁸ A suspension is authorized when the federal officer determines that the permittee has committed a criminal violation prohibited by the Act.¹⁰⁹ Revocation, which appears to be more permanent and serious, occurs when the permittee has been formally convicted of a criminal act or administratively assessed a civil penalty. The 1979 Act specifies no procedural mechanism for exercising these punitive powers, although broad discretion would probably be upheld due to the seriousness of the threatened harm. In this way, the Act provides potential administrative control over the parties granted permits.

Congress attempted to integrate the American Indian's interest into the permitting process in several ways. The Act prohibits issuance of a permit for work to be conducted upon Indian lands without the prior consent of the Indian tribe or individual owning or having jurisdiction over the land. This effectively provides Indians with a veto power over proposals to investigate sites on Indian lands. In this fashion, the Act recognizes the legitimate interest of American Indians whose ancestral dwellings, possessions, and remains are often the subject of archaeological interest.¹¹⁰ In addition, the land manager is required to give prior notification to the pertinent Indian tribes when a permitting proposal could result in "harm to, or destruction of, any religious or cultural site," even if that site is not on Indian lands.¹¹¹ This notice requirement, although superficially reasonable, will probably be difficult to administer due to the lack of knowledge on the part of the federal land manager of the existence and location of such revered sites.¹¹² The Act does not specify which legal recourse the noti-

108. 16 U.S.C. § 470cc(f) (Supp. III 1979).

109. It is not certain that sufficient federal personnel exist to supervise the archaeological sites and that those officers available will be adequately trained to recognize a permit violation.

110. See 16 U.S.C. § 470cc(g)(2) (Supp. III 1979). The only representative of the American Indian's interests who testified at Senate hearings on S. 490—Mr. Leroy Wilder, General Counsel of the Association on American Indian Affairs—stressed the need for such a veto power not only for sites on Indian lands but also for sites located outside Indian lands that are of religious, cultural, or historical significance to the Indians. *Senate Hearings, supra* note 21, at 93-94.

111. 16 U.S.C. § 470cc(c) (Supp. III 1979). In the Senate hearings, Mr. Wilder emphasized the fact that an archaeological excavation project on Indian lands could exhume not-too-distant ancestors of living Indians. This, he believed, was especially true with the fifty-year time limit within the definition of an "archaeological resource" originally in S. 490. *Senate Hearings, supra* note 21, at 93.

112. See 16 U.S.C. § 470cc(c) (Supp. III 1979). In spite of the mandatory language employed in this section of the statute imposing a general notification duty upon the federal land manager, the House debate on this section reflects the intent that the disclosure obligation attach only to known sites. There is no "positive duty" on the part of the Secretary of the Interior to be "independently aware" of sites having religious significance. See 125 CONG. REC. H5513 (daily ed. July 9, 1979) (remarks of Reps. Clausen and Udall).

Moreover, Indian tribes might be reluctant to specify sites of religious significance to federal officials for fear that the information would be misused and would result in the destruction, not

fied tribes may take and what the effect of a failure to notify will be. It is an open question whether the administrative regulations to be issued pursuant to the Act will allow the notified Indian tribes to contest the permit application.

Miscellaneous Permitting Issues

The 1979 Act clearly states that permits issued under the authority of the 1906 Antiquities Act remain in force and that no other approval under the new Act is needed to pursue the previously authorized activity.¹¹³ Any modification of the previously approved undertaking would apparently require a new permit under the 1979 Act. A more interesting question concerns whether or not the Act effectively repeals major portions of the 1906 Antiquities Act. The new statute does not explicitly indicate that a repeal of the prior law has been achieved but it does state that no permit under the Antiquities Act "shall be required . . . for any activity for which a permit is issued under this section."¹¹⁴ This, in practical effect, dooms the prior Act if the decision in *Diaz* has not already done so. The 1979 Act updates and strengthens the federal law relating to archaeological sites and artifacts and provides a much broader range of enforcement tools than did the earlier law. As a matter of legislative drafting, the 1979 Act should have specifically amended the Antiquities Act repealing redrafted sections so as to avoid any future confusion.¹¹⁵

The 1979 Act grants a preferential status to state Governors who seek a permit for the purposes of "archaeological research, excavation, removal, and curation, on behalf of the State or its educational institu-

the preservation, of such places. Congress was concerned about the danger of this locational data being obtained by commercial looters through the Freedom of Information Act [FOIA]. Section 9 of the 1979 Act exempts this type of information from FOIA but permits its disclosure under limited circumstances. 16 U.S.C. § 470hh (Supp. III 1979).

113. 16 U.S.C. § 470cc(h)(2) (Supp. III 1979).

114. *Id.* § 470cc(h)(1). The Senate Report on S. 490 reveals the formal position of the Senate committee preparing the bill that "no changes in existing law are made by the bill S. 490 as reported." SENATE REPORT, *supra* note 75, at 20. This statement is obviously false and appears motivated by political interests. See note 115 *infra*. The Supreme Court recently held in *TVA v. Hill*, 437 U.S. 153 (1978), that finding a statutory repeal implied in subsequent legislation is clearly disfavored. *Id.* at 189 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)). Under this rule of construction, confusion will certainly result from Congress' failure to indicate repeal of the 1906 Act.

115. The apparent reason for avoiding a direct amendment to the 1906 Antiquities Act was a political controversy centering on the President's power to withdraw lands from the public domain and declare them national monuments. See 16 U.S.C. § 431 (1976 & Supp. III 1979). The recent exercise of that authority had sufficiently antagonized the Alaskan congressional delegation so that they attempted to have the Antiquities Act amended to restrict this unbounded executive power. See note 21 *supra*. In an effort to separate the politically charged issue of land withdrawal power from the relatively noncontroversial questions surrounding artifact protection, the congressional drafting committees asserted that the Archaeological Resources Protection Act of 1979 did not amend the 1906 Act. By so doing, the land withdrawal issue could not be raised to slow the progress of the critical protection legislation.

tions. . . ."¹¹⁶ Several of the obligations imposed on other permit applicants are waived when the Governor of a state files an application.¹¹⁷ It is significant to note that the federal land manager is accorded discretionary authority to grant a permit in the case of a nonstate applicant but is confronted with a mandatory duty if the statutory requisites are met by a state applicant.¹¹⁸ This provision not only accords a state Governor a position of priority, but it also allows the Governor to designate a party to receive a permit without being subject to as close an evaluation as would otherwise be required.¹¹⁹ Most importantly, the statute attempts to preclude the federal land manager from including in any permit granted to a Governor or his designee any "terms and conditions" governing the conduct of the work at the archaeological site.¹²⁰ Therefore, the performance conditions that would normally be contained in a permit may not be imposed. This will effectively free the state and its designees from federal supervision even though the activities are pursued on federal lands. Furthermore, the federal powers to revoke an outstanding permit and to seek civil penalties for permit violations may also be lost.¹²¹ Although this provision recognizes a state's interest in federal and Indian lands within its borders, it creates the

116. 16 U.S.C. § 470cc(j) (Supp. III 1979). The provision originated in the House bill, *see* note 75 *supra*, and was adopted by the Senate in the conference committee. The Senate had not differentiated between types of permit applicants in S. 490. *See* 125 CONG. REC. S14,721 (daily ed. October 17, 1979) (remarks of Sen. Bumpers).

117. 16 U.S.C. § 470cc(j) (Supp. III 1979). The first two elements of the general permitting test are eliminated. These are the requirements that the applicant is qualified to do the work and that the work is undertaken to further archaeological knowledge in the public interest. *Id.* § 470cc(b)(1), (2).

118. The general permit granting authority contained in the Act is framed in discretionary language. *See* note 94 *supra*. When a state Governor applies, however, the permit "shall issue" subject to most of the same requirements imposed upon nongovernmental applicants. 16 U.S.C. § 470cc(j) (Supp. III 1979). The House report on H.R. 1825 stated: "Upon such request [from the Governor], the Federal land manager shall issue a permit." HOUSE REPORT, *supra* note 75, at 10.

119. Upon the Governor's written request, the permit would be issued "for the purpose of conducting archaeological research, excavation, removal, and curation, on behalf of the State or its educational institutions to such Governor or such designee as the Governor deems qualified to carry out the intent of this Act." 16 U.S.C. § 470cc(j) (Supp. III 1979) (emphasis added).

120. The statute specifically omits the provisions in § 4(d) of the Act giving the federal land manager power to impose permit conditions upon any permit issued to a state governor. 16 U.S.C. § 470cc(j) (Supp. III 1979). Assuming that this is not an error, it frees the state and its designees from enforceable regulatory supervision in archaeological work. Although possibly drafted to avoid federal enforcement actions against state employees, it is highly questionable whether this exemption should have been provided.

121. *See id.* § 470cc(j). The language of the statute would seem to require that result since the state's permit would not contain "terms and conditions." *See* note 120 *supra*. There is, however, some uncertainty on this point. Rep. Udall, the floor manager for H.R. 1825, stated: "When State Governors are given permits on request, they must identify the responsible individual, and if the applicable provisions of the act are violated, the permit can be revoked." 125 CONG. REC. H9088 (daily ed. October 12, 1979). Rep. Udall's brief remarks indicate his opinion that such a permittee would be subject to at least the revocation sanction. It is worth noting that the Act's criminal and civil penalties are available against any "person"—a defined term which includes "any officer, employee, agent . . . of any State or political subdivision thereof." 16 U.S.C. § 470bb(6) (Supp. III 1979). This would tend to support Rep. Udall's suggestion regarding revocation.

potential for an abuse of discretion in contravention of the intent of the statute.

Enforcement Procedures

The primary congressional motive for enacting the 1979 Act was to create a significant deterrent to prevent looting of and damage to archaeologically significant sites located upon federal and Indian lands. Beyond this general goal, Congress wished to extend the scope of criminal liability to include remote participants in the commercial exploitation of such sites. The Antiquities Act of 1906 had provided a criminal penalty only for persons shown to "appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity" located on federal lands without a permit.¹²² This statute, in addition to employing vague language, established a minimal deterrent which in no way discouraged potential law violators. Although Congress perceived the need for stronger legislation, it also realized that a broadly sweeping punitive section would encompass not only the acts of commercial looters but also those of "innocent" members of the public searching for arrowheads, bottles, and other collectible items.¹²³ The resulting legislation attempts to distinguish between those activities which should be soundly punished and those which are acceptable. As with any enforcement statute, its success or failure will be determined by the way it produces the desired result—undamaged archaeological sites and artifacts. This, in turn, depends upon its reception in the courts.¹²⁴

Criminal Penalties

After establishing a permit requirement, the Act defines three categories of prohibited acts which serve as potential bases for the imposition of a criminal penalty.¹²⁵ In this way, the 1979 Act may provide its

122. 16 U.S.C. § 433 (1976).

123. In order to accommodate such an innocuous use of federal lands, the congressional drafters specifically exempted "the removal of arrowheads located on the surface of the ground" from the criminal provisions of the Act. *See id.* § 470ee(g). This should be read as a narrow exception to the general prohibition embodied in § 6(a) of the Act and a deviation from the coverage of the definition of "archaeological resource" included in § 3(1). This exception may have unfortunate consequences. The loss of surface indicators of significant underground sites generally should be avoided since they serve as valuable tools for the archaeologist. Without such indicators, buried structures and artifacts might never be located.

124. Significant criminal penalties are being imposed. In the first reported decision under the 1979 Act, Federal District Court Judge William P. Copple sentenced three men to jail terms ranging from twelve to eighteen months for illegal excavation activities in the Tonto National Forest in Arizona. In addition, each defendant was fined \$1,000 for stealing clay pots, bone owls, and human skeletal remains from the prehistoric Indian ruins. *N.Y. Times*, June 7, 1980, at 6, cols. 4-5 (city ed.).

125. 16 U.S.C. § 470ee(a)-(c) (Supp. III 1979). The language of the criminal penalty provision originated in the House bill and was adopted with only slight changes. *See HOUSE REPORT, supra*

most valuable function—the deterrence of major site looting activities. Each one of the statutorily proscribed activities addresses a different facet of the problem of antiquities theft and damage. First, no one may “excavate, remove, damage or otherwise alter or deface any archaeological resource located on public lands or Indian lands” without a permit.¹²⁶ This prohibition is composed of three material elements: (1) the requisite act (excavating, removing etc.); (2) the relationship of an “archaeological resource” to the act; and (3) the absence of a permit. This section is similar to the existing language of the 1906 Antiquities Act.¹²⁷ It prohibits, however, a greater range of acts and adds considerably more specificity to the definition of the protected items. The congressional intent was undoubtedly to declare illegal the primary activity in the archaeological site looting process. Active surveillance combined with stiff judicially imposed penalties could make the Act effective in slowing or stopping the actual site destruction.

Second, the new statute states that no one may “sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed” either without a 1979 Act permit or in violation of any other federal law.¹²⁸ This provision is intended to control the secondary activity associated with site damage—the movement and commerce in archaeological materials illegally taken from federal or Indian lands. As before, this prohibition is comprised of three distinct segments: (1) the illicit act (selling, purchasing, etc.); (2) the existence of a protected archaeological resource; and (3) the illegal acquisition of that resource.

Third, the Act prohibits commerce in archaeological resources acquired in violation of “any provision, rule, regulation, ordinance, or permit in effect under State or local law.”¹²⁹ The attempt here was to create, as a supplemental ground for federal enforcement, a separate basis of federal criminal liability—presumably under the commerce power—for a local law violation. In order to be an enforceable federal

note 75, at 4. The severity of the criminal penalty will depend upon the damage done to the site and the number of prior convictions for similar charges. 16 U.S.C. § 470ee(d) (Supp. III 1979).

126. 16 U.S.C. § 470ee(a) (Supp. III 1979). Excavation and removal of archaeological resources is permissible if done either pursuant to a 1979 Act permit or a preexisting 1906 Act permit or without a permit by an Indian authorized under tribal law.

127. The criminal law sanction of the 1906 Act reads as follows:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Id. § 433.

128. *Id.* § 470ee(b).

129. *Id.* § 470ee(c).

offense, however, the illegal act must bear some relationship to interstate or foreign commerce.¹³⁰

Taken together, these three sections strive to define and to prohibit the range of activities comprising the commercial exploitation of archaeological sites. Although a commercial motivation is not required for criminal liability, it is certain that the congressional goal was to stem the increasingly sophisticated pillage of federal lands for the purpose of financial gain.

After delineating the elements of the prohibited acts, the statute then sets forth the ways in which the criminal penalty will be imposed.¹³¹ The Act makes the knowing violation of one of the three proscriptions a criminal act, and extends such liability to anyone who "counsels, procures, solicits, or employs any other person"¹³² to violate the law. At first, the statutory language appears direct and unambiguous. But upon closer consideration, several troubling issues are manifested which could affect the way in which the courts will enforce the statute. In light of the intended deterrent effect of the Act, the resolution of these interpretive questions could have a major impact upon the Act's success or failure.

A major modification to preexisting law made by the 1979 Act was the significant upgrading of criminal penalties available for judges to impose upon the finding of a violation.¹³³ The meager sanctions provided by the 1906 Act¹³⁴ were far surpassed by the new law which established the maximum penalty for a first offense of one year of imprisonment, a \$10,000 fine, or both.¹³⁵ This change to felony status was accompanied by an unusual stipulation which could double the

130. This required relationship to interstate or foreign commerce was apparently believed to be necessary on constitutional grounds. The violation of state or local law standing alone would not be sufficient to ground the exercise of federal legislative authority without some specific connection to a federal power. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 232-36 (1978).

131. 16 U.S.C. § 470ee(d) (Supp. III 1979). There appears to be support in the legislative history for the proposition that the criminal penalties found in the 1979 Act are not the exclusive enforcement tools available to federal prosecutors. The House Report noted: "The Committee is aware that these penalties [in the 1979 Act] overlap with more general statutes and regulations, and there is no intent to preclude action under those general provisions relating to the protection of Federal property under appropriate circumstances." HOUSE REPORT, *supra* note 75, at 11. This position is consistent with the ruling in *United States v. Jones*, 607 F.2d 269 (9th Cir. 1979), and the views of the Department of Justice recorded in HOUSE REPORT, *supra* note 75, at 25.

132. 16 U.S.C. § 470ee(d) (Supp. III 1979). This language was drafted with the intention of extending criminal liability under the Act beyond those who actually loot the protected sites to cover others who arrange to have such illicit activities conducted in their behalf. The effort appears to be aimed at the commercially motivated dealers in antiquities who might contact others to perform the illegal work.

133. *Id.* Virtually every hearing witness and congressional supporter of the new law stressed the importance of strengthening the criminal sanctions against looting of sites. See SENATE REPORT, *supra* note 75, at 13; *Senate Hearings*, *supra* note 21, at 41, 54-55, 59, 61.

134. See note 125 *supra*.

135. 16 U.S.C. § 470ee(d) (Supp. III 1979). This penalty, and the entire provision, was taken in large part from § 7(b) of S. 490. See SENATE REPORT, *supra* note 75, at 5.

available penalties for a first offense. Should the "commercial or archaeological value" of the protected item involved in the criminal offense and the "cost of [its] restoration and repair" exceed \$5,000, the initial penalty limits are automatically raised to imprisonment for two years, \$20,000 in fines, or both.¹³⁶ The rapidly escalating value of artifacts and the high cost of restoring the damage caused by looters will cause the doubled criminal penalty maxima to be applied in many instances. The legislative drafters of this provision clearly meant to emphasize the seriousness of looting and damage to sites since they raised the criminal penalty ceiling for a second or successive conviction under the Act to five years imprisonment, \$100,000 in fines, or both.¹³⁷ These elevated statutory punishments will only have the desired deterrent effect if the surveillance of federal and Indian lands is significantly increased and successful prosecutions are brought against violators. In order to truly influence the behavior of unscrupulous domestic and international art dealers, however, a federal enforcement action must be pressed against individuals who would counsel, procure, solicit, or employ others to illegally obtain archaeological resources. The most severe penalties authorized by the statute should be directed against these dealers.

The congressional drafters of the Act's criminal law enforcement provision stated that violation of the statute would constitute a "general intent" crime.¹³⁸ This position was adopted at the suggestion of federal prosecutors who testified that such a designation would be necessary in order to win convictions of those charged under the Act.¹³⁹ To obtain a conviction, a person must be shown to "knowingly violate"¹⁴⁰ any one of the three previously described prohibited acts. This language was employed to describe the requisite state of mind or knowledge necessary to find a violation of the Act. The sparse legislative history of this

136. 16 U.S.C. § 470ee(d) (Supp. III 1979).

137. *Id.* The imposition of penalties of this magnitude was thought necessary to deter "these operators who go out on public lands with a big scheme to mine an archaeological site and extract material that belongs to the people of the United States as corporate property and sell it on the antiquities market for the highest financial gain possible." *Senate Hearings, supra* note 21, at 55.

138. SENATE REPORT, *supra* note 75, at 9; HOUSE REPORT, *supra* note 75, at 11. The use of such terminology does not necessarily clarify the important question of the defendant's requisite knowledge as a precondition to criminal liability. The use of the term "general intent," without a careful consideration of potential effects, may do more to confuse matters than to improve them. See W. LA FAVE & A. SCOTT, CRIMINAL LAW 201-22 (1972).

139. In testimony before the Senate Parks Subcommittee, Michael D. Hawkins, United States Attorney in Phoenix, Arizona, forcefully argued in favor of retaining the word "knowingly" in defining the criminal intent needed for conviction. Objecting to a standard which would imply a specific intent requirement, Mr. Hawkins stated that such a test would require proof that "the defendant acted intentionally, deliberately, and with the bad purpose of disobeying or disregarding the law." *Senate Hearings, supra* note 21, at 59. This he argued would be difficult to accomplish and would require the granting of testimonial immunity to co-defendants for the production of the necessary testimony establishing the requisite state of mind. *Id.*

140. 16 U.S.C. § 470ee(d) (Supp. III 1979).

section of the new law indicates congressional intent that a person charged with an offense under the Act need not be shown to have undertaken the illicit action with an awareness of its criminality.¹⁴¹ It was believed that use of the term "willfully" would have changed the offense into a specific intent crime requiring the prosecutor to prove that the defendant was cognizant of the statute's prohibition.¹⁴² Consequently, a knowing violation of the statute's prohibitions was said to be merely one which reflects an intentional or volitional act on the part of the accused.¹⁴³ An examination of the prohibited acts defined by the Act demonstrates the potentially broad application and possibly unintended results of this new "general intent" criminal law statute.

The Act specifies that anyone who excavates, removes, damages, or otherwise alters or defaces an archaeological resource without permission violates the law. As previously stated these acts must be done "knowingly." The offender must intend to take the action and it must in fact affect an "archaeological resource." Questions could arise in situations where the defendant claims that he was mistakenly excavating on federal lands while thinking he was on private or state property. Cases involving the accidental or negligent destruction of artifacts or sites would present a similar problem. The issue of the defendant's knowledge of his precise location at the time of the incident could be an important factor in a prosecution under the Act. The statute does not provide any specific guidance for dealing with situations involving good faith mistake or accident. But a more significant question concerns the knowledge required of a defendant in order to be found guilty of a criminal violation under the Act. Would the purchaser of an ille-

141. The House committee report noted: "[T]his is a general intent crime, and therefore a person could be convicted if he acted of his own volition and was aware of the acts he was committing." HOUSE REPORT, *supra* note 75, at 11. In a colloquy between Sen. Dale Bumpers and United States Attorney Michael D. Hawkins during Senate hearings on S. 490, it was apparent that Mr. Hawkins believed that a general intent statute did not require any proof that the person charged had knowledge that he was violating a federal statute. *Senate Hearings, supra* note 21, at 58.

142. See *Senate Hearings, supra* note 21, at 57 (remarks of Michael D. Hawkins, United States Attorney); HOUSE REPORT, *supra* note 75, at 25 (letter from Patricia M. Wald, Assistant Attorney General). The apparent intent of Congress was to construct a criminal sanction for the looting of archaeological sites that would be easy to enforce. For example, the mere possession of an illegally acquired artifact was deleted from the list of prohibited acts originally present in S. 490, probably because of the difficulty in proving the illicit acquisition of the article once possessed. See 125 CONG. REC. S10,832 (daily ed. July 30, 1979) (remarks of Sen. Bumpers). But see *Andrus v. Allard*, 444 U.S. 51 (1979). In the *Allard* decision, the Court dealt with a similar problem in the area of wildlife protection.

143. The only direct discussion of the significant questions concerning the requisite intent and state of mind necessary for criminal liability is found in the House report on H.R. 1825. There the committee noted: "This section also provides criminal penalties for those who knowingly commit one of the prohibited acts. This is a general intent crime, and therefore a person could be convicted if he acted of his own volition and was aware of the acts he was committing." HOUSE REPORT, *supra* note 75, at 11. This hardly constitutes an adequate discussion of the relatively complex situations which may arise under the statute.

gally excavated artifact be subject to criminal prosecution without proof of his actual knowledge of the illicit acquisition of the item by the vendor or a prior owner? If the act was intended to function as a strict liability criminal law then the answer would be affirmative. The same question can be posed in connection with anyone who might come into contact with an illegally acquired archaeological resource as a seller, receiver, or transporter of the item. In addition, it would seem that the prosecution's difficulty in tracing illegally acquired items into the secondary market would preclude the use of the statute's criminal sanctions in many situations. The fact that nearly identical artifacts could have been lawfully excavated from nonfederal lands makes the identification of the alleged contraband even more important. A more careful attention to detail in the drafting of the criminal sanctions and in the establishment of the pertinent legislative history would have avoided much of this uncertainty. Subsequent judicial rulings will undoubtedly add the necessary gloss on the statutory language.

Civil Penalties

Aside from the significant criminal sanctions provided by the Act, the new statute also creates authority in federal land management officials to assess civil penalties against "any person who violates any prohibition contained in an applicable regulation or permit issued under [the Act]."¹⁴⁴ The statutory language clearly anticipates the use of monetary civil penalties as a discretionary enforcement technique available in those instances where full criminal proceedings are inappropriate.¹⁴⁵ Unfortunately, little guidance is given to distinguish between situations justifying a criminal prosecution under section 6 of the Act and those for which an administratively imposed civil penalty is appropriate. Although administrative regulations to be issued under this section will define the offensive conduct to be punished by civil penalties, the Act's legislative history demonstrates an intent to reach only less serious occurrences.¹⁴⁶

Once a regulatory or permit violation is charged, the civil penalty may not be formally assessed until the alleged violator is notified and provided an opportunity for an administrative hearing.¹⁴⁷ The proceeding must be conducted as a formal adjudicatory hearing in con-

144. 16 U.S.C. § 470ff(a)(1) (Supp. III 1979).

145. The creation of the civil penalty authority in § 7 of the Act establishes a specialized power in federal land managers to administratively punish wrongdoers. Prior to the passage of the 1979 legislation, similar power was considered to exist under the authority of other legislation. See *Senate Hearings*, *supra* note 21, at 45-46; 125 CONG. REC. S14,722 (daily ed. October 17, 1979) (remarks of Sen. Bumpers).

146. See HOUSE REPORT, *supra* note 75, at 11; SENATE REPORT, *supra* note 75, at 9.

147. 16 U.S.C. § 470ff(a)(1) (Supp. III 1979).

formity with the requirements of the Administrative Procedure Act with the federal land manager serving as the finder of fact.¹⁴⁸ The administrative penalty proceedings must also be conducted with attention given to the need to produce a coherent and defensible record which will serve as the basis for judicial review. Thereafter, the federal land manager must establish the monetary penalty pursuant to uniform regulations.¹⁴⁹ The statute directs that the amount of the penalty be set according to the value of the archaeological resource involved and the cost of restoring the resource and the site.¹⁵⁰ Since there is no limitation placed on the size of the civil penalty imposed, the statutory criteria could result in the monetary civil penalty being as large or larger than the monetary criminal sanction. This power to establish civil penalties provides the land manager with significant discretion. Once assessed, a civil penalty may be appealed to the local federal district court as long as the review petition is filed within thirty days from the issuance of the administrative order.¹⁵¹ Otherwise, judicial review is precluded. Finally, enforcement of the administrative penalty may take the form of a civil action to collect the penalty brought in federal district court. At this stage in the penalty collection proceeding, the court may not examine either the validity or the amount of the penalty.¹⁵²

The administrative penalty provision of the 1979 Act may prove to be an extremely useful element in the federal program to protect archaeological sites and artifacts. The discretionary authority of the federal land managers can be used against illegal activities which should be deterred but for which a criminal prosecution is unlikely or unwarranted. It is possible that the criminal sanction will be employed only in cases of large-scale, commercially motivated looting where the complexity of the illicit activity and the need for punishment by incarceration requires a formal criminal prosecution. As with the enforcement of the criminal provision, the success of the civil sanction depends upon thorough surveillance of the public lands and careful investigation in preparing the charge. One of the most difficult tasks in the administration of the civil remedy will be the discrimination between those actions considered innocuous and those for which a civil fine will be sought. A balance must be struck so that minor or technical viola-

148. *Id.* § 470ff(c).

149. *Id.* § 470ff(a)(1). As of May 1, 1980, no regulations have been published in the Federal Register. The statute did not specify a time limit on the development of uniform regulations. *See* 16 U.S.C. § 470ii(a) (Supp. III 1979); note 31 *supra*. The Interior Department conducted field hearings in Denver, Phoenix, Portland, and Knoxville during the Spring of 1980 to solicit public opinion prior to the preparation of the uniform regulations. *See* 45 Fed. Reg. 17,622 (1980).

150. 16 U.S.C. § 470ff(a)(2)(A), (B) (Supp. III 1979). *But see* note 145 *supra*.

151. 16 U.S.C. § 470ff(b)(1) (Supp. III 1979).

152. *Id.* § 470ff(b)(2).

tions of the Act will not give rise to harsh penalties which could undermine public support for the statutory purpose.

Additional Sanctions

In an effort to encourage individuals to provide information concerning violations of the Act, a monetary reward mechanism was included in the statute.¹⁵³ Under its terms, an informant giving information leading to either a civil fine or a criminal conviction may receive up to one-half of the financial penalty imposed upon the guilty party, with a maximum reward of \$500.¹⁵⁴ The apparent legislative intention was to provide a persuasive economic incentive to those persons having information necessary for enforcement proceedings to step forward and make themselves known to the federal authorities. However, the relatively low maximum reward permitted by the statute may result in few informants willing to implicate others in potentially serious criminal activity. A higher reward limit might encourage more participation and willingness to assume the risks associated with providing this type of information.¹⁵⁵

The 1979 Act further provides for the forfeiture of "[a]ll archaeological resources with respect to which a violation [of the Act has] occurred and which are in the possession of any person"¹⁵⁶ and all "vehicles and equipment"¹⁵⁷ used in connection with a violation of the statute. Imposition of the forfeiture sanction is at the discretion of the trial judge or the administrative law judge and requires an underlying criminal conviction or civil penalty assessment.¹⁵⁸ The new statute thus permits forfeiture to the federal government of both the means and the fruits of illicit activities. If the illegal conduct occurred on Indian lands, all fines and forfeited items must be given to the Indian tribe or individual.¹⁵⁹ Although the language of the law appears to provide for forfeiture of artifacts innocently possessed and of vehicles used in the illegal act even if stolen, the discretionary nature of the authority will

153. *Id.* § 470gg(a). The rewards are to be paid from the fines collected under the Act and will not require an annual appropriation. *Id.*

154. *Id.*

155. The House bill—H.R. 1825—had originally provided for rewards up to \$1500. 125 CONG. REC. H5511 (daily ed. July 9, 1979). This figure was reduced to \$500 to be consistent with the Senate's language and its reasoning that by reducing the maximum amount payable as a reward it would discourage "frivolous allegations aimed at obtaining a large reward." SENATE REPORT, *supra* note 75, at 10. The Senate Committee's wisdom may be subject to question in light of the nature of the illicit activity involved.

156. 16 U.S.C. § 470gg(b) (Supp. III 1979).

157. *Id.*

158. *Id.* The statute also requires a formal determination that the archaeological resource or other item forfeited be involved in the violation. *Id.*

159. *Id.* § 470gg(c). There does not appear to be any discretion in these cases to award the fines or forfeited items to the United States rather than to the Indian tribe or individual.

probably ensure that it will be exercised solely against the wrongdoers themselves.¹⁶⁰ By consistently imposing the sanction of forfeiture, the courts and the land management agencies can significantly raise the financial cost of a statutory violation and thereby enhance the deterrent effect of the new law.

CONCLUSION

On the most basic level, the 1979 Act responds to the immediate need to correct a serious deficiency in federal law caused by the Ninth Circuit's decision in *Diaz*. The new statute, however, reflects the difficulty inherent in a legislative approach to a complex problem area not amenable to legal definition. Furthermore, this regulatory effort has uncovered significant conflicts of opinion concerning the use and management of the vast federal landholdings in the western portion of the nation. As a harbinger of future political and legal change, the archaeological resource issue demonstrates the growing state interest in the development of federal lands. This conflict in federalism will undoubtedly be confronted in other contexts during the coming decade.

Viewing the 1979 cultural resources statute critically, a number of comments can be made. First, the statute contains several important drafting errors which at the least may result in confusing interpretations and at worst may make criminal enforcement practically impossible. Furthermore, the legislative history for the statute is scant and is of little assistance on several crucial points. Greater attention should have been paid to the articulation of legislative principles and effective exposition.

Secondly, the decisionmaking structure adopted by the 1979 Act relies upon local administration of the permitting program with no external review. The local land manager is empowered to make important decisions regarding the exploitation of an archaeological site guided only by uniform regulations. Moreover, this decision is specifically exempted from the specialized review process created under NHPA.¹⁶¹ This lack of integration with other statutory requirements should have been avoided. Although an individual or public interest group could judicially challenge the land manager's decision to grant a permit as a deviation from statutory or regulatory requirements, such a recourse is expensive and uncertain in its outcome. By vesting the permitting power in this fashion, Congress has treated archaeological site

160. The House committee's report on the forfeiture provision states: "[I]t is expected that the courts and the administrative law judges would exercise their discretion to avoid unduly burdensome forfeitures of property belonging to persons who neither know nor could have known of the illegal activities." HOUSE REPORT, *supra* note 75, at 11. See SENATE REPORT, *supra* note 75, at 9.

161. 36 C.F.R. §§ 800.1-800.15 (1979).

exploration as an unexceptional land management function. Congress should have developed a procedure for issuing permits that would have required an expedited external review of proposals by an expert body. As the Act is presently constructed, the individual decisions of land managers may go unreviewed in any other forum.

Another criticism of the congressional policy focuses upon the jurisdictional exemptions from the statute's coverage. The Act carefully excludes from its protections archaeological resources located on private, state or Outer Continental Shelf lands. If the federal policy is to protect the nation's cultural history, some thought must be given to extension of regulatory power by some level of government to nonfederal lands. The discrimination in protection available to archaeological sites depending upon their location may ultimately result in the loss of valuable sites and artifacts on nonfederal lands. Congress should have at least explained this inconsistency in policy.

Finally, the statute can be criticized for the substantive policy position adopted. The Act takes a narrow view of the problem of cultural resource protection and merely seeks to create a locally administered permit system accompanied by criminal and civil sanctions for violation of the regulations or statutory proscriptions. The statute approaches the problem of antiquities destruction as one of remedying deficiencies in legal sanctions. Of course, legally valid criminal and civil penalty provisions coupled with careful surveillance and vigorous enforcement may deter looting by individuals. If there is a significant decrease in this illicit activity, then the new law will accomplish a great deal. Congress, however, could have adopted a more protective policy by granting antiquities a preferential position when confronted by potentially destructive, governmentally supported actions. The Endangered Species Act¹⁶² and section 4(f) of the Department of Transportation Act¹⁶³ could serve as models for such a provision. In its present form, the statute does not contemplate nor does it authorize the denial of a permit in order to leave an archaeological site in its undisturbed form. Such a policy would preserve sites for future examination with new methods.

In conclusion, this analysis of the 1979 Act demonstrates a number of important points. Society is increasingly aware of the need to protect the nation's cultural history. This is evident in the wide-ranging support given to the 1979 Act. The new law also illustrates the existence of countervailing considerations inherent in the adoption of any policy position. In this case, the expansion of federal regulatory control

162. 16 U.S.C. §§ 1531-1542 (Supp. III 1979).

163. 49 U.S.C. § 1653(f) (1976).

for antiquities protection is perceived as interfering with state power over lands within that state and free public use of federal lands. The value accorded the protected interest must be weighed against the other competing interests. It is clear that the Act represents a partial solution to the multifaceted problem of cultural resources protection. For this legislative approach to be successful, the general public must be educated to understand the social importance of antiquities and to discourage noncommercial violations of the statute. In addition, federal land managers must take antiquities protection seriously, and they must be supplied with sufficient personnel to properly supervise the lands under their control. With this support, the intentional commercial violators may be deterred. The protection of archaeological sites and artifacts cannot be ignored. Once our prehistoric cultural history is lost, it is gone forever.

