Archeological Resource Preservation: The Role of State and Local Government

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Archeological Resource Preservation: The Role of State and Local Government

Ronald H. Rosenberg*

Americans have begun to rediscover their cultural history. In an effort to define a national identity and chart a future course, the nation is looking to its past. In many parts of the country, there is evidence that individuals and governments are becoming aware of the value of preserving cultural resources. That movement has been reflected primarily in the upsurge of interest in preserving buildings or districts of historical value.¹ Historical preservation has also become a technique for redevelopment of many declining urban districts throughout the nation.² While there may be various reasons for the increased enthusiasm for historical preservation within the urban context, it is apparent that society has recognized that certain places and structures are imbued with a cultural value connecting the present with the past. That recognition illustrates a social awareness of the benefit in protecting culturally important sites and objects.³

Historically or architecturally significant buildings, however, are only one familiar example of a cultural resource. More broadly defined as “physical features, both natural and man-made, associated with human activity [and] possessing significance . . . in his-

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1. Judicial support for historical preservation can be seen in cases such as Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), where the United States Supreme Court approved local government efforts to preserve historically significant buildings. In Penn Central, the Court upheld the constitutionality of the New York City Landmark Preservation Law against a claim made by the owners of the Grand Central Station that the city law effected an unconstitutional “taking” of their property for public use. Id. at 122, 138. A secondary issue, not addressed in the majority opinion, was whether the transfer of development rights could be “just compensation” in the event an unconstitutional “taking” was found. See id. at 150-52 (Rehnquist, J., dissenting).


3. In Penn Central, the United States Supreme Court recognized that landmark preservation ordinances were “expected to produce a widespread public benefit” and further noted that the destruction of an historical landmark like Grand Central Station could be harmful to society. Arguments to the contrary ignored “the development in sensibilities and ideals reflected in landmark legislation like New York City’s.” 438 U.S. at 133 n.30.
tory, architecture, archeology, or human development," the term “cultural resources” also encompasses archeological resources, that is, physical sites of prior human habitation and material objects or artifacts associated with the sites. Archeological resources frequently provide the only material link with past civilizations that left no written record of their existence. In addition, they provide insights into and information about past civilizations that are necessary for solving modern-day problems. Recognizing the intangible and irreplaceable value of archeological resources, American society has sought to identify and protect them through varied legislative and administrative actions for nearly 100 years.

Today, archeological resources are vulnerable to damage or obliteration by a number of forces; some of those forces are subject to governmental control, and some are not. Archeological sites and artifacts can be easily damaged by public or private land development or construction. A number of statutory provisions require that advance planning include consideration of the effect federal


5. From the perspective of the archeologist, physical sites and artifacts are interrelated sources of information about prior human experiences. The location of an artifact at the archeological site can be of major importance in understanding earlier social patterns. To preserve that unique cultural data, archeological resources must be viewed as an integrated whole.


7. The recently enacted Archeological Resources Protection Act (ARPA) provides a statutory definition of archeological resources that focuses primarily on artifacts or material remains rather than the site itself. See 16 U.S.C. § 470bb(1) (1976).
activities will have on those cultural resources. Those specialized review statutes have done much to make federal agencies aware of the need to plan projects and programs in a way that minimizes adverse effects on archeological resources. In addition, they have provided a reviewable legal standard for agency performance. Similar state and local requirements have also been imposed to regulate potentially destructive activities on nonfederal lands. Thus, the legal system has been structured to protect archeological resources from damaging governmental acts in much the same fashion as it has protected environmental interests.

Because many archeological resources are considered highly valuable art objects, there is an additional threat to their existence and to the physical integrity of the site from which they are taken. With the value of artifacts on the domestic and international art markets rapidly escalating, commercially motivated looters have stepped up their destructive activities on both public and private lands. In addition, private collectors have enhanced their collections at the expense of the general public by illegally taking artifacts from public lands. In addition, private collectors have enhanced their collections at the expense of the general public by illegally taking artifacts from public lands. Vandals, as always, have done their damage through senseless and wanton destruction. That looting and vandalism has resulted not only in the loss of valuable objects,

8. See authorities cited note 6 supra.
9. See notes 115-125 infra and accompanying text.
10. For example, artifacts taken by looters from a site in the Gila National Forest in southwestern New Mexico were valued at $4000. United States v. Smyer, 596 F.2d 939, 943 (10th Cir. 1979). See Hearings on S. 490, Archeological Resources Protection Act, Before the Subcomm. on Parks, Recreation and Renewable Resources of the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess. 89 (1979) [hereinafter cited as Senate Hearings] (statement of Professor Raymond H. Thompson that a single pot could command a price between $10,000 and $30,000). In a recent case, three men pled guilty to charges that they had violated the ARPA by stealing $6,000 to $8,000 worth of clay pots, bone awls, human skeletal remains and other artifacts from prehistoric Indian ruins in the Tonto National Forest in Arizona. See N.Y. Times, June 7, 1980, at 6, cols. 4-5 (city ed.).
11. Because valuable artifacts are usually buried under the surface of the land, traditional property law has regarded them as belonging to the owner of the locus in quo. See R. BROWN, PERSONAL PROPERTY 26 (3d ed. 1975). See also Goddard v. Winchell, 86 Iowa 71, 52 N.W. 1124 (1892); Alfred v. Biegel, 240 Mo. App. 818, 219 S.W.2d 665 (1949). That has been the position consistently taken by Congress and federal land management agencies where discoveries have been made on federal land. As the owner of the locus in quo and as the sovereign, the federal government has claimed comprehensive rights to property under its control. In California 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 by the Secretary of the Interior pursuant to the Antiquities Act of 1906. See 16 U.S.C. § 431 (1976). 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
but in the destruction of scientific information about prior societies. Although governments may directly control their own actions or those of regulated private interests, they can only deter private individuals' illicit activities indirectly through the vigorous use of civil or criminal sanctions. Furthermore, no matter how effective federal or state policy is in regulating the actions of the government itself, those efforts are of little value if commercially motivated abuses on private land remain unchecked. When an archeological resource is lost, whether through private taking, public theft or accidental damage, unique and truly irreplaceable data is lost forever.

This article will examine ways in which the American legal system has responded to accommodate cultural resources as a protected value. First, the development of federal cultural resource policy will be briefly traced to determine its scope and effectiveness. Special attention will be given to the potential use of federal policy as a model for state action. Second, the numerous state law techniques for preserving archeological resources will be described and evaluated, and the wide variety of statutory approaches and different perceptions of the state's role in protecting cultural resources will be demonstrated. The relationship of federal policy development to that of the states also will be examined. Finally, a series of recommendations for the enhancement of existing state laws will be provided. Those suggestions will reflect the important role of state government in preserving the nation's cultural history.

I. THE DEVELOPMENT OF FEDERAL CULTURAL RESOURCE POLICY

During the nineteenth century, the federal government had a limited, but significant, involvement in cultural resource protection. Beginning in 1872 with the establishment of Yellowstone National Park, the federal government began to remove areas of unique scenic, scientific and historical value from settlement, sale or occupancy. By those reservations of land, the federal govern-

under his jurisdiction." 618 F.2d at 621.
Some states have also claimed title to archeological discoveries made on state and local government lands. See, e.g., Colo. Rev. Stat. § 24-80-401 (1974).
13. See id. § 21.
14. Congress viewed the removal of particular parcels of public land as an effective, low-cost method of preserving archeologically significant, or otherwise important, properties. The inclusion of virtually unlimited presidential power to reserve federal lands for "national monuments" in the 1906 Antiquities Act, see id. § 431 (originally enacted as Act of June 8, 1906, ch. 3060, § 2, 34 Stat. 225), reflected a major shift of responsibility to the executive
ment preserved spectacular natural wonders and established the legitimacy of withdrawing lands from the public domain as a means of protecting them. In 1892, the reservation mechanism was first used to protect an archeologically significant site—the Casa Grande Indian ruins in Arizona—from damage caused by looters and vandals. Despite early recognition of the reservation technique, however, it was only available to preserve a limited number of nationally significant sites because reservation of public land required express congressional action in each instance.

In the latter part of the nineteenth century, federal policymakers became more active in archeological preservation by encouraging the acquisition of historically important private land. During a period of nine years, the federal government acquired five significant Civil War battlefields for preservation as military parks. Those parks were considered important to the nation because they were "fields of some of the most remarkable maneuvers and most brilliant fighting in the War of Rebellion." The establishment of military parks as Civil War memorials marked the federal government's initial involvement in the acquisition, management and protection of places having national historical value.

During the same period, judicial precedents were established that validated governmental preservation of historical properties. For example, in United States v. Gettysburg Electric Railway, the United States Supreme Court determined that the exercise of eminent domain powers in acquiring the Gettysburg battlefield constituted a taking of private property for a valid public purpose. Justice Peckham found that condemning private land for a nationally important commemorative park inculcated patriotism in the public, a purpose in which "there can be no well founded doubt."
Thus, *Gettysburg Electric Railway* established the principle that the acquisition and protection of places having significant historical value was a proper governmental function.

As the nineteenth century ended, federal cultural resource policy was limited to actual governmental ownership and control of a small number of military and archeological monuments. However, during the last quarter of that century, scientific organizations were active in focusing the attention of the federal government and the general public on the deteriorating condition of archeological resources.\(^{20}\) Privately funded expeditions to the southwest United States ascertained that the Indian ruins in that region had been seriously damaged by looters and vandals.\(^{21}\) The reports reaching the East indicated such severe damage that prominent archeologists and their sponsors petitioned both Congress and the Department of the Interior as early as 1882 for assistance in protecting the imperiled sites by preserving the artifacts and reserving the sites from public sale. Unfortunately, public support was not yet strong enough to force protective legislation.\(^{22}\) Even at that early stage, the conflicting goals of conservationists and developers were readily apparent.\(^{23}\)

In the latter part of the nineteenth century and the early years

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\(^{21}\) See *id.*, at 14-18.

\(^{22}\) Senator 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 to save the matter from an anonymous death in the Senate Committee on Public Lands. *See* 13 *Cong. Rec.* 3777 (1882).

\(^{23}\) In the present context, that conflict is dramatically apparent in the effort to restrict unlimited presidential power, derived from the Antiquities Act, to declare national monuments, thereby removing them from development and use. *See* 16 *U.S.C.* § 431 (1976). Alaska's Senator Gravel, concerned about the creation of 17 national monuments in Alaska, which would have precluded oil and gas exploration on 56 million acres, sponsored a bill that would have amended the Antiquities Act by limiting executive withdrawals to 5,000 acres without prior congressional approval. *See* 125 *Cong. Rec.* S10837 (daily ed. July 30, 1979). *See also* 15 *Weekly Comp. of Pres. Docs.* 121, 151 (Jan. 25, 1979) (President Carter's State of the Union message outlining presidential action in preserving Alaskan wilderness areas).
of the twentieth century, public awareness of American archeology was greatly enhanced by museum displays and other exhibitions of artifacts. However, that rising awareness also brought increased looting and consequent site damage. It became clear that federal action was required if the nation's cultural resources were to be preserved.

Although legislation was introduced as early as 1900 directing the President to reserve selected archeological sites and prohibiting the unauthorized disturbance of archeological resources, lack of national awareness and concern delayed congressional action. During that period of legislative inaction, federal land managers, relying on administrative authority, withdrew lands under their control from public sale, settlement or entry, which temporarily protected identified sites until more formal action could be taken.

After six years of deliberation, Congress attempted to regulate the looting and unauthorized exploitation of significant Indian artifacts and structures by passing the Antiquities Act of 1906. The 1906 Act specifically prohibited the appropriation, excavation, injury or destruction of any “historic or prehistoric ruin or monument or any object of antiquity located on federal land” without first obtaining permission from the federal land manager and established criminal penalties of up to $500 in fines or ninety days imprisonment or both. Congress anticipated the need for expert examination and possible excavation of archeological sites and allowed “properly qualified” institutions to undertake the task pursuant to a federal permit. Additionally, the 1906 legislation gave

24. See Lee, supra note 20, at 47-77.
25. 16 U.S.C. §§ 431-433 (1976) (original version at ch. 3060, 34 Stat. 225 (1906)). The Antiquities Act was the only federal law prior to enactment of the 1979 Archeological Resources Protection Act, id. §§470aa-470ll (Supp. III 1979), to preserve archeological sites and artifacts on federal lands from the destructive actions of private individuals.
26. Id. § 433 (1976). Unfortunately, the terms “historic or prehistoric ruin or monument” and “object of antiquity” were not defined in the statute, which eventually resulted in the invalidation of the statute as unconstitutionally vague. See United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) (term “objects of antiquity” is unconstitutionally vague if the Antiquities Act prohibition included artifacts only three or four years old). But see United States v. Smyer, 596 F.2d 939 (10th Cir. 1979) (term “objects of antiquities” not unconstitutionally vague as applied to Mimbres bowls 800-900 years old and like objects).
27. 16 U.S.C. § 433 (1976). Under the 1979 Archeological Resources Protection Act, the criminal sanctions were significantly increased and combined with civil penalties. See id. §§ 470ee-470ff (Supp. III 1979).
28. Id. § 432 (1976). The administrative regulations issued under the 1906 Act state that permits “will be granted . . . to reputable museums, universities, colleges or other recognized scientific or educational institutions, or to their duly authorized agents.” 43 C.F.R. § 3.3 (1980).
the President broad discretionary power to create national monuments by reserving qualified lands in the public domain. 29

Although historically important, the 1906 Antiquities Act proved inadequate. The statute sought only to regulate cultural resources located on federal land and did not attempt to extend federal regulatory power to property held by states or individuals. The drafters of the Antiquities Act seemed to approach the problem of archeological plunder as a question of federal land management rather than cultural protection. By design, the system relied on the issuance of permits and the close supervision of federal officials to ensure that unauthorized excavation would not occur. The vast expanse of territory under federal control, the limited number of federal officials and the relative unimportance of administering the Antiquities Act combined to reduce the effectiveness of the statute. Finally, as time passed, it became apparent that the penalties provided in the Act, coupled with its lax enforcement, 30 did not deter potential violators. The weakness of the 1906 Act and the increased market value of artifacts made the enactment of stronger legislation inevitable.

Although no federal legislation for the protection of archeological sites and objects would be forthcoming for nearly thirty years, several significant events occurred during that period which influenced the course of cultural resource preservation. In the late 1920's, with the substantial financial support of John D. Rockefeller, Jr., the town of Williamsburg, Virginia, was restored to its pre-Revolutionary War condition. 31 That project resulted in the development of improved archeological field methods and drew public attention to the careful restoration techniques employed. 32 In the 1930's, the economic depression bolstered the federal government's role in surveying and salvaging historically and archeologically significant properties. The Historic American Building Survey, which

29. 16 U.S.C. § 431 (1976). That power has been frequently exercised and has led to serious discord between at least one state and the federal government. See notes 14, 23 supra.

30. That ineffective enforcement was described well by Judge Merrill, in United States v. Diaz, 449 F.2d 113 (9th Cir. 1974): "Counsel on neither side was able to cite an instance prior to this in which conviction under the [1906] statute was sought by the United States." Id. at 114.

31. The restoration of that magnificent colonial city was largely attributable to the initiative of Dr. W.A.R. Goodwin and the financial support of John D. Rockefeller, Jr. For a textual and pictorial description of the restoration, see The Restoration of Colonial Williamsburg in Virginia, 78 THE ARCHITECTURAL RECORD 356 (1935).

preserved data concerning historical structures, provided employment for a large number of architects. Under the supervision of the Smithsonian Institution, the Works Progress Administration (WPA) hired a large number of unemployed persons to examine and excavate archeological sites primarily located in the area affected by the newly created Tennessee Valley Authority.

When Congress enacted the Historic Sites Act in 1935, federal cultural resource policy expanded broadly from the initial position taken by the Antiquities Act. The new statute declared that it was the “national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.” The statute continued the preexisting policy of focusing on sites having national, rather than local or regional, significance. The concept of public use of historical properties, which may have reflected Congress’ interest in establishing public museums, was also maintained in the law. However, by emphasizing the preservation of historical and prehistoric sites, the Act apparently rejected the salvage approach embraced by the federally sponsored WPA program.

The 1935 Act accorded the National Park Service central authority to carry out the federal government’s program of historical and archeological preservation. Specifically, the National Park Service was directed to gather documentary information on historical and archeological resources through survey and examination of those sites, thereby involving the federal government in a continuing process of identifying and evaluating cultural resources throughout the nation.

The 1935 Act embraced the idea of public ownership of sites as a major mechanism for the protection of historical and archeological resource areas. To achieve that purpose, the agency was

33. See Fowler, supra note 4, at 1479 & n.44.
35. Id. § 461.
36. Id. §§ 462, 464. In 1916, the National Park Service was established as a separate entity within the Department of Interior:
[The National Park Service] shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.
Id. § 1.
37. Id. §§ 462(a)-(c).
permitted to acquire “by gift, purchase, or otherwise” both real and personal property and to restore significant properties for the public’s benefit.38 The statute also encouraged the development of historical or archeological sites as public museums, possibly in response to the Williamsburg restoration project.39 As a result, fifty-six historical sites have been established under the authority of the 1935 statute.40 Although the actual accomplishments of the 1935 Act may have been modest, it did serve to reinforce federal involvement in cultural resource protection and placed the primary responsibility for federal historical preservation in the Department of the Interior.

There was little legislative activity in the area of cultural resource protection in the years immediately following World War II.41 However, federal development of public resources rapidly expanded in number and scope, often affecting areas of archeological significance.42 In response to those impacts, federal agencies fre-

38. Id. §§ 462(d), (f); United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680-83 (1896), apparently permitted federal condemnation for the purpose of historical preservation. See text accompanying note 18 supra. In Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939), the court held that the Secretary of Interior could condemn private property under the authority of the Historic Sites Act, provided that compensation was ultimately paid to the private owner. The Eighth Circuit found that the “or otherwise” language in the 1935 act permitted condemnation under the general federal eminent domain authority. Id. at 297-98. The only question remaining was whether the Interior Department’s purpose in acquiring the old St. Louis, Missouri site constituted a public use. The court concluded: “[W]e think there can be no reasonable doubt that the proposed use of this land is a public one.” Id. at 299.

39. See notes 31-32 supra and accompanying text.


41. In 1949, Congress did enact legislation creating the National Trust for Historic Preservation in the United States. See id. §§ 468(a)-(d) (1976) (originally enacted as Act of Oct. 26, 1949, ch. 755, § 1, 63 Stat. 927). 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. § 468c(f). Modeled in part after the British National Trust, the American organization was intended to supplement federal preservation efforts and to serve as the recipient of private contributions, which otherwise probably would not be made to the federal government. See Letter from J.A. Krug, Secretary of Interior, to Congressman J. Hardin Peterson, Chairman of the House Committee on Public Lands, reprinted in [1949] U.S. Code Cong. & Ad. News 2285, 2287-88.

42. The legislative history of the Reservoir Salvage Act of 1960 reflects the acceleration of federal water development activities that had damaging effects on archeological resources. In a letter supporting the enactment of protective legislation, Assistant Secretary of the Interior Fred G. Aandahl stated:

With the increased industrialization and greater Federal activity in construction of large-scale multipurpose water control projects, the problem of salvaging and preserving archeological and historical antiquities of national significance in advance of destruction becomes ever more critical. The bill emphasizes the point that the neces-
quently undertook archeological salvage as part of their operations. The trend was reflected in federal highway legislation and, most notably, in the Reservoir Salvage Act of 1960.

The Reservoir Salvage Act provided for a system of interagency notification and funding of salvage activities in the face of federal dam construction that might "cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data." The intent of the statute was to ensure that archeological investigation and salvage operations would begin at the planning stage of a federally owned or federally licensed dam. An important feature of the Act was the creation of a consultation procedure between the project agency and the Department of the Interior concerning the cultural resource impact of a proposed dam. The Interior Department was authorized to survey project locations for significant archeological data and to recover and preserve that which was discovered. Those procedures further reinforced archeological and historical salvage should be performed in advance of such construction activities, and it reflects a growing public awareness of their increasing loss of this national heritage through such Federal and private activities.


43. The House Committee Report on the 1960 Reservoir Salvage Act indicated that at least one federal agency, the Army Corps of Engineers, had cooperated with archeological salvage activities on its projects under authority of the 1935 Historic Sites Act, and that the Army believed the 1960 legislation was unnecessary. See H.R. REP. No. 1392, supra note 42, at 3-4, reprinted in [1960] U.S. CODE CONG. & AD. NEWS 2405-06.


46. Id. § 469a-1.

47. A Committee Report indicated that the purpose of the statute was "to place this salvage program, so far as it relates to the construction of dams, on a firmer basis by establishing definite procedures for coordination of archeological investigations and salvage operations with the planning and construction of dams by Federal agencies or under permits granted by Federal agencies." H.R. REP. No. 1392, supra note 42, at 1, reprinted in [1960] U.S. CODE CONG. & AD. NEWS 2403-04. The drafters believed that the statute would make agency responsibilities mandatory where they had previously been considered discretionary. Id. at 2, reprinted in [1960] U.S. CODE CONG. & AD. NEWS at 2404.

48. In addition, the 1960 Act specifically allowed up to one percent of the funds appro-
forced the Interior Department's role as the expert agency in cultural resource protection. The potential scope of the survey and salvage program was broadened in 1974 by the enactment of the Archeological and Historical Preservation Act (AHPA),49 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."50

The primary purpose of the federal program authorized by the Reservoir Salvage Act and the AHPA was the preservation of data by investigation and salvage techniques rather than by requiring agency project planning that was sensitive to cultural resource protection and that avoided the use of historically and archeologically significant lands.51 The program was intended to lessen the de-
structive effects of development by locating, identifying and removing culturally significant items. However, that approach did not preserve sites in their undisturbed state.

In the 1960's, the growth of the environmental movement led to the enactment of the National Environmental Policy Act (NEPA) in 1969. The movement also influenced the passage of a broad range of other laws and the issuance of executive orders addressing specialized environmental concerns. Within the emerging concept of environmental quality, cultural resource values were explicitly recognized as a component of a desirable quality of life. Many of the protections available to more familiar environmental interests were extended to include cultural resources. In addition to the assimilation of cultural resource values into the general concept of environmental quality, specialized protective statutes were designed to address narrow cultural resource issues. The National Historic Preservation Act of 1966 (NHPA) is a prime example of that development and is potentially one of the most important specialized federal statutes.

The NHPA significantly extended federal cultural resource policy in a number of ways. First, the statute articulated a new federal position regarding cultural values. It emphasized the pres-

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.

Id. at 18118.


54. The most obvious protection was the inclusion of cultural resource issues in the environmental impact statement required by NEPA. See Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974). The history of the Warm Springs Dam case was complicated by subsequent actions for permanent injunctions on different grounds; however, the archeological considerations stated here were approved by all subsequent courts. See 417 U.S. 1301 (1974) (Douglas, J., sitting as circuit judge for the Ninth Circuit); No. 74-1068 (9th Cir. Aug. 18, 1975) (unpublished memorandum decision); 431 F. Supp. 320 (N.D. Cal. 1977); 565 F.2d 548 (9th Cir. 1977); 621 F.2d 1017 (8th Cir. 1980). See also Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060 (8th Cir. 1977); Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977); Robinson v. Knebel, 560 F.2d 422 (8th Cir. 1977); Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976).

ervation of historical and cultural properties and objects "as a living part of our community life in order to give a sense of orientation to the American people." That approach deviated from preexisting policy by focusing on active federal encouragement of preservation as a protective strategy. Moreover, the underlying rationale for cultural resource protection shifted from emphasizing the patriotic dimension of historical preservation to stressing a sense of human orientation within the historical continuum. Second, the Act expanded the scope of federal protection to include sites having local or regional importance but lacking a national significance, thereby reemphasizing that historical preservation is a matter of community and state importance. Third, the Act had the effect of regulating federal agency activities that might affect cultural resources. The NHPA required all federal agencies to consult with the newly created Advisory Council on Historic Preservation whenever federal projects or other "undertakings" could affect historically or archeologically significant sites. Although consultation was mandatory, the Council's function was intended to be only advisory. An executive order issued in 1971 clarified those agency obligations, and a later legislative change extended the scope of the NHPA provision to properties "eligible" for inclusion on the National Register of Historic Places.

The full impact of the executive order and the legislative amendment was recognized after the Advisory Council issued im-

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56. Id. § 470(b) (1976).
57. See notes 16-19 supra and accompanying text.
58. See Fowler, supra note 4, at 1484-88.
59. Under the NHPA, financial assistance was made available to states to initiate "comprehensive statewide historic surveys and plans . . . for the preservation, acquisition, and development of [cultural properties]." 16 U.S.C. § 470(a)(1) (1976). In addition, the Act provided matching grants to states for the actual preservation of significant historical properties. Id. § 470a(a)(2). Those funds, which have increased significantly since 1966, provided great incentive for state action in historical and archeological protection.

Under the authority of the 1966 Act, a Historic Preservation Fund was established to finance the activities authorized by the statute. Surprisingly, support for the fund came from revenues derived from the Outer Continental Shelf Lands Act. Authorized appropriations for the 1977 fiscal year were $24.4 million and were increased to $150 million for the 1981 fiscal year. See id. § 470h (1976 & Supp. III 1979).
60. See id. §§ 470i-470l.
61. Id. § 470(t) (1976). That subsection would seem to apply to both detrimental and beneficial effects of federal actions.
plementing regulations in early 1974. The Advisory Council procedures required a federal agency to consult with a State Historic Preservation Officer (SHPO) when determining how agency activities would affect historical or archaeological sites. In certain cases, the procedures also required the SHPO, along with the Advisory Council and the interested federal agency, to reach written agreement on mitigation of any adverse effects expected from a federal project.

The Advisory Council procedures placed a significant obligation on federal agencies. By itself, NEPA requires agencies to evaluate the effects of their activities on cultural as well as ecological resources. The NHPA, as implemented through the Advisory Council procedures, often requires additional investigation and documentation of cultural resource impact beyond that required by NEPA in an environmental impact statement. Those additional requirements may be particularly onerous where archeological properties are involved because their presence and precise loca-

64. See 43 C.F.R. §§ 3.1-.17 (1974).
65. Strict time limits are imposed on the SHPO, and if no response to a request for his opinion is received within 30 days, concurrence is presumed. 36 C.F.R. § 800.5 (1980).
66. Id. § 800.6(c) (1979). The Advisory Council procedures also contain specified review periods, which can delay federal projects. For instance, the Advisory Council may take 30 days to review a “no adverse effect” determination made by a federal agency. That 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. Id. § 800.4(a)(3).
68. Recent amendments to the Advisory Council’s regulations were addressed to questions of NEPA compliance. Those new regulations suggested that agencies should coordinate their NEPA and NHPA review processes, although at the same time, stating that the two statutes are “independent.” 36 C.F.R. § 800.9 (1979). The Council on Environmental Quality regulations concerning federal environmental impact statement preparation direct NEPA compliance to be combined with other statutory requirements “to the fullest extent possible.” 40 C.F.R. § 1502.25 (1980). In the policy statement, the proposed NEPA regulations direct federal agencies, “to the fullest extent possible,” to “integrate the requirements of NEPA with their planning and environmental review procedures so that all such procedures run concurrently rather than consecutively.” Id. § 1500.2(c). The intention is to streamline all federal environmental review.

tion usually cannot be detected without field surveys, which occasionally involve subsurface excavation.

In 1974, the Ninth Circuit declared, in *United States v. Diaz*,\(^6^9\) that the criminal penalty provisions of the Antiquities Act were unconstitutionally vague. At the time *Diaz* was decided, it was apparent that the penalties provided by the Antiquities Act, even if judicially upheld, would not deter those who were damaging archeological sites and pilfering artifacts. Because archeological objects had become extremely valuable on domestic and international art markets,\(^7^0\) the weak and infrequently imposed penalties were undoubtedly viewed by commercially motivated looters as a minor cost of doing business. The lack of an effective legal sanction, combined with the tremendous area to be supervised, created a serious threat to the future of America's cultural resources.

The frustration resulting from the *Diaz* decision and the consensus of opinion that a statutory change was necessary moved Congress to enact the Archeological Resources Protection Act\(^7^1\) in 1979. The expedited treatment of that legislation reflected a common perception that immediate action was warranted.\(^7^2\) Although Congress avoided one controversial element of the 1906 Antiquities Act—the unfettered presidential power to declare national monuments on federal lands\(^7^3\)—it was willing to address itself to the primary task of developing a new regulatory program for the control of archeological exploration and recovery.

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69. 499 F.2d 113 (9th Cir. 1974). The Ninth Circuit includes Arizona, California, Nevada, Idaho, Oregon, Washington and Montana. Five years after *Diaz*, the Tenth Circuit, in *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), upheld the Antiquities Act. That circuit is comprised of New Mexico, Colorado, Utah, Oklahoma, Kansas and Wyoming. The split of opinion between those two judicial circuits is significant because a great number of archeological sites are located in those states.

70. See note 10 supra.


72. All the witnesses who testified at the legislative hearings held on the proposed act agreed that a statutory amendment was necessary. See *Senate Hearings*, supra note 10, at 89.

73. The seriousness of that issue can be seen in the extraordinary effort made by Senator Mike Gravel of Alaska to have the unlimited discretionary powers of the President restricted. *See id.*, app. at 137-45; 125 Cong. Rec. S10,836-42 (daily ed. July 30, 1979) (remarks of Senator Gravel). Senator Gravel introduced an amendment to the Antiquities Act land withdrawal provision, which would have required a concurrent resolution of Congress approving any withdrawal of more than 5,000 acres. That requirement would have applied retroactively to invalidate an earlier presidential declaration pertaining to Alaskan lands.
The 1979 Act emphasized a federal permit program to control access to archeologically significant sites that were located on federal land. In an effort to avoid a constitutional attack based on vagueness, the statute explicitly defined a number of important terms, leaving no doubt about when a permit would be required. In addition, the Act set out four considerations to be taken into account before issuing a permit for excavation on federal lands.

First, it must be shown that an applicant is “qualified” to carry out the proposed activity. The permit request must describe the proposed work in enough detail to enable the federal official to assess the applicant’s technical competence to complete the project in a professional manner. Even though the Act substantially expanded the range of persons and organizations allowed to excavate archeological properties, anyone applying for a permit must be shown to be qualified. That requirement could force professional archeological organizations to license or certify their members to make them eligible for work on federal lands. In the

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74. That permit procedure must be considered in combination with the civil and criminal sanctions also provided in the Act to comprehend the emerging congressional policy of cultural resource protection. See 16 U.S.C. §§ 470ee(d)-470ff (Supp. III 1979).

75. See id. §§ 470bb-470cc. The statute states:

Any person may apply to the Federal land manager to excavate or remove any archeological resource located on public lands or Indian lands and to carry out activities associated with such excavation and removal. The 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. See id. § 470cc(a). The language of that provision should have more clearly indicated the mandatory nature of the application by using the words “shall apply” rather than “may apply” because the failure to procure such a permit could lead to the imposition of significant criminal sanctions. See id. § 470ee(d).

76. Id. § 470cc(b)(1). The precise nature of a permittee’s requisite “qualifications” is uncertain because there was no discussion of the issue in the legislative debates. However, the Senate hearings do provide some insight. Dr. Ernest A. Connally, Associate Director of the Heritage Conservation and Recreation Service 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 Historic Preservation Officers or other people who are qualified and might have the 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.

absence of formal professional certification, some minimum level of experience and training should be required to ensure high quality work.

Second, the proposed activity must be "undertaken for the purpose of furthering archeological knowledge in the public interest." That requirement reserves authorized exploration on federal lands for noncommercial purposes and ensures that the nation's cultural resources will only be disturbed for the advancement of scientific knowledge and public understanding.

Third, the archeological resources removed from the site remain the property of the United States; those items, along with associated archeological records and data, must be preserved by a suitable institution. That provision reiterates the position that artifacts found on federal land are a national resource unavailable for private ownership. It also emphasizes the importance of preserving not only the artifact itself but the scientific data derived in the course of investigating the site. Also reflected, however, is the policy that federal lands are available for exploration and that material remains of prior cultures found on federal land may be removed. The statute does not express support for a preservation

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78. Id. § 470cc(b)(2) (Supp. III 1979).
79. Id. § 470cc(b)(3). It may be difficult to keep the artifacts and the related data physically together because archeological resources may be transferred between universities, museums or other institutions. The Act invites the Secretary of Interior to develop regulations governing the exchange between institutions of archeological resources from federal or Indian lands. Id. § 470dd(1). It also permits the Interior Department to establish rules governing the "ultimate disposition" of both newly discovered items and those found under prior authorities. Id. § 470dd(2). The meaning of that provision is unclear. In all cases where archeological resources are taken from Indian lands, the consent of the Indian or Indian tribe owning the land or having jurisdiction must be received before the resource can be transferred. Id. § 470dd.

80. See 43 C.F.R. § 3.17 (1980).
81. The Archeological Resources Protection Act allows exploration on lands having religious as well as scientific significance. The Act only requires the federal land manager issuing a permit to notify "any Indian tribe which may consider the site as having religious or cultural importance." 16 U.S.C. § 470cc(c) (Supp. III 1979). That procedure may conflict with the provisions of the American Indian Religious Freedom Act, 42 U.S.C. § 1966 (Supp. III 1979) (originally enacted as Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469), which declared the federal policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonials and traditional rites." Id.
oriented theory favoring the protection of significant sites. In that subtle way, the 1979 Act may encourage the destruction of sites to preserve particular artifacts.

The fourth requirement for issuance of a permit is that the proposed work plan must not be "inconsistent with any management plan" applicable to the land involved. 82 In effect, a permit proposal may not be granted if it will unreasonably interfere with another use of the land, such as grazing, mining, oil and gas exploration, forestry or land reclamation. Through that condition, Congress made certain that the protective purpose of the Act, which was to regulate archeological site exploration and excavation and to deter commercially motivated looters, would not be used to impose additional restrictions on development activity review requirements. 83 For that reason, the permit procedure was statutorily freed from the review requirements of the National Historic Preservation Act, 84 although multiple use activities remain subject to the specialized review process required by that statute. 85

The 1979 Act combined a permit program with enhanced enforcement techniques in the form of strengthened civil and criminal penalties to deter illicit excavation of sites, 86 but required a high level of surveillance and enforcement by federal land managers. The Act demonstrated continued congressional support for archeological site and artifact protection within the context of federal land management. As a reinforcement and further articulation of the 1906 Antiquities Act coverage, however, the 1979 statute is limited in its scope to federal lands. The Act made no effort to extend any federal regulatory power to nonfederal lands. Consequently, state and privately owned lands possessing significant archeological resources may be excavated without any federal intervention. In the absence of other legal restrictions, that lack of federal regulation could result in the loss of irreplaceable sites, ar-

83. The House Committee Report reflected the belief that properly authorized multiple use activities would protect archeological sites from disturbance. See H.R. Rep. No. 311, 96th Cong., 1st Sess. 9 (1979). The implication to be drawn from that report is that archeological resources are better protected under the NHPA and the NEPA than under the ARPA. See notes 54, 60-68 supra and accompanying text.
84. 16 U.S.C. § 470cc(i) (Supp. III 1979). See also notes 60-68 supra and accompanying text.
85. See 16 U.S.C. § 470f (1976). The regulations issued by the Advisory Council on Historic Preservation implement the review process and make clear the broad range of federal and federally related actions for which an evaluation of effect must be made. See 36 C.F.R. § 800.2(c) (1980).
The next section of this article will discuss and evaluate the broad variety of state and local policies and legal techniques that can be employed to protect archeological resources.

II. OVERVIEW OF STATE ARCHEOLOGY LEGISLATION

Before examining specific features of state archeology legislation, several general points are worth noting. First, laws protecting archeological sites and artifacts exist in almost every jurisdiction. Because some states enacted legislation as early as 1906, while others acted only within the last decade, there is a wide range in the approaches to and the scope of government intervention. Second, there is a great variation in the complexity and detail of legislation in states having archeology protection laws. Those variations reflect the tendency of legislative draftsmen to focus on regionally different archeological interests rather than following a uniform model in formulating their state programs. Some states have been primarily concerned about underwater archeology or American Indian sites; others have sought to protect colonial or prehistoric sites. Finally, it is apparent that states have established new archeological programs or have recently reinforced existing ones to establish eligibility for funding under the NHPA. A closer analysis of the specific approaches and legal techniques employed throughout the nation will reveal the rich variety of state law options available to protect archeological resources.

A. Policy Statements

It is not uncommon in the articulation of state cultural resource policy to find a statement that it is within the public interest to protect enumerated places and objects to preserve the cultural heritage of the state, or to fulfill a moral obligation to succeeding generations to preserve irreplaceable state values. Most states declare, either by statute or constitutional provision,

87. See, e.g., Wash. Rev. Code Ann. § 27.53.010 (Supp. 1980). The concept of states' cultural history and that of Native American groups or other individuals can come into conflict. For instance, the professional interests of the archeologist and agency planner can be diametrically opposed to that of Native Americans. See, e.g., Winter, Indian Heritage Preservation and Archeologists, 45 Am. Antiquities 121 (1980). State policy encouraging the excavation of burial sites can raise serious ethical problems. For an excellent discussion of that issue, see Rosen, The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility, 82 Am. Anthropologist 5 (1980).

that the protection of cultural resources, including archeological sites, constitutes a public benefit. Those statements recognize, in one fashion or another, the importance of historical places to the citizens of the state. Some states’ policy declarations have established cultural resources as important environmental assets and, consequently, have incorporated them into an expanding environmental quality concept. Other states have emphasized the importance of protecting archeological sites and objects threatened by encroaching human activities because they are unique sources of scientific information. A number of jurisdictions have authorized comprehensive programs of historical preservation to promote the use and conservation of historical properties for the “education, inspiration, pleasure, and enrichment” of the citizenry. Finally, legislative or constitutional policy statements often specifically authorize, as a protective measure, the acquisition of archeological or


The General Assembly hereby determines that the historical, archeological, architectural, and cultural heritage of Arkansas is among the most important economic and environmental assets of this State and that rapid development threatens to remove the remaining vestiges of Arkansas’ proud and unique heritage. Therefore, it is hereby declared to be public policy and in the best interests of the general economic, social, and educational welfare of all the citizens of Arkansas for this State to engage in a comprehensive program of historic preservation, undertaken at all levels of the government of Arkansas and its political subdivisions, to promote the use and preservation of such property for the public interest and the education, inspiration, pleasure, and enrichment of the citizens of this State.

Id.


The legislature of New Hampshire has determined that the historical, archeological, architectural and cultural heritage of New Hampshire is among the most important environmental assets of the state and that the rapid social and economic development of contemporary society threatens the remaining vestiges of this heritage


historical properties through condemnation. 94

To accomplish those generally stated purposes, state programs have been authorized to manage cultural resources within the framework of state government. Often, the archeological values of a state are encompassed within the broader definition of historical properties or cultural resources and are, thus, under the control of the state’s historical preservation program. However, there are examples of independent policy statements regarding archeological resources 95 that are usually effectuated by separate organizational structures having jurisdiction over archeological sites and artifacts.

B. State Regulatory Control of Activities on State Land

The vast majority of states have established regulatory controls to prevent the unauthorized excavation of archeological sites located on state lands. 96 State statutes normally prohibit the exploration and excavation of sites and the removal of artifacts without a state issued permit, thereby seeking to control permissible

94. See Mont. Const. art. IX, § 4. See also notes 183-185 infra and accompanying text.


97. Statutes vary greatly in the specificity with which they describe the prohibited conduct. Compare Wash. Rev. Code Ann. § 27.53.060 (Supp. 1980) with Wyo. Stat. § 36-1-114 (1977). Statutes also vary in the way they describe protected archeological resources. For instance, Virginia statutes employ the term “object of antiquity” to denominate the items to be protected. Probably drawn from the federal Antiquities Act of 1906, that term was found unconstitutionally vague by the Ninth Circuit in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). See notes 69-70 supra and accompanying text. Fortunately, the Virginia
site exploration and eliminate site looting. As under federal law, violation of a prohibition against unpermitted site activity usually constitutes a minor criminal infraction punishable by relatively short imprisonment or modest fines or both. In addition to fines or imprisonment, state criminal laws may require a convicted person to forfeit the archeological artifacts illegally removed from a protected site.

As with the federal program, states generally make permits available only to parties who possess a demonstrated professional competence in archeological investigation. However, a number of legislature defined the term in another section of the statute. See Va. Code § 10-150.3(E) (1978).

98. See notes 27, 86 supra and accompanying text.

99. As a general proposition, state criminal laws treat the pillage of archeological sites as a relatively insignificant offense; consequently, they provide little deterrence against looting. Moreover, the absence of reported cases suggests that detection and prosecution of those offenses occurs only infrequently.


101. See generally notes 74-85 supra and accompanying text.

jurisdictions require no showing of expertise or experience to obtain a permit, \(^{103}\) and some allow amateurs to undertake field explorations. \(^{104}\)

With one significant exception, \(^{105}\) state regulatory control of archeological sites limits lawful excavation to those activities conducted in the public interest \(^{106}\) and denies a permittee any reward from the artifacts found at the site. Some states insist that archeo-

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\(^{105}\) States with underwater archeological resources often have statutes that regard the sunken shipwrecks within state waters as salvage items within a traditional maritime context. Specifically, states allow salvors a percentage of the salvaged materials as compensation for their activities. Such a reward system is unfortunate because it encourages salvage operations that consider the recovered materials more a financial treasure than a unique archeological resource. See La. Rev. Stat. Ann. §§ 41.1605, 1606 (West Supp. 1980) (percentage of cash value of objects recovered); Miss. Code Ann. § 39-7-17 (1973) (percentage of cash value of objects recovered); Nev. Rev. Stat. § 381.207 (1979) (50% of artifacts to permittee); N.C. Gen. Stat. § 121-25 (1981) (portion of all relics may be sold or retained by the licensee); Okla. Stat. Ann. tit. 70, § 3309(a) (West 1972) (retention of 50% of all “articles, implements and material found or discovered”); R.I. Gen. Laws § 42-45.1-5 (1977) (“fair compensation to the permittee for underwater historic property recovered”); S.C. Code §§ 54-7-230(a)-(b) (Supp. 1980) (“licensee’s equity . . . shall not be less than fifty percent artifacts or value of the artifacts recovered”); Va. Code § 10-145.9(C) (Supp. 1981) (fair share of the objects recovered or a reasonable percentage of the cash value); Utah Code Ann. § 63-18-25 (1978) (“a fair share of the items recovered”). But cf. S.C. Code § 1-20-25 (1974) (all such “information and objects deriving from state lands shall remain the property of the state and be utilized for scientific or public educational purposes”).

Even professional archeologists have been reluctant to consider shipwrecks and other underwater materials as archeologically important as land sites. See Cockrell, The Trouble with Treasure—A Preservationist View of the Controversy, 45 Am. Antiquity 333 (1980).

\(^{106}\) The permit process is frequently available only to those applicants who intend to further a scientific or educational objective. The Montana statute is typical in its expression of that public benefit rationale. The legislation authorizes permits to “reputable museums, universities, colleges or other . . . institutions . . . with a view toward dissemination of knowledge about cultural properties.” Mont. Rev. Codes Ann. § 81-2505(a) (Supp. 1977).

See also Del. Code Ann. tit. 7, § 5302 (1974) (excavation “with a view to increase knowledge”); Ga. Code Ann. § 40-813a (1975) (permits granted “solely for scientific or public educational purposes”). A specific articulation of that principle is most important because it expresses a policy of reserving archeological exploration solely for the public’s benefit and not for personal financial gain.
logical materials discovered at the site of a permitted exploration and all records pertaining to the activity are the property of the state and must be transferred to state custody at the conclusion of the excavation. Assertions of title to artifacts recovered from archeological sites on state lands have been justified on the theory that objects buried underground are owned by the titleholder of the real property. Because the state is the owner of the land, it also owns articles found buried in the ground.

The permit programs conducted by state governments are focused solely on excavation conducted on state, and sometimes local, government lands. Although state legislation often speaks in terms of the protection and preservation of sites, that is not the primary goal. Archeological permit programs represent state supervision of private activities on public lands—a land management rather than an explicitly preservationist function. One notable omission from most state statutes is the concept of continuing supervisory responsibility over permitted activities. Authorized site exploration should be supervised by competent state personnel.


108. Colorado's statute and declaration of purpose typifies others, providing:

The state of Colorado reserves to itself title to all historical, prehistorical, and archeological resources in all lands, rivers, lakes, reservoirs, and other areas owned by the state or any of its political subdivisions. Historical, prehistorical, and archeological resources shall include all deposits, structures, or objects which provide information pertaining to the historical or prehistorical culture of people within the boundaries of the state of Colorado, as well as fossils and other remains of animals, plants, insects, and other objects of natural history within such boundaries.


109. See note 11 supra.

110. Occasionally, state permit programs apply to sites on both state and local government lands. See, e.g., IDAHO CODE § 67-4120 (1973); KAN. STAT. ANN. §§ 74-5403 to -5404 (1980); KY. REV. STAT. § 164.720 (1977); MASS. ANN. LAWS ch. 9, § 27C (Michie/Law. Co-op. 1980); MINN. STAT. ANN. §§ 138.31(2), 36(2) (West 1979); Miss. Code Ann. § 39-7-11 (1972). However, permit programs apply only to lands owned by or under the control of the state.

111. Continuing supervision could only occur if there was sufficient state or federal funding to support the formation of a group of highly trained officials who would be present at excavation sites to represent the state's interest.
to ensure that proper techniques are being employed and that all discoveries are being reported.

An examination of state law also reveals that permit programs apply only to governmental lands and do not place legal obligations on the private landowner in the use of his land. Because no state has claimed ownership or control over artifacts found on private property, an individual may investigate and excavate his land without any form of governmental intervention; any artifact discovered is considered the property of the landowner. Moreover, there is no legal prohibition against landowners intentionally destroying artifacts or sites located on their own property, although many states encourage landowners to comply voluntarily with the permit requirements applicable to state land, and others create an affirmative duty to report discovery of an archeological site or artifact to a state agency. Aside from those limited provisions,

112. For instance, the North Dakota statute requires a state permit “before making any investigation, exploration, or excavation of any prehistoric or historical [sites] on any lands in North Dakota.” N.D. CENT. CODE § 55-03-01 (1972) (emphasis added). Another section of the statute, however, specifically declares: “Nothing contained in this chapter shall be construed to limit or prohibit any person owning land in this state from exploring or excavating for archeological or paleontological material on his own land or by written consent to any other person.” Id. § 55-03-05. Professor Robert E. Beck, noting the disparate treatment of public and private lands, has suggested that private landowners could be required to apply for digging permits on their own lands. He adds, however, that the permits could not be denied by the state. Beck, North Dakota’s Historic Preservation Law, 53 N.D. L. REV. 177, 190-92 (1976). Although a permit requirement would give the state notice of an impending excavation, it would not effectively protect sites, and it would probably be ignored by private landowners.

113. The Arkansas statute provides:

It is a declaration and statement of legislative intent that field archeology on privately owned lands should be discouraged except in accordance with both the provisions and spirit of this Act §§ 8-801 to -808; and persons having knowledge of the location of archeological sites are encouraged to communicate such information to the Arkansas Archeological Survey.


114. See HAWAII REV. STAT. § 6E-10(a) (1976) (90 days notice before any construction, alteration, disposition or improvement); LA. REV. STAT. ANN. § 41.1610 (West Supp. 1980) (90 days notice); ME. REV. STAT. ANN. tit. 27, § 361 (1974) (no minimum time required, but notice must be given); UTAH CODE ANN. § 63-18-27 (1978) (immediate notification). The Hawaii statute is noteworthy because it permits the State Department of Land and Natural Resources to condemn threatened properties discovered through the statutory notice requirement. See HAWAII REV. STAT. §§ 6E-10(a), (d) (1976). A similar provision exists in New Mexico. See N.M. STAT. ANN. §§ 18-6-10(C)(1)-(5) (1978) (permitting condemnation or zoning to preserve site).
state control over activities adversely affecting archeological properties located on private property is virtually nonexistent.

C. State Review of Development Projects Affecting Archeological Resources

Archeological properties may be adversely affected by direct governmental action. Federal statutes have made federal agencies aware of the impact their actions may have on historical and archeological resources and, through sensitive project planning, have required them to avoid unnecessary harmful effects. However, those federal laws do not reach the myriad of state and local activities that affect cultural properties. Recognizing that state and local government action can be as damaging to archeological resources as any federal undertaking, many states have enacted statutes to regulate and coordinate state and local government actions to, at best, avoid the loss of archeological sites and artifacts or, at least, make government planners aware of cultural resource interests at an early stage of project planning. A number of statutes advise state agencies and local governments to cooperate with cultural resource oversight agencies. However, those statutes have relatively little value because they do not impose specific obligations to notify and consult with cultural resource agencies to minimize the negative effects of state actions on archeological properties. In at least one jurisdiction, the state archeological department is directed to inform public agencies of the location of archeological sites so they can be avoided in project planning. That procedure allows state agencies to voluntarily integrate consideration of archeological site location into their internal processes and long

115. See e.g., LA. REV. STAT. ANN. § 41:1613 (West Supp. 1980); VA. CODE § 10-150.2(B) (1978).

116. As part of a multifaceted system of government regulation, the Alaska statute requires that “the department [of Natural Resources] shall locate, identify and preserve in suitable records information regarding historic, prehistoric and archeological sites, locations and remains. The information shall be submitted to the executive departments of the state.” ALASKA STAT. § 41.35.070(a) (1977). North Dakota accomplishes the same result by stating as a matter of law that “[t]he state, its departments and agencies, each city, county, school district, and other body politic, are by this chapter notified of the existence of state historic sites . . . listed in the state historic sites registry.” N.D. CENT. CODE § 55-10-08(1) (Supp. 1979).

Federal law and the law of the State of Washington restrict access to archeological resource site information. See 16 U.S.C. § 470hh (Supp. III 1979); WASH. REV. CODE ANN. § 42.17.310(1)(b) (1979). There is justification in limiting access to site location data because commercially motivated site looters could acquire public information and use it for their illicit purposes.
term planning.117

The vast majority of states that subject agency and local government development decisions to a cultural resource impact review have modeled their procedures, to some extent, after the federal system.118 That system requires federal agencies undertaking potentially damaging actions to obtain the comments of the Advisory Council on Historic Preservation before proceeding with the proposed project.119 Often, the Advisory Council can secure a memorandum of agreement with the project agency requiring it to mitigate the adverse effect of its proposed action on cultural properties.120 In the state law context, state and local governments are usually required to notify the state archeologist or historical preservation agency prior to taking any action that will or may have an adverse effect on archeological sites.121 The purpose of the notice requirement in most jurisdictions is to provide a hiatus during which state archeologists can salvage any significant artifacts.122 The primary emphasis of those statutes is not to prevent

118. The North Carolina statute employs language most similar to that of federal law: [T]he head of any State agency having a direct or indirect jurisdiction over a proposed State or state-assisted undertaking, or the head of any State department, board, commission, or independent agency having authority to build, construct, operate, license, authorize, assist, or approve any State or state-assisted undertaking, shall, prior to the approval of any State funds for the undertaking, or prior to any approval, license, or authorization as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is listed in the National Register of Historic Places . . . .
120. Id. § 800.8.
122. The Rhode Island statute is typical:
site disturbance but to postpone the state agency's planned activities until objects of interest have been removed.\textsuperscript{123}

In all but four instances,\textsuperscript{124} state cultural resource agencies are powerless to interfere with the ultimate decision to proceed with a planned project. Although there may be valid reasons for denying state archeologists absolute power to veto development proposals of other governmental entities, in appropriate situations, the decision to preserve a site rather than salvage the artifacts and data available from the site should be made by an external board or perhaps by the governor of the state. That type of conflict resolution procedure would enable a state archeological agency to advocate cultural resource preservation within the structure of state government.

An alternative procedure could be modeled after the specialized administrative committee technique included in the federal Endangered Species Act,\textsuperscript{125} which established a bifurcated administrative process to resolve governmental development/wildlife conflicts and placed the ultimate decisionmaking authority in a com-

All state agencies, departments, institutions, and commissions, as well as all municipalities, shall cooperate fully with the historical preservation commission in the preservation, protection, evacuation, and evaluation of specimens and sites and to that end:

(a) When any state or municipal agency finds or is made aware by an appropriate historical or archeological authority that its operation in connection with any state, state assisted, state licensed, or contracted project, activity, or program adversely affects or may adversely affect scientific, historical, or archeological data, such agency shall notify the state historical preservation commission and shall provide the commission with appropriate information concerning the project, program or activity.

The provisions of this chapter shall be made known to contractors by the state agencies doing the contracting.

(b) The state historical preservation commission, upon such notification, shall, after reasonable notice to the responsible agency, conduct a field investigation.

(c) The state historical preservation commission shall initiate actions within thirty (30) days of notification under subsection (a) or within such time as agreed upon by the parties involved. The responsible agency is authorized to expend agency funds for the purpose of assisting said commission with such field investigations.


mittee composed of agency heads. Development-oriented agencies
would probably be more willing to consult with archeological offi-
cials early in project planning if the ultimate decision was made by
an internal board. That system would also encourage agencies to
adopt suggested project design and location modifications to ob-
tain the concurrence of the state archeological agency. A legislative
amendment would be the most appropriate way to establish such a
procedure.

D. Other State Regulatory Provisions

Cultural resource interests are recognized in environmental
policy and impact statement laws, critical areas legislation, mining
and energy facility siting statutes, and local government planning
and land use control authority. Each of those sources of authority
permits state and local governments some control over adverse im-
acts on archeological and historical properties.

1. State Environmental Policy and Impact Statement Statu-
tes—One of the many accomplishments of NEPA\[126\] was the arti-
culation of a national environmental policy, applicable to federal
government actions. The Act prescribed a decisionmaking process
that requires evaluation of the environmental effects of a federal
activity during the planning stage by means of the environmental
impact statement.\[127\] Importantly, NEPA expanded the concept of
environmental quality to include cultural resources.\[128\] Following
the enactment of NEPA in 1969, many states passed environmen-
tal protection legislation, often very similar to the federal stat-
ute.\[129\] Consequently, state environmental policy statutes often in-
clude cultural resources as protected environmental values\[130\] and,

127. Id. § 4332(2)(c).
128. See note 54 supra and accompanying text.
129. At least 15 states have enacted environmental policy statutes similar to NEPA.
Rodgers, supra note 53, at 809-22.
130. All the statutes mentioned in note 129 supra, except North Carolina's and Wis-
consin's, specifically recognize cultural resource values within the environmental quality
therefore, have potential for providing an additional level of protection for culturally significant properties.

State environmental statutes have assumed two general forms.\(^{131}\) The majority of states have followed the pattern of federal law by establishing a state policy requiring an environmental impact evaluation of governmental action and authorizing interagency consultation and review of proposals.\(^{132}\) Although applicable to a variety of actions, the environmental impact statements required by most of those statutes include consideration of cultural resource issues. Moreover, the environmental review requirements have provided private litigants standing to challenge state decisionmaking.

A second type of state statute provides declaratory and injunctive relief for environmental damage.\(^{133}\) Under those statutes, the concept of environmental quality encompasses cultural properties. The intent underlying the equitable remedy statutes is to provide groups and individuals access to the courts to achieve their environmental protection goals. Although compliance with existing statutes, regulations and ordinances constitutes a defense to the authorized civil action, it appears that litigants may employ the environmental quality statutes to restrain both private and public actions threatening archeological properties. The effectiveness of those statutes will undoubtedly depend on the willingness of the courts to view archeological resources as important subjects of public trust.

2. **Critical Areas Legislation**—A number of jurisdictions have recognized the unique qualities of and threats to certain land within their borders and have enacted laws designed to protect

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\(^{131}\) A third approach to environmental protection at the state level involves the designation and acquisition of environmentally significant areas. See notes 174-194 infra and accompanying text. Archeological properties have been included within that protective system. See, e.g., Ark. Stat. Ann. §§ 9-1403, -1409(b), -1409(f) (1976 & Supp. 1981).


Some states have formally designated fragile, critical or natural areas as preferred land use categories and have sought to preserve them through state acquisition programs or state land use regulation. Significantly, those protective state programs often reach lands having archeological or historical importance and thus provide additional protection for cultural resource properties. Such programs, however, may lead to unnecessary duplication of regulatory requirements and a lack of coordination between state agencies responsible for cultural resources and those responsible for other critical areas.

3. Mining and Energy Facility Siting Statutes—States also have exercised regulatory control over a limited range of privately sponsored activities with potential for damaging archeological properties. For instance, the siting of electric generating facilities is usually supervised and approved through licensing procedures administered by a state public utilities commission. A number of state legislatures have set out standards for the regulatory agency to follow when considering potential plant sites. In at least two jurisdictions, New York and California, those criteria are employed to minimize adverse environmental effects, including the impact of siting decisions on archeological or historical resources. However, the secondary effects of new energy produc-

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137. See id; notes 174-194 infra and accompanying text.


142. See N.Y. Pub. Serv. Law § 146(2) (McKinney Supp. 1981). The California statute goes even further by specifying that "areas for . . . historic preservation" are not to be approved as a power plant site unless "such use is not inconsistent with the primary uses of such lands and . . . there will be no substantial adverse environmental effects." Cal. Pub.
tion will not be determined and are possibly unascertainable at the licensing stage. Regulatory and nonregulatory protections mentioned elsewhere in this article are therefore necessary to ensure that remote effects of energy generation will not damage archeological properties.

A second area of state regulation of private enterprises affecting archeological properties is surface or strip mining. Many states have enacted legislation regulating surface mining within their borders.\(^{144}\) Those statutes were spurred by passage of the federal Surface Mining Control and Reclamation Act of 1977,\(^{145}\) which requires states to have a federally approved surface mining regulatory program.\(^{146}\) The federal law, serving as a model for the states, prohibits surface mining on public parks and “places included on, or eligible for listing on, the National Register of Historic Places unless approved jointly by the [state mining] regulatory authority and the Federal, State or local agency with jurisdiction over the park or [historic] places.”\(^{147}\) An area of land also may be designated as unsuitable for surface mining if the operations would “affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, or aesthetic values or natural systems.”\(^{148}\) Several states have chosen to closely follow the federal law and regulations by empowering state surface mining agencies to designate cultural resource properties as unsuitable for mining activities.\(^{149}\) Others

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\(^{146}\) See id. §§ 1251-1279. The Department of Interior issued final regulations in 1979 specifying the prerequisites for an approvable program. 30 C.F.R. §§ 700.1-890.23 (1980). Those regulations respond to archeological resource interests in a number of ways. See id. § 776.12(a)(3)(i) (1980) (mining application requires a narrative description of listed or eligible properties of the National Register and known archeological resources); id. § 779.24(i) (permit application requires maps of cultural resource locations); id. § 761.12(f) (transmission of permit application to cultural resource protection agencies for review); id. § 810.2(h) (permanent program performance standards).


have established legislative criteria for denying surface mining permits, specifically recognizing the value of archeological and historical sites. Through those regulatory provisions and other sections of state mining law, archeological properties can be spared the devastating and disturbing effects of surface mining.

4. Local Planning and Land Use Control Authority—Some states have granted local governments specific regulatory power to protect and preserve historically significant areas. That authority frequently has been used to enact local landmark and historic district legislation.

In addition, state legislatures have often required localities to plan community development. In a number of jurisdictions, that planning includes requirements that local land use planners consider historical properties in preparation of master or comprehensive plans. The integration of cultural resource policy into land

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151. Some states have gone beyond the minimum required by the Department of Interior regulations. For instance, Mississippi generally prohibits any surface mining on lands which are part of a national park, national monument, national historic landmark, any property listed on the national register of historic places, national forest, national wilderness area, national wildlife refuge, national wild or scenic river, state park, state wildlife refuge, state forest, recorded state historic landmark, state historic site, state archeological landmark or city or county park, forest or historical area. Miss. Code Ann. § 53-7-47 (Cum. Supp. 1979). Montana, on the other hand, recognizes a policy “to restore, enhance, and preserve its scenic, historic, archeological, scientific, cultural and recreational sites” within its surface mining law. Mont. Rev. Codes Ann. § 82-4-202(1)(d) (1979). The Montana statute also specifically notes that in granting permits for prospecting, underground mining and strip mining, “particular attention should be paid to the inadequate preservation previously accorded Plains Indian history and culture.” Id. § 82-4-227(2)(d).


154. The New Jersey planning statute provides a useful example. It establishes mandatory elements of a local master plan, including “[a] community facilities plan element showing the location and type of educational or cultural facilities, historic sites . . . and other related facilities, including their relation to the surrounding areas.” N.J. Stat. Ann. § 40:55D-28(b)(6) (West Supp. 1981). The term “historic site” is defined in the statute. See
use planning systems could avoid archeological site damage caused by local government construction and development activities. Moreover, if local planners identified important sites within their jurisdictions, local governmental units could acquire the property as a means of protecting significant cultural resources.

General land use planning and control powers are commonly delegated to local governments through state enabling acts. Throughout the nation, control of land use type, density and location has been effectuated through the exercise of zoning, subdivision control and building code requirements. Zoning is authorized as a police power regulation intended to accomplish generally stated public purposes. Over time, the police power has been found to be a legitimate source of authority for an expanding range of local land use regulation. The generality of language employed in the state enabling acts makes it conceivable that local governments could create regulations based on the police power to preserve archeologically significant sites.

As a general principle, highly restrictive local land use controls have been judicially approved where they have been shown to be rationally related to valid public purposes and not arbitrary or un-

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155. Some states have granted regional agencies the power to review local development projects. It might be advisable to subject such actions to regional review to assess their impact on cultural resources. A Kentucky statute, originally enacted in 1961, could serve as a model. See Ky. Rev. Stat. Ann. §§ 147.610, 650 (Baldwin 1980).

156. See notes 174-194 infra and accompanying text.


158. For an expansive discussion of the major goals of land use planning and zoning, see 1 N. Williams, American Land Planning Law §§ 8.01-15.07 (1974).


160. The Hawaii statute grants expansive authority to local governments: In addition to any power or authority of a political subdivision to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing body of any political subdivision may provide by regulations, special conditions, or restrictions for the protection, enhancement, preservation, and use of historic properties. Such regulations, special conditions, and restrictions may include appropriate and reasonable control of the use of [sic] appearance of adjacent or associate private property within the public view, or both, historic easements, preventing deterioration by wilful neglect, permitting the modification of local health and building code provisions and transferring development rights.

reasonable.\textsuperscript{161} Local zoning ordinances and subdivision controls could be designed so that private construction would not be permitted on lands where archeological sites are located.\textsuperscript{162} In areas having many such sites, a land survey might be required as a prerequisite to the issuance of a building permit.\textsuperscript{163} Further, local ordinances in jurisdictions with state cultural resource agencies could provide that development projects in areas of known archeological importance be preceded by a referral to the state body for review.\textsuperscript{164} Within a reasonable period of time, the agency could take actions ranging from a literature or site survey to actual salvage of artifacts. In addition, lands found to possess special archeological value could be recommended for public acquisition through purchase or condemnation. Referral to a state agency would accomplish a number of objectives. First, development occurring on private lands would be subject to an archeological resource impact review. That requirement would provide one of the few methods available for regulating development and controlling damaging activities on private land. Second, the issue of archeological resource protection would necessarily become one of local concern; local government officials could no longer ignore cultural resources. Third, cooperation between state cultural resource agencies and local units of government would be encouraged. By establishing that type of coordinated system, many of the protections provided by NHPA and state review statutes would be available.\textsuperscript{165}

Local governments could also exercise their zoning authority to place archeological properties in special zoning classifications that limited the land's use. Land use controls restricting a landowner's right to develop his property have been upheld as valid police power regulations where they sought to achieve important social objectives. Examples can be found in controls protecting

\textsuperscript{162.} For over 50 years, many types of subdivision controls have been imposed on residential developers. See 5 N. Williams, supra note 158, §§ 165.01-09. The subdivision process has been regulated for a number of purposes, including the control of large scale development to minimize adverse financial and environmental effects. Subdivision control ordinances often regulate very specific aspects of residential development. See generally D. Hagman, Public Planning and Control of Urban and Land Development 604-10 (2d ed. 1980).
\textsuperscript{163.} See 3 R. Anderson, supra note 157, § 17.02 (2d ed. 1977); 1 N. Williams, supra note 158, § 16.06 (1975).
\textsuperscript{164.} Such a system of referral has been applied to state and local government actions. See notes 115-125 supra and accompanying text.
\textsuperscript{165.} See notes 59-68, 115-125 supra and accompanying text.
wetlands, \textsuperscript{166} shorelines, \textsuperscript{167} open spaces, \textsuperscript{168} floodplains \textsuperscript{169} and historical properties. \textsuperscript{170} Frequently, those limitations have required that the land remain relatively undeveloped. \textsuperscript{171} If by statute or judicial ruling archeological protection was determined to be a legitimate exercise of the police power, protective zoning regulations could survive initial constitutional due process challenges. \textsuperscript{172}


\textsuperscript{168} The United States Supreme Court recently upheld a California municipality's open space regulations against the claim of an uncompensated taking of property. See Agins v. City of Tiburon, 447 U.S. 225 (1980). Justice Powell, writing for the Court, stated:

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open space plans will discourage the "premature and unnecessary conversion of open-space lands to urban uses." ... The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes have long been recognized as legitimate.

\textsuperscript{169} Id. at 261 (citation omitted). However, the New York Court of Appeals' decision in Fred F. French Investing Co. v. New York, 39 N.Y.2d 587, 300 N.E.2d 381, 385 N.Y.S.2d 5, appeal dismissed, 429 U.S. 990 (1976), took a less sympathetic view of local government regulations attempting to provide public open space.


\textsuperscript{172} See 1 R. Anderson, supra note 157, § 7.03; D. Godschalk, D. Brower, L.
A more serious obstacle to archeological site zoning is the possibility that it would be deemed a "taking" without just compensation. It is assumed that, as in floodplain zoning, a landowner who has an archeological site located on his property would be prohibited from taking any action that would disturb the physical integrity of the site. That classification, if permanent, would effectively eliminate the development potential of the land. It is not inconceivable that a landowner would regard that form of public regulation as the equivalent of a public acquisition of private land without compensation.

Although courts have been reluctant to find that public land use regulations constitute an impermissible taking of property, archeological site zoning would be more appropriate as a temporary "holding device" used to maintain the status quo until the site had been either professionally surveyed or permanently protected through governmental or public interest group acquisition. Using archeological site zoning as a temporary device would avoid a constitutional attack and provide protection for significant archeological sites.

E. Public Acquisition of Archeological Resources

While the regulation of land-disturbing activities may present an attractive approach to the problem of archeological resource damage, acquisition methods are also available. Those techniques often provide benefits unattainable through purely regulatory methods. First, acquisition of an archeological site by a state or local government unit or by a nonprofit organization may permanently remove the land from private market development and increase the total amount of land available to the public for educational and recreational activities. Second, acquisition would extend existing legal protections against unauthorized excavations of land

173. The essence of the landowner's claim would be that the archeological use classification constituted an excessive regulation of property rights. As Justice Holmes stated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922), "If a regulation goes too far it will be recognized as a taking." The Court's recent refusal to find a taking in the Penn Central decision was based on the assumption that the landowner could continue an existing, profitable use of the land. In the archeological context, the preexisting land use might be as undeveloped rural land and, consequently, the analogy to the Penn Central case would be imperfect.
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previously beyond the scope of protection provided by state and federal law. And third, by employing a policy of land acquisition, potentially significant sites could be reserved for future examination when new techniques and methods of analysis became available. However, it is worth noting that the public acquisition of archeological sites, standing alone, does not ensure their preservation. A commitment to the management and surveillance of those areas is necessary to protect against looting and vandalism. That obligation is a continuing one and must be considered as an important land management function by the entity acquiring the land.

To understand the different options available for acquiring property, a number of techniques must be examined.

1. Acquisition by Purchase—State and local governments and public interest groups can protect archeological sites by obtaining ownership of parcels through direct purchase from the fee title holders. Other interests, such as preservation restrictions, could also be purchased. Because, in the direct purchase context,

174. See notes 112-114 supra and accompanying text.

175. New methods of analysis and analytical approaches that will require undisturbed locations for their application are being developed. A policy that encourages the salvage of sites rather than their preservation would preclude future examinations that could reveal important insights into prior societies. See King & Lyneis, Preservation: A Developing Focus of American Archeology, 80 AM. ANTHROPOLOGIST 573, 882 (1978).

176. Vast tracts of land are owned by the federal government and are under the supervision of federal officials who are armed with significant enforcement powers. See note 86 supra and accompanying text. Yet, the expanse of territory to be covered and the small number of personnel may make the sanctions provided by federal law less effective than they could be.


178. The acquisition of preservation rights or easements rather than fee title interests provides a potentially less expensive method of protecting archeologically significant properties. In addition, the holding of such an easement does not impose substantial land management responsibilities on the owner. The South Dakota statute provides an example of specific legislation authorizing local governments to acquire, by a variety of means, "historic easements." The statute provides:

Any county or municipality may acquire, by purchase, donation or condemnation, historic easements in any area within their respective jurisdictions wherever and to the extent that the governing body of the county or municipality determines that the acquisition will be in the public interest. For the purpose of this section, "historic
the seller must be willing to convey title, and the buyer must be able to pay seller's price, voluntary land transactions can present at least two problems. First, the landowner may not be willing to sell because he wants to maintain the existing use or hold the property for later sale at an enhanced price. Second, the landowner may demand a price the purchaser cannot meet.

A number of states have specifically authorized governmental units to acquire properties having historical and archeological significance. That statutory authorization is often necessary to provide an identifiable delegation of power from the state legislature. Occasionally, statutory authority for the acquisition of land for general conservation purposes, such as open space preservation, also permits the purchase of culturally significant sites. Even if the requisite legislative authority exists for acquiring archeological properties, most states do not make funding available. Public interest organizations that intend to acquire and preserve such sites have similar funding problems because their resources, usually donated by members or benefactors, are quite limited.

easement" means any easement, restriction, covenant or condition running with the land, designated to preserve, maintain or enhance all or part of the existing state of places of historical, architectural, archeological or cultural significance. S.D. CODIFIED LAWS ANN. § 1-19B-16 (1980). See also notes 185-192 infra and accompanying text.

179. See, e.g., ALASKA STAT. § 41.35.060 (1977); MINN. STAT. ANN. § 138.09 (West 1980); N.J. STAT. ANN. § 40:60-25.33 (West 1967); N.C. GEN. STAT. § 121-9(b) (1981); PA. STAT. ANN. tit. 32, §§ 5005(a), (c) (Purdon Supp. 1981); S.D. CODIFIED LAWS ANN. §§ 1-19B-12 to -16 (1980); VA. CODE §§ 10-152, 156(c)(3) (1978); WASH. REV. CODE § 79.08.250 (1979); WIS. STAT. ANN. §§ 61.94(3), (5m) (West Supp. 1981); WYO. STAT. § 18-10-105 (1977).

180. See, e.g., VA. CODE §§ 10-152, 156(c)(3) (1978). Local governments may acquire funding for the acquisition of cultural resource land under federal open space land legislation, see 42 U.S.C. § 3535(d) (1976), which is administered by the Department of Housing and Urban Development (HUD). That program can provide a grant of up to 50% of the acquisition costs. See 24 C.F.R. §§ 540.1(b), .2(f)(3), .3(a), .4(b)(4) (1980). The administrative regulations also anticipate the acquisition of protective easements and other less-than-fee interests. Id. § 540.6. Complex selection criteria are also provided in the form of HUD regulations. Id. §§ 541.1-.20. Note, however, that during fiscal year 1981, the federal acquisition program was not funded.


182. Although the problem of obtaining sufficient acquisition funds is of major concern, there are some public and private preservation groups that have combined financial resources to purchase archeological sites. The Archeological Conservancy, a private organization, and the Ohio Historical Society, a quasi-public group, have recently joined forces to acquire the 120-acre site of the Hopewell Mound Group near Chillicothe, Ohio. That acquisition was intended to protect a major ceremonial site from the threat of urban sprawl. See
2. **Acquisition by Condemnation**—For a number of reasons, such as an inadequate offering price or development expectations, the present titleholder of an archeological site may not wish to sell. Consequently, eminent domain powers may be used as an alternative means of acquiring the land.183 A number of states have granted specific power to state agencies and subordinate governmental units to condemn culturally significant properties.184 It is likely that delegations of general condemnation authority also could be used to support public “takings” of archeological sites.

Although authority for the condemnation of archeological sites is available,185 there are a number of considerations that make

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Cleveland Plain Dealer, Nov. 19, 1980, at 6B, cols. 5-6.

183. Condemnation of land or interests in land for the purpose of protecting cultural resources has long qualified as a permissible exercise of eminent domain powers. The United States Supreme Court has twice ruled that such a condemnation of private property constitutes a valid public purpose within the traditional constitutional bounds of eminent domain. See notes 18-19 supra and accompanying text. See also 2A J.S. Nichols, The Law of Eminent Domain § 7.519 (3d ed. 1980). State courts have reached the same result. See Flaccomio v. Mayor & City Council of Baltimore, 194 Md. 275, 71 A.2d 12 (1950); In re Application of Dept. of Archives & History, 246 N.C. 392, 98 S.E.2d 487 (1957).

184. See, e.g., ALASKA STAT. § 41.35.060(b) (1977) (state agencies acquiring historical, prehistoric or archeological properties in danger); HAWAII REV. STAT. § 6E-3(2) (1976) (state agency acquiring historical cultural properties); MINN. STAT. § 138.09 (1980) (counties acquiring archeological sites); NEB. REV. STAT. § 82-120 (1976) (state historical society to acquire historical properties); N.J. STAT. ANN. § 40:60-25.53 (West 1967) (municipalities acquiring historical sites); N.C. GEN. STAT. §§ 121.9(b), (g) (1981) (state agency acquiring properties of historical, architectural, archeological or other cultural importance); PA. STAT. ANN. tit. 32, §§ 5005(a), (c), 5008 (Purdon Supp. 1981) (state agency and counties acquiring historical sites); S.D. CODIFIED LAWS ANN. § 1-19B-16 (1980) (county or municipality acquiring historical easements); VA. CODE § 10-145.1 (1978) (state attorney general); WIS. STAT. ANN. §§ 61.94(2), (3m) (West Supp. 1981) (village acquiring historical places).

At least one state, Mississippi, has specifically denied counties and municipalities the power to use condemnation authority to acquire “historic preservation properties.” Miss. CODE ANN. § 39-13-9 (Cum. Supp. 1980). A recent review of Mississippi law concluded that the “[d]enial of the eminent domain power would be a serious hindrance to the preservative cause but for an earlier statutory provision authorizing county boards of supervisors to acquire historic sites by gift or grant.” Comment, Historic Preservation and the Zoning Power: A Mississippi Perspective, 50 Miss. L.J. 533, 561 (1979). The author apparently did not consider the possibility of an unwilling grantor. The Virginia state courts have narrowly construed the eminent domain power to make it exercisable only by the state attorney general. See Virginia Historic Landmarks Comm’n v. Board of Supervisors, 217 Va. 568, 230 S.E.2d 449 (1976).

185. The Alaska statute anticipates one situation where the exercise of condemnation authority may be crucial. If the Alaska Department of Natural Resources finds that an historical, prehistoric or archeological property is in danger of being sold or used so that its cultural value will be destroyed or seriously impaired, the state agency may acquire the property by eminent domain. See ALASKA STAT. § 41.35.060(b) (1977). That provision for emergency use of the condemnation power is valuable, although its usefulness would depend on prompt notification of impending site damage.
other acquisition methods preferable in most circumstances. First, taking of property by eminent domain requires compliance with a detailed condemnation procedure, which is often the subject of judicial review. Local government officials may not wish to risk the financial and political cost of an extended struggle for acquisition of property for cultural resource preservation. Second, the condemnor must compensate the landowner for the property rights that are taken. That presents the same problem encountered in the voluntary acquisition context—a lack of funding. Third, a local government could face political opposition to a decision for either the expenditure of public funds or the exercise of eminent domain power in acquiring and protecting archeological sites. Fourth, the acquisition of an archeological site by condemnation would require a continuing management responsibility, which a local governmental unit might not wish to assume. Fifth, local governments’ separate purchases or condemnations could result in the misallocation of scarce acquisition funds. Finally, such a decentralized system would not ensure that the most significant archeological sites, determined on the basis of state or regional priority, would be acquired.

3. Protective Restrictions—Because the acquisition of fee interests in lands possessing special environmental or cultural value may be impractical, a large number of state legislatures have provided for restrictive land use agreements, which can be useful in protecting those valuable interests.\(^{186}\) Protective restrictions per-

mit landowners to transfer specifically defined development rights to their land. By conveying away a preservation restriction, the present landowner agrees to subject his property to limitations that can preserve an existing use, in theory protecting the cultural resource located on the land. Protective restrictions are similar to the traditional restrictive covenant or equitable servitude. To avoid technical limitations inherent in the traditional real property devices, state legislation authorizing protective agreements often specifies that the restrictions are binding against successive owners of the land and are enforceable by transferees of the initial grantee.

Some landowners may willingly transfer protective easements without any additional incentive other than the thought that the present condition of their lands will be preserved. However, economic incentives exist to further encourage the donation of restrictive covenants to public bodies or nonprofit organizations. Making a gift of a preservation right to such entities can qualify as a tax deductible charitable contribution for federal income tax purposes. The Internal Revenue Code was amended in 1977 to recognize charitable gifts of real property easements “granted in


188. The Rhode Island statute concerning “conservation restrictions” specifically addresses those issues:

No conservation restriction held by any governmental body or by a charitable corporation, association, trust or other entity whose purposes include conservation of land or water areas or of a particular such area, and no preservation restriction held by any governmental body or by a charitable corporation, association, trust or other entity whose purposes include preservation of structures or sites of historical significance or of a particular such structure or site, shall be [unenforceable] against any owner of the restricted land or structure on account of lack of privity of estate or contract, or lack of benefit to particular land, or on account of the benefit being assignable or being assigned to any other governmental body or to any entity with like purposes, or on account of any other doctrine of property law which might cause the termination of such a restriction.


perpetuity . . . exclusively for conservation purposes.\textsuperscript{190} The economic importance of that federal income tax provision depends on the value assigned to the donated easement: the greater the restriction, the larger the charitable contribution.\textsuperscript{191} In the context of archeological properties, the precise valuation of the transferred restriction will be determined by the value of alternative land uses that are no longer permissible. That allows a larger deduction where the donated preservation restriction eliminates use of the land for more lucrative activities.

In addition to the federal income tax deduction for donation of a preservation restriction, state laws frequently offer the inducement of reduced real estate taxes.\textsuperscript{192} On the theory that the owner of the fee simple estate has conveyed away part of his interest in the land, state statutes direct that the remaining restricted property be taxed at a reduced value. That lower appraisal is derived from an estimate of fair market value of the land encumbered by the preservation restriction. By transferring the preservation restriction to a governmental entity or nonprofit organization, the landowner is taxed for the limited use permitted rather than the highest and best use of the land.\textsuperscript{193} The real estate tax reduction


\textsuperscript{191} The Internal Revenue Code generally limits the maximum amount of charitable contribution deductions to 50\% of the taxpayer's "contribution base for the taxable year." \textit{Id.} § 170(b). The deduction of an extremely large contribution can be carried forward up to five years. \textit{Id.} § 170(d).


\textsuperscript{193} The ability to reduce local land taxes by the donation of preservation restrictions to tax exempt organizations or the state government provides the landowner an economic benefit, but it may be unattractive to the local taxing jurisdiction, which would lose tax
derived from that approach could be substantial, resulting in the continuation of existing land uses that did not disturb cultural resource sites.

If considered in combination with the associated economic incentives, preservation restrictions are powerful tools for protecting culturally important lands. However, in the context of archeologically significant properties, preservation restrictions must be carefully drafted to clarify the range of permissible activities allowed the landowner. Also, the holders of those restrictions must conscientiously inspect the burdened parcels at regular intervals to ensure that the agreements have not been breached. Because the idea of specialized nonpossessory land use restrictions has spread rapidly throughout the nation, it is likely that they will provide an inexpensive, nonregulatory method for protecting socially significant lands.\textsuperscript{194}

III. Recommendations

Most states have recognized the existence of archeological resources by statute and have attempted to protect them through regulatory and nonregulatory policies. However, it is unusual to find a comprehensive and integrated approach in any single jurisdiction. Although several methods are available to protect archeological sites, few states have adopted them all as a unified system. Because state and local governments have the potential for significant action in the area of archeological resource protection, it is suggested that an analysis be undertaken of the sufficiency of local law in each state. Such an analysis would require an understanding

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\textsuperscript{194} The expanding state law in this field makes it possible for landowners to donate or sell preservation rights in their land and may have a major impact on future protection of cultural properties. Public and private entities now will be able to own nonpossessory interests that can be judicially enforced. For example, Connecticut law specifically states:

\begin{quote}
[C]onservation and preservation restrictions are interests in land and may be acquired by any governmental body or any charitable corporation or trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land. Such restrictions may be enforced by injunction or proceedings in equity.
\end{quote}


The private landowner will retain possession and existing use of the property, but will have ceded the right to modify the land use to one that could damage or destroy the protected interest.
of the essential components of a comprehensive state program for the protection of archeological sites.

1. States should have a cultural resource agency that is staffed by fully trained individuals and is adequately funded. The state cultural resource agency could be charged with a wide range of responsibilities, including the discovery and identification of archeologically important sites, intergovernmental review and comment on state agency actions, expeditious acquisition of title or preservation rights to immediately imperiled sites, active solicitation of donations of culturally significant properties, provisions for expert advice and technical assistance to local governments, and education of the general public to the value of cultural resources. Counties or regional organizations could be integrated into statewide systems to locate, acquire and preserve archeological sites.

2. State legislatures should express a clear policy favoring the preservation of archeological resources located on private as well as public land. Those policy statements should be applicable to all governmental action and should affirm the principle that intentional or accidental site damage must be avoided. Significant cultural sites should be presumptively ineligible for public construction projects, and destructive use of those sites should be limited to extraordinary situations where no reasonable or prudent alternative exists. The legislative policy statements also should require compliance by state and local government agencies and those requirements should be enforceable in suits by private citizens.

3. A system of intergovernmental review should be established to evaluate the effect of state agencies' development proposals on cultural resources. Many development projects are funded, licensed or otherwise assisted by the federal government and consequently come under the review provisions of NEPA and the NHPA. However, a large number of other potentially damaging activities are undertaken solely by subfederal governmental units and therefore escape the coverage of federal law. State activities should be evaluated by an independent commission or cultural resource agency, which could advise the project agency of possible adverse effects on archeological sites and suggest ways of mitigating the impact. To avoid lengthy delays, the review procedure should be limited in duration, and inaction should create a presumption of approval. In cases of serious and immediate threats to extremely significant cultural properties, the review commission should be empowered to stop the development agency's project for
a period of time to enable it to appeal directly to the governor. In addition, public intervention could be employed to allow for the submission of written comments, public hearings or citizen suit proceedings. Over time, such a review procedure, coupled with a legislative policy statement favoring the preservation of archeological sites, could alter state agency project planning practices.

Although state activities may be subject to some form of cultural resource or environmental review, local governments’ actions are often free of external evaluation. It would be advisable to subject some of those local activities to review by statewide or regional cultural resource organizations. State legislative policy also should direct local governments to plan their construction projects to avoid, where possible, the use of archeological properties. Known or suspected archeological sites might also be exempted from public use without special review and analysis. In addition to regulating their own development activities, local governments should be encouraged to protect known or discovered archeological sites by direct acquisition or through cooperation with preservation organizations. The enactment of local regulatory ordinances protecting those sites would supplement existing state authority.

State legislatures should appropriate funds for the purchase or condemnation of significant sites that are in danger of being damaged by private activities. The acquisition of full fee interests or restrictive agreements should be authorized. Cooperative procedures should be established between privately funded preservation organizations and state funded cultural resource agencies to ensure that limited private funds will be used to protect the most seriously imperiled sites. In an era of severe government budget restrictions, that public/private collaboration should include joint efforts aimed at securing additional financial support from charitable foundations and other contributors for archeological site acquisition.

Legislative action could enhance a protective acquisition policy by encouraging the sale and acquisition of protective restrictions or covenants. The formal recognition of those severable rights would facilitate private donations of enforceable land restrictions without cost to the state or preservation organization. Without a clear interpretation of state law establishing the existence and enforceability of preservation rights, landowners might be reluctant to make such donations.
IV. Conclusion

The federal government has taken two primary approaches to the problem of cultural resource protection: acquisition and regulation. The limitations of that structure are apparent. Financial constraints allow only limited acquisition of historically or archaeologically significant sites. Furthermore, federal authority to require advance expert review of potentially destructive activities extends only to actions undertaken by federal agencies, their licensees or grantees. In addition, the federal archeological site excavation permit process reaches only federally owned or controlled land. Therefore, the federal legislative policy standing alone cannot control the full range of activities that threaten archeological sites and artifacts. A significant role exists for state and local governments to assist the federal government in protecting irreplaceable cultural resources.

Ultimately, the question of state action will be determined on the basis of the priority accorded cultural resource protection by state and local officials and administrators. States can create a policy favoring cultural resource protection, but such a policy must be supported by numerous government officials having only peripheral contact with historical and archeological resources. It is of prime importance that state and local officers be made aware of the significance of archeological sites and artifacts and then foster a preservationist philosophy. That direction must inevitably come from the legislature and must take the form of specific programs and protective legal standards.

Failure to protect archeological resources in a comprehensive fashion will mean that future generations of Americans will lose irreplaceable knowledge about prior societies and about their cultural heritage. Unless a clear policy of preserving significant archeological sites is established, the destruction of sites and artifacts by public and private land development and by acts of vandalism and pillage will persist. We possess the means to avoid that destruction through coordinated intergovernmental action. That opportunity will not exist forever; to allow it to pass would be unpardonable.