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Overview of Archaeology and the Law: Seventy Years of Unexploited Protection for Prehistoric Resources

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COMMENTARIES

AN OVERVIEW OF ARCHAEOLOGY AND THE LAW: SEVENTY YEARS OF UNEXPLOITED PROTECTION FOR PREHISTORIC RESOURCES

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I. Introduction: The Value of Archaeology

The array of federal legislation which has an impact on archaeological resources is bewildering. This article examines this legislation and explains its influence, realized and potential, upon archaeological resources.

Before this examination, however, a more basic question is why the law should be concerned with our past. Do we have an inherent need to understand our past? Congress has implicitly recognized such a need: the National Historic Preservation Act of 1966[1] states that the historical and cultural heritage of this country should be preserved in order to "give a sense of orientation" to this nation's people.[2]

Information about man's past falls into two categories: his biological heritage and his cultural heritage. Knowledge of the biological heritage of humanity is important in at least two ways. First, it provides the long-range perspective needed to assess man's impact on the environment[3] and the impact of the environment on man. This understanding of biological interaction will enhance man's ability to project his future influence on nature.[4] And second, data concerning man's biological past is useful to geneticists in developing concepts of human and agricultural eugenics.[5]

Similarly, knowledge of our cultural heritage is important because it promotes understanding of our sociological selves. The rudiments of religion, law, social structures, familial relationships, morals and aesthetics—virtually everything which defines man as a unique species—are contained in the annals of

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1 The National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1970).

2 *Id.* § 470(b).

3 Since man first began his attempts to control the environment, he has exerted an influence on his environment which is disproportionate to that exerted by other species. For an account of the use of fire, including that by early man, see O. Stewart, *Fire as the First Great Force Employed by Man*, in MAN'S ROLE IN CHANGING THE FACE OF THE EARTH 115 (1967).

4 DEPARTMENT OF THE INTERIOR, ARCHEOLOGY AND ARCHEOLOGICAL RESOURCES: A GUIDE FOR THOSE PLANNING TO USE, AFFECT, OR ALTER THE LAND'S SURFACE 1 (n.d.) (1972) [hereinafter cited as ARCHEOLOGICAL RESOURCES].

5 It has been noted that corn, as we know it today, is derived from a cross between ancient grasses which were crossbred, probably accidentally, by ancient civilizations in Peru and Mexico. P. C. MANGELSDORF, R. S. MACNEISH & G. R. WILLEY, ORIGINS OF AGRICULTURE IN MIDDLE AMERICA, in I HANDBOOK OF MIDDLE AMERICAN INDIANS 427-45 (1964).

prehistory.[6] The following description of man's duration on this planet places prehistory in perspective:

> If we imagine the whole of earth's history compressed into a single year, then on this scale, the first eight months would be completely without life. The following two months would be devoted to the most primitive creatures ranging from viruses and single-celled bacteria to jellyfish, while the mammals would not have appeared until the second week in December. Man, as we know him would have strutted onto the stage at about 11:45 p.m. on December 31, and the age of written history would have occupied little more than the last sixty seconds on the clock.[7]

Prehistory is even more significant when we consider that written history records only 5,000 years of man's activities; less than 1,000 of these years contain any appreciable amount of detail; and only 500 years of that detailed history refers to America.[8]

Prehistory, obviously, is very important to man's knowledge about man. Modern society poses threats to this knowledge however, and thus necessitates intervention by the legal system. One such threat is the destruction engendered by modern man's propensity to expand his land use requirements. The encroachments of dams, highways, and housing developments upon archaeological resources are well documented.[9] The incidence of this destruction is increasing at an alarming rate. For example, one writer states that in California alone approximately 1,000 sites are destroyed annually.[10] Another authority on archaeology and the law, notes that spot checks in Arkansas revealed that 25 percent of the known archaeological sites in that state have been destroyed over the past 10 years.[11] In response to this destruction of the human heritage, Congress made the following finding in the Historic Preservation Act of 1966:

> That, in the face of ever-increasing extension of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation.[12]

Another threat to archaeological resources is the pothunter—the individual who removes an archaeological artifact from the site without regard to its contextual provenience and then sells, trades, or collects it as an *objet d'art*.[13]

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6 In the context of this article prehistory refers to that period of time prior to written records.

7 R. CARRINGTON, A GUIDE TO EARTH HISTORY 47-48 (1961).

8 ARCHEOLOGICAL RESOURCES, *supra* note 4, at 1.

9 B. FAGAN, MEN OF THE EARTH 16 (1974); F. HOLE & R. HEIZER, AN INTRODUCTION TO PREHISTORIC ARCHEOLOGY (1969); C. MCGIMSEY, PUBLIC ARCHEOLOGY 4 (1972).

10 D. THOMAS, PREDICTING THE PAST 32 (1974).

11 MCGIMSEY, *supra* note 9, at 3.

12 16 U.S.C. § 470(d) (1970).

13 For a complete discussion of the looting problem on an international level, see Meyer, *The Plundered Past: I—The Flying Facade and the Vanishing Glyphs*, THE NEW YORKER, Mar. 24, 1973, at 96 (pt. 1); Meyer, *The Plundered Past: II—Sailing from the Byzantium*, THE NEW YORKER, Mar. 31, 1973, at 80 (pt. 2); Meyer, *The Plundered Past: III—Casino, Palace and Slum*, THE NEW YORKER, Apr. 7, 1973, at 96 (pt. 3).

Archaeological resources are nonrenewable.[14] The context in which an archaeological artifact or feature is found is at least as important as the artifact or feature itself, and a site which has been disturbed has permanently lost a considerable amount of its significance.[15] As stated by the Committee on the Public Understanding of Archeology of the Society of American Archaeology:

> Archeological resources are akin to an endangered species—even more endangered—for no matter how hard we work to protect them, they cannot reproduce or increase.[16]

Recognizing the importance of protecting American archaeological resources, it is appropriate to examine the legal responses. What protections are provided by the legal system?

II. Perspectives: Federal Legislation Affecting Archaeological Resources

Prior to the Antiquities Act of 1906,[17] the federal government had not addressed the issue of protection of archaeological resources. Moreover, limited discussion in the legislative history of that act indicates that little thought had been given to historic preservation, nor did the 1906 Act raise much debate.[18] Prior to 1906, then, the only protections for these resources were private financing of excavations and museums, and private legal remedies such as trespass or conversion. There were no federal regulatory or enabling provisions.

A. *The Antiquities Act of 1906*

1. Explanation of the Act

The Antiquities Act of 1906 gives the President authority to declare archaeological sites and features to be national monuments and to set aside a parcel of land sufficient for their management. There is, of course, a limitation that the antiquity be situated on federally owned land; where private land is concerned, the statute authorizes the Secretary of the Interior to "accept the relinquishment of such lands."[19] Clearly, Congress declined at this point to empower the Secretary to use eminent domain in order to obtain sites which may be assessed by the scientific community as particularly valuable.

Section 432 of the Antiquities Act enables the Secretaries of the Interior, Agriculture, and the Army to issue permits to institutions for excavations on behalf of "reputable museums, universities, colleges, or other recognized scientific or educational institutions."[20] Persons excavating archaeological sites on federal

14 ARCHEOLOGICAL RESOURCES, *supra* note 4, at 3.
15 R. HEIZER & J. GRAHAM, A GUIDE TO FIELD METHODS IN ARCHAEOLOGY 74 (1967). *See also* Coggins, *Archeology and the Art Market*, 175 SCIENCE 263 (1972).
16 ARCHEOLOGICAL RESOURCES, *supra* note 4, at 21.
17 16 U.S.C. §§ 431-33 (1970).
18 40 CONG. REC. 7888 (1906) (remarks of Senator Baker). *See also Understanding Our Heritage*, TRENDS, Oct.-Dec. 1974, at 2.
19 16 U.S.C. § 431 (1970).
20 *Id.* § 432.

land without permission are subject to a $500 fine or 90 days incarceration or both.[21]

There is a tendency among writers to understate the importance of the Antiquities Act.[22] It is not a clarion for the protection of archaeological resources, but it was a beginning.[23] That Congress addressed the issue at all was an accomplishment.[24] Moreover, it provided the only penal sanction for the unauthorized excavation of archaeological sites on government property.

2. Impact Today: *United States v. Diaz*

Recently, in *United States v. Diaz*,[25] the Antiquities Act was enforced against a defendant who had attempted to sell Indian artifacts taken from a cave on federal property to an individual whom he later learned was an FBI agent. The artifacts, according to expert testimony, were fashioned by a tribal medicine man between 1969 and 1970. The issue was whether objects of this recent origin were "antiquities" within the meaning of § 433. After further expert testimony, the district court held that they were. Stating that today's artifacts could easily become tomorrow's antiquities, the anthropologist testified:

> In a case such as this, there can be no specific definite time limit as to when an object becomes an "antiquity." The determination can be made only after taking into consideration the object or objects in question, the significance, if any, of the object and the importance the object plays in a cultural heritage.[26]

On appeal, the Ninth Circuit reversed.[27] The court noted that while it "had no doubt as to the wisdom of the legislative judgment . . . that the public interest in and respect for the culture and heritage of native Americans requires protection of their sacred places, past and present, against commercial plundering,"[28] this protection must not be couched in statutory terms which are impermissibly vague. It was further stated that, because there was no notice given by the statute, "antiquity" could refer not only to an aged object but to objects which were put to a particular use as well.[29] The effect would be that the individual could not know with reasonable certainty when he takes up his pick and shovel which objects he must leave and which he may disturb.

The court in *Diaz* also noted: "Counsel on neither side was able to cite an instance prior to this in which conviction under the statute was sought by the United States."[30] Thus, not only has the Antiquities Act of 1906 been rarely

21 *Id.* § 433.
22 *See, e.g.*, McGIMSEY, *supra* note 9, at 111; Shull & Shull, *New Inroads for Historic Preservation*, 26 ADMIN. L. REV. 357 (1974).
23 One writer supposes it to predate any state legislation written specifically to protect archeology. *See* McGIMSEY, *supra* note 9, at 102.
24 *Understanding Our Heritage*, TRENDS, Oct.-Dec. 1974, at 2.
25 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).
26 368 F. Supp. at 858.
27 United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).
28 *Id.* at 114.
29 *Id.* at 115.
30 *Id.* at 114.

used, but the Ninth Circuit's declaration that the statute is impermissibly vague casts doubt as to the future efficacy of the Act. However, although *Diaz* might be read to imply that the statute is unconstitutional on its face, it can be argued that it was only found to be unconstitutionally applied. What offended the court's notion of fair warning was the "particular use" element of the definition of "antiquity," that is, an object which is not old, but merely ceremonial—and thereby indicative of the culture from which it came—could fall within the definition of "antiquity." If a clearer case were presented, where it is obvious even to the unlearned individual that the objects taken are of ancient origin, then a conviction under the Antiquities Act of 1906 would be arguably constitutional.

B. *Historic Sites Act of 1935*

1. Explanation of the Act

The next major piece of legislation to affect archaeological resources on federally owned property throughout the country was the Historic Sites Act of 1935[31] which declared that it was

> 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.[32]

Under this Act the Secretary of the Interior is responsible for surveying and cataloguing archaeological sites of exceptional value and national significance.[33] He is further empowered to acquire property by "gift, purchase or otherwise"[34]—provided Congress has appropriated the funding—and to freely contract for the purpose of preserving archaeological resources regardless of ownership.[35] The Act creates an advisory board of United States citizens drawn from various historical and scientific fields to advise the Secretary and recommend policies.

2. Litigation Under the Historic Sites Act

In *Barnidge v. United States*[36] the Eighth Circuit interpreted the phrase "or otherwise" relating to the Secretary's powers of acquisition authorizing the use of eminent domain.[37] In response to the appellant's argument that his land was not being taken for "public use," the court stated that the right to determine that a particular purpose is a "public use" lies within the powers of Congress, and that it was not unconstitutional for the Legislature to have delegated this power to the Secretary of the Interior. Thus, on the Secretary's determination

31 16 U.S.C. §§ 461-67 (1970).
32 *Id.* § 461.
33 This was the beginning of what would later be called the "National Register." 16 U.S.C. § 470a (1970).
34 *Id.* § 462(d).
35 *Id.*
36 101 F.2d 295 (8th Cir. 1939).
37 *Id.* at 297-98.

that certain land in St. Louis, Missouri, "possessed exceptional value as commemorating . . . the history of the United States,"[38] eminent domain was exercised to procure the land.

Since *Barnidge,* the Eighth Circuit has twice applied the provision of the Historic Sites Act to eminent domain proceedings.[39] None of these cases dealt specifically with the acquisition of archaeological sites, but the court's reasoning is at least indicative of the potential impact of the Act on the preservation of archaeological resources.

C. *National Historic Preservation Act of 1966 (NHPA)*

1. Explanation of the Act

The first truly broad-based legislation providing a means for preserving archaeological artifacts and sites was the Historic Preservation Act of 1966.[40] The Act is more affirmative than previous legislation, stating that it is

> necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, [and] to give maximum encouragement to agencies and individuals undertaking preservation [as well as] state and local governments. . . .[41]

The Act expands the cataloguing system begun in the Historic Sites Act of 1935, and entitles it the National Register.[42] Most remarkable about the Act, however, is its funding provisions; it authorizes the Secretary of the Interior to grant funds to the states for the purpose of surveying, nominating, and maintaining sites for the Register. Matching grants-in-aid can also be awarded to the states for their own programs for preservation of historic and prehistoric sites, so long as those programs are in accordance with a comprehensive state plan which has been approved by the Secretary.[43]

Section 470f of the NHPA facilitates the preservation of archaeological sites by directing appropriate federal agencies to "take into account" the effect of projects upon structures or sites listed on the National Register prior to making expenditures of federal monies or issuing licenses.[44] While "take into account" is a mild directive, the Act laid the groundwork for subsequent statutes which would require compliance with federal historic preservation legislation prior to receiving a federal license or federal funding.

A final contribution of the Historic Preservation Act of 1966 is its establishment of the Advisory Council on Historic Preservation.[45] The 20-person Council

38 *Id.* at 296.
39 O'Donnel v. United States, 131 F.2d 882 (8th Cir. 1942); United States v. Becktold Co., 129 F.2d 473 (8th Cir. 1942). For a discussion of the use of eminent domain in historic preservation, see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).
40 16 U.S.C. § 470 (1970).
41 *Id. See* notes 1 and 12 and accompanying text *supra.*
42 16 U.S.C. § 470a (1970).
43 *Id.* § 470b.
44 *Id.* § 470f.
45 *Id.* § 470i.

consists of representatives from various departments and agencies of the federal government and individuals who have significant interest and experience in the matters to be considered by the Council. The Council is purely advisory in nature, yet does offer a body of experts to whom Congress and the President can look for recommendations.[46]

Procedures developed for compliance with § 470f of NHPA require that federal agencies involved in projects which are carried out, licensed, or financially assisted by the federal government should, at the earliest planning stage, consult the National Register of Historic Places to determine whether a National Register item will be affected. The agency is to ascertain whether the undertaking creates a change in the historical, architectural, archaeological, or cultural character which initially qualified the property to be listed in the Register. Absent such change, the project may proceed as planned.[47] If it is determined that there would be an adverse effect (including, but not limited to, destruction or alteration of the character), then the agency is to select a "prudent and feasible alternative to remove the adverse effect," thus allowing the project to proceed. Failing to achieve such a solution, the agency is to recommend all possible planning in order that the adverse effect may be minimized and to delay further work until the Advisory Council makes recommendations.[48]

Aside from the Advisory Council's opportunity to comment, it would seem that, except for procedural shortcomings on the part of the agency in charge, a project will eventually be able to proceed regardless of the relative severity of the damage it may do to the items supposedly protected by the Historic Preservation Act.[49] In fact the Act may be counterproductive in some circumstances. Because the location of sites of the Register becomes common knowledge through its publication, many states will not nominate an otherwise deserving site unless there are adequate means of protecting it from destruction by the public. Further, the fact that a site which will be affected by a federal project is not listed on the Register may lead an agency to erringly conclude that it is not significant.

2. Litigation Under the NHPA

To the extent that the Act forces agencies to give consideration to a federal project's impact on historical and archaeological resources, the NHPA has been effective.[50] In *Thompson v. Fugate*,[51] for example, the owner of a parcel of land upon which an historic landmark listed on the National Register was located sought to enjoin further highway construction. Although the state had not yet requested federal approval of the route, the district court found it to be within

46 *Id.* § 470j.
47 The procedure for compliance with this statute is established in 36 Fed. Reg. 3312 (1971).
48 O. GRAY, ENVIRONMENTAL LAW: CASES AND MATERIALS 737-38 (1973).
49 Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969).
50 For more detailed discussion of litigation under NHPA, see Shull & Shull, *New Inroads for Historic Preservation*, 26 ADMIN. L. REV. 357 (1974); Comment, *The National Historic Preservation Act: Ten Years Later*, 7 SW. U. L. REV. 688 (1975).
51 347 F. Supp. 120 (E.D. Va. 1972).

the purview of federal legislation because the highway would be built according to federal interstate standards and would eventually be an integral part of the circumferential urban highway connecting with the interstate system. The federal court enjoined further construction pending compliance with both the National Historical Preservation Act and the National Environmental Policy Act, holding that construction had not reached the state of completion at which "the costs of altering or abandoning the proposed location would outweigh whatever benefits might be derived therefrom."[52]

In another case, *Warm Springs Dam Task Force v. Gribble*,[53] the plaintiffs sought to enjoin the awarding of a contract for the construction of a segment of a dam project. Their attack was two-pronged: first, the sufficiency of the environmental impact statement required by the National Environmental Protection Act was challenged;[54] and second, it was argued that sites in the affected area might be eligible for inclusion in the National Register under the National Historic Preservation Act.

As to the issue concerning the NHPA, the court held that meeting the environmental impact statement requirements under the National Environmental Protection Act did not necessarily constitute compliance with the NHPA requirement for federal agencies to nominate sites to the National Register.[55]

If the Secretary of the Interior determines that certain sites affected by the project might qualify for inclusion in the Register, the appropriate federal agency is required to give the Advisory Council on Historic Preservation an opportunity to comment before substantial alterations can be made.

D. *National Environmental Policy Act of 1969*

1. Explanation of the Act as it Relates to Archaeology

Another major piece of federal legislation which had an impact upon archaeological resources is the National Environmental Policy Act of 1969 (NEPA).[56] Designed to create a national policy of preventing or eliminating damage to the environment and biosphere, the Act provides that:

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[57]

52 *Id.* at 125.
53 378 F. Supp. 240 (N.D. Cal. 1974), *rev'd on other grounds*, 417 U.S. 1301 (1974) (order by Douglas, J., sitting as Circuit Judge).
54 For a discussion of the issue concerning the adequacy of the environmental impact statement, see notes 80-83 and accompanying text *infra*.
55 These requirements are actually pursuant to Exec. Order No. 11,593, 3 C.F.R. 154 (1971).
56 42 U.S.C. §§ 4321-47 (1970).
57 *Id.* § 4331(a).

The Act puts the nation in the position of "trustee of the environment for succeeding generations"[58] and states that it is the nation's duty to

> preserve important historic, cultural, and natural aspects of our national heritage, and [to] maintain, wherever possible, an environment which supports diversity and variety of individual choice.[59]

To accomplish these and other ends NEPA directs federal agencies to prepare an environmental impact statement (EIS) on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[60] Without establishing the relative weight to be given various elements contained in the EIS, NEPA directs an agency to make its decisions in consideration of what appears in the statement.

In addition, the Act creates the Council on Environmental Quality (CEQ), a body which has the authority to issue guidelines[61] to federal agencies regarding the preparation of environmental impact statements.[62] The EIS must contain a description of the proposed action, its probable impact on the environment, alternatives to the action, the probable adverse environmental effects which cannot be avoided, together with a description of "[a]ny irreversible and irretrievable commitments of resources that would be involved in the proposed action" if the action is implemented.[63] The CEQ guidelines further instruct that the term "resources" should not be limited to mean merely the labor and materials utilized in a project, but should be used to include the natural and cultural resources which would be destroyed in the course of the project.[64]

An integrated reading of the above provisions sets forth the basis for protection of archaeological resources under the National Environmental Protection Act. With varying success, a number of attempts have been made to use those provisions to halt the destruction of particular historic and prehistoric sites. Most plaintiffs have asserted both NEPA and NHPA as grounds for relief; consequently, it is difficult to ascertain how much of a court's decision rests on the NEPA and how much on NHPA, unless an opinion specifically addresses the matter.

2. Litigation Concerning Historic and Prehistoric Preservation

The plaintiffs in *Ely v. Velde*[65] attempted to bring the requirements of NEPA and NHPA to bear upon the State of Virginia's construction of a correctional facility in an area containing several National Register sites. The opponents of the project feared that the locality's historical value would be diminished by reason of the proposed center. Virginia had applied for funds through the

58 *Id.* § 4331(b)(1).
59 *Id.* § 4311(b)(4).
60 *Id.* § 4332(C).
61 *See* 35 Fed. Reg. 7390 (1970).
62 Exec. Order No. 11,593, 3 C.F.R. 154, 157 (1971).
63 National Environmental Policy Act, 42 U.S.C.A. 4332(C)(v)(1975).
64 38 Fed. Reg. 20554 (1973).
65 363 F. Supp. 277 (E.D. Va. 1973).

Omnibus Crime and Safe Streets Act of 1968.[66] The Safe Streets Act enunciated a "hands-off" policy on the part of the federal government after the money had been awarded to avoid the establishment of a federal police agency. The Law Enforcement Assistance Agency (LEAA), the federal agency charged with administering the Act, admitted not complying with NEPA and NHPA, arguing that the Safe Streets Act's policy of minimal interference prohibited it from doing so. The district court agreed with the defendants. However, the Fourth Circuit reversed on appeal,[67] finding no contradiction between the two sets of federal legislation. Judge Sobeloff wrote that requiring the LEAA to gather enough information to "assess the environmental and cultural impact of the proposed plan . . . would not remotely approach the apprehended 'control over any police force or other law enforcement agency' "[68] prohibited by the Safe Streets Act. Since the area in question contained three sites listed on the National Register of Historic Sites, the court went on to require that the LEAA comply with NHPA requirements, and that LEAA submit an EIS in accordance with the National Environmental Policy Act as well. The court, however, concluded by reiterating that while NHPA and NEPA were applicable to federal agencies, the Acts did not apply to the states.

Accordingly, Virginia then withdrew its application for federal funds, restoring the project to its former, entirely state-funded status. The opponents of the center once again sought to have the district court force compliance with NHPA and NEPA on the ground that: (1) impermissible bookkeeping shifts were utilized to avoid compliance, and (2) once a project has been designated federal, that designation is irrevocable.[69] The arguments were unsuccessful. The district court held that the plaintiffs had not shown that the bookkeeping shifts enabled Virginia to directly or indirectly use federal funds for a project which had purportedly been sponsored by the state.[70] It further held that a project may be tentatively designated "federal" without that designation becoming irrevocable.[71]

On appeal, the Fourth Circuit agreed that the program had not become "irrevocably" designated federal.[72] It reversed the district court, however, on the ground that federal funding was sought in the first instance to assist in the construction of the penal complex. The court found it significant that the state was "retaining federal funds that it [had] obtained for the center on the premise that it would comply with federal environmental Acts, while at the same time it [planned] to construct the center without compliance."[73] Thus, the state would be able to proceed with its project without meeting NEPA and NHPA requirements only if it relinquished its federal funding.

66 Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701, 3711, 3751-3769 (1970).
67 451 F.2d 1130 (4th Cir. 1971).
68 *Id.* at 1136-37.
69 363 F. Supp. 280 (E.D. Va. 1973), *rev'd,* 497 F.2d 252 (4th Cir. 1974).
70 363 F. Supp. at 283.
71 *Id.* at 285.
72 497 F.2d at 257.
73 *Id.* at 256.

Sierra Club v. Callaway[74] dealt peripherally with the notion of prehistoric sites and the EIS. The dispute concerned the Wallisville Project which was to be constructed in the Trinity River Basin in Texas. In addition to its many other implications concerning environmental law and NEPA, the decision further substantiated the notion that archaeological resources have a place on the environmental impact statement.

A decision which could potentially hinder those seeking to protect archaeological resources is *St. Joseph Historical Society v. Land Clearance for Redevelopment Authority.*[75] The conflict arose in an urban renewal project, where some of the buildings scheduled for demolition had been nominated for or had won places on the National Register. Plaintiffs unsuccessfully sought to have NEPA and NHPA requirements applied to the renewal project in order to avoid the destruction of some of the sites. The court for the Western District of Missouri held that because the historic sites were not on the National Register *prior* to approval of the urban renewal project, the NHPA requirement that the federal agency take into account the effect of the project on such historic sites was not applicable.[76] The court further held that NEPA was directed at the overall environmental problems of the nation and was not intended to expand the coverage of NHPA.[77]

The court's reasoning on this second holding is not clear. It began by stating that the plaintiffs were erroneous in their reliance upon the Fourth Circuit's announcement in *Ely* that NEPA and NHPA requirements were not nullified by the Safe Streets Act.[78] According to the *St. Joseph* court, though, the facts before it could be readily distinguished from those before the *Ely* court. This much is correct. But what the *St. Joseph* court disregarded is that, even at the time of the first decision in *Ely,* the Fourth Circuit was willing to require the federal agency in charge to comply with the NEPA directive that the project's impact—including the historical impact—was to be considered in the EIS.

Requiring the project agency to prepare an EIS which includes the historical impact does not, however, expand the coverage of NHPA as the court in *St. Joseph* implied. The plaintiff's contention that NEPA "protects buildings of architectural and historic significance whether or not they are listed in the National Register,"[79] provided they otherwise fall within the scope of NEPA is correct. Thus, while NEPA was not intended to expand the provisions of NHPA, it may apply to certain historic and prehistoric resources independent of NHPA.

Warm Springs Dam Task Force v. Gribble, discussed briefly in the previous section,[80] also considered the argument that the EIS was deficient by reason of incomplete and inaccurate studies on the archaeological portion of the statement.

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74 Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

75 366 F. Supp. 605 (W.D. Mo. 1973).

76 *Id.* at 609.

77 *Id.* at 612.

78 At the time the *St. Joseph* court delivered its opinion, the plaintiffs in *Ely* had not yet made their second appeal to the Fourth Circuit.

79 366 F. Supp. at 609.

80 378 F. Supp. 240 (N.D. Cal. 1974), *rev'd,* 417 U.S. 1301 (1974), discussed in note 53 and accompanying text *supra.*

The standard which had been established by the Ninth Circuit for judging the sufficiency of an EIS is that it must stimulate "a full examination of all objections, adverse consequences, alternatives and . . . possible operational limitations."[81] Summarizing the Ninth Circuit's view the district court stated that the purpose of the EIS is "to inform the decision makers of the environmental ramifications of the proposed action, nothing more and nothing less."[82] The district court in *Warm Springs Dam Task Force,* applying this standard, deemed that while this segment of the EIS had its "obvious shortcomings" it was not deficient.[83] The court felt that overall the EIS met the statutory requirements. The plaintiffs then applied to the Ninth Circuit for an injunction pending appeal. When that motion was denied, they applied to the Circuit Justice for the Ninth Circuit for a stay of the order of the district court and a stay to restrain further construction on the dam project. Justice Douglas, sitting as Circuit Justice, granted the stay on the basis of evidence tending to show that the district court did not give sufficient weight to a determination by the Council on Environmental Quality that the EIS was inadequately prepared. He pointed out that since the CEQ is the agency charged with administration of NEPA and since it had taken an "unequivocal position" that the statement was deficient, the agency's determination was entitled to great weight despite the district court's conclusions.

The difficulty with trying to assess the significance of this decision to the preservation of archaeological resources lies in its chameleon-like characteristic. In the district court, much discussion was given to the adequacy of the EIS with respect to certain archaeological sites. Justice Douglas' discussion, however, appears to be much more concerned with other aspects of the EIS, and the decision itself turned on how much weight was to be given an agency determination of EIS adequacy. Thus, it is only speculation to say how important the archaeological aspects were in the Court's decision.

While none of the above cases can be classified as legal landmarks for the protection of historic and prehistoric resources, there is promise. Archaeological considerations have found a place on the EIS and are among the legitimate considerations that the EIS is supposed to prompt. Likewise, at least for those sites on the National Register, federal agencies must evaluate a proposed action's effect on these sites. Yet by turning to Congress and away from the courts, archaeological protectionists may find a more expeditious, effective remedy. Certainly a beginning can be found in the Moss-Bennett Amendment.

III. The Reservoir Salvage Act and the Moss-Bennett Amendment

The Reservoir Salvage Act of 1960 together with the changes made by the Moss-Bennett Amendment[84] is the most recent federal legislation in the area of historical resources, and it may well be the most important.

81 Environmental Defense Fund v. Armstrong, 487 F.2d 814, 822 (9th Cir. 1973), *cert. denied,* 416 U.S. 974, *reh. denied sub nom.,* Environmental Defense Fund v. Stamm, 419 U.S. 1041 (1974).

82 378 F. Supp. at 244.

83 *Id.* at 251.

84 16 U.S.C. § 469 *et seq.* (1970).

A. *The Reservoir Salvage Act of 1960 Prior to the Moss-Bennett Amendment*

The Reservoir Salvage Act (commonly known as Salvage Act) was passed in 1960 in an attempt to minimize federal contribution to the increasing losses of historic and prehistoric data caused by this country's expanding land use needs. The act was designed to enable federal agencies involved in federal water projects (dams and reservoirs) to take action to preserve archaeological resources. These federal agencies were required to notify the Secretary of the Interior of proposed water projects (excepting projects under a designated size). The Secretary was responsible for making a survey of the site and where significant data was found, the Secretary was to provide for its recovery and preservation.[85] The Act further authorized the Secretary to enter into contracts, hire experts and use donated or appropriated funds to conduct the program.[86] The Salvage Act further mandated that the Secretary keep the appropriate agency head informed of salvage progress and that he determine ownership of salvaged artifacts according to consultation with all interested parties.

B. *The Moss-Bennett Amendment*

The Moss-Bennett Amendment of the 1960 Salvage Act brought considerable change. The dominant purpose in enacting the amendment according to the legislative history was to

> expand the application of the 1960 Act providing for the preservation of historical and archeological data to include all Federal and federally assisted construction projects, rather than being limited to Federal dam and reservoir sites.[87]

At the same time, the Congress was concerned that undue interference or delay of federal projects and programs should be avoided. The amendment sought to vest additional responsibility in the Secretary of the Interior as well.[88]

To broaden the scope of the former act, language was added which extended coverage to "any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program."[89] Unlike the former provision, the act is no longer limited in application to construction projects. Where a federal agency becomes aware that any federal program or federally assisted activity will result in the destruction of scientific, prehistoric or historic data, that agency is required to notify the Secretary of the Interior.[90]

The Moss-Bennett Amendment also represents the first attempt by Congress to legislate concerning archaeological resources located upon private lands. Section 3 provides that where federal assistance in the form of grants or loans is

85 These requirements are actually pursuant to Exec. Order No. 11,593. 3 Fed. Reg. 154 (1971).
86 H. R. Rep. No. 992, 93d Cong., 2d Sess. 8 (1974).
87 *Id.* at 3.
88 *Id.* at 7.
89 16 U.S.C. § 469 (1970).
90 *Id.* § 469a-1(a).

awarded to private individuals, private associations or public organizations, the Secretary, if he has the consent of those having a legal interest in the project, may conduct a survey and take measures to recover and preserve the archaeological resources. The Secretary is also authorized to compensate for losses suffered as a result of such salvage operations.[91]

Upon receipt of notice that irreparable damage is being done to historic and prehistoric sites by any federal project, the Secretary, after reasonable notice to the agency, is to conduct a survey and recover and preserve such data as the public interest requires.[92] The Act provides, however, that these requirements do not apply to federal actions taken as a result of any emergency, for example, natural disasters.[93] The Secretary is given sixty days in which to initiate the survey,[94] and thus avoid undue delays.[95]

Section 4 requires the Secretary to keep the responsible agency appraised of the progress of salvage work undertaken in order to give agencies adequate notice required to avoid delays.[96] Under the new law the Secretary is authorized to consult interested parties, including "federal and state agencies, educational and scientific organizations and private institutions and qualified individuals."[97] This section also directs the Secretary to act as national coordinator and reporter on all federal surveys and recovery activities authorized under the act.

The new law further enables the Secretary to consult with experts and accept funds made available by any source for the purpose of salvage archaeology.[98] Section 7 enables the project agency to expend up to 1% of the project funds on salvage.[99] Other budgetary provisions enable the Secretary to accomplish much more for archaeological preservation under the Moss-Bennett version than he could under the former legislation.[100]

The Moss-Bennett Amendment effects two major changes. First, it provides for funding of the survey and salvage activities necessary to preserve archaeological resources. Funding has been a leading problem in past efforts in historic and prehistoric preservation even where the parties concerned were willing to cooperate with the salvage work. Now it is possible to use project funds to carry out some of these objectives. There is a question, however, whether the 1% allocated will be sufficient to defray the costs of all the preservation work that needs to be done.[101]

The second major change of the Moss-Bennett Amendment is that it substantially broadens the scope of the Salvage Act. Where the Act was formerly restricted to federal water construction projects, it now applies to any federal

91 Id. § 469a-1(b).
92 *Id.* § 469a-2(a).
93 *Id.* § 469a-2(b).
94 *Id.* § 469a-2(c).
95 H.R. REP. No. 992, 93d Cong., 2d Sess. 7 (1974).
96 16 U.S.C. § 469a-3(a) (1970).
97 *Id.* § 469a-3(b).
98 *Id.* § 469b.
99 *Id.* § 469c(a). The one per cent limitation is not applicable where the total project funding does not exceed $50,000.
100 *Id.* § 469c(b)-(c).
101 Telephone interview with Gary S. Messinger, Congressional Liaison Advisory Council on Historic Preservation, Oct. 24, 1975.

construction project or federally licensed activity which alters the terrain.

Whatever the apparent promise of the Act, it leaves much to be done in the area of preservation of archaeological resources. Some of the problems of litigation under the former statutes will remain. For example, it remains to be seen what constitutes an "alteration of the terrain." And, as with NEPA, it remains to be seen what constitutes a "Federal construction project or federally licensed activity."

IV. Summary and Conclusion

Congress has explicitly declared that it is a national policy to preserve archaeological resources. The same declaration has been made implicitly in the context of a more general policy of preserving natural resources as a means of promoting a beneficial balance in our environment. Moreover, these declarations call for a greater role by the federal government in enacting these policies.

One of the most important things to remember about the federal legislation is that it applies to federal agencies only. Congress cannot impose its will on state agencies concerning this matter. Note, however, that the Congress can direct a federal agency to condition federal assistance to state agencies upon compliance with certain requirements.

Thus, it would seem that all federal actions are potentially within the federal statutory scheme. Determining whether a particular federal project falls within the federal scheme is possible by looking to the particular statute involved. Thus, if a federal action "significantly affects the environment," it falls within NEPA. If a federal action involves an alteration of the terrain and historic or prehistoric resources may be irreparably lost, it falls within the Salvage Act. And if a federal project affects a site listed on the National Register or one which is significant in archaeology, it comes within the purview of the NHPA.

Certain nonfederal projects can come within the ambit of the federal statutes. Both private and public actions may be deemed "federal projects" by virtue of their affiliation with larger federal projects, federal funding in the form of loans or grants, federal licensing, or other forms of federal assistance. Absent one of these connections or conditions, however, federal legislation exerts no influence over archaeological resources on state or private lands.[102]

Once it is determined that the federal statutes apply, it is necessary to consider the range of protection afforded the resources in question. "Consideration" is one form of protection provided under NEPA, NHPA and the Salvage Act. By including archaeological resources among the disciplines to be studied in the EIS, the law, to the extent that it can, requires agencies to make their decisions in consideration of resultant impact on archaeological resources. Under NHPA and the Salvage Act, decisions cannot be made until the Secretary of the Interior has had an opportunity to comment upon the effect of the project on any archaeological data which may be endangered. It is difficult to determine, however, the extent to which this mandatory consideration actually results in the

102 For a complete, nonlegal breakdown of state archeological projection, see McGimsey, *supra* note 9.

statutory purpose Congress sought to effect.

A very important protection provided by the NHPA and the Salvage Act is financial assistance. The NHPA authorizes the Secretary of the Interior to supplement the development of archaeological sites, and it assists with regard to sites listed on the National Register. One of the key contributions of the Moss-Bennett Amendment to the Salvage Act is the authorization for project agencies to draw upon a certain percentage of project monies for salvage work.

Perhaps the greatest contribution of the federal legislation to the protection of archaeology is that it begins to give direction to archaeological excavations on a national level. Despite the fact that much federal legislation on archaeology is of an emergency nature, there now exists, in theory at least, national coordination of information on archaeology through the National Register and the reporting requirements placed upon the Secretary of the Interior by the Moss-Bennett Amendment. This could possibly herald a change from primarily salvage protection for archaeology to an approach which seeks to do more than keep ahead of the graders.

A number of statutes discussed in this article have been in effect for many years. Yet an examination of the case law under the statutes and the literature concerning the fast depletion of archaeological resources demonstrate that they have not been utilized to a great extent to foster the preservation of prehistoric resources. Although an extensive collection of empirical data pointing to reasons for the nonuse of this legislation is beyond the scope of this article, there are several possibilities.

First, it is possible that the lack of funding has prevented persons interested in prehistoric preservation from employing the statutes. The legal costs involved may have acted as a deterrent in a field which finds itself low on the list of public spending priorities.

Detection of circumstances which give rise to the applicability of the statutes may be a problem as well. Even though the contracting officer for the federal agency may be aware that archaeological evidence may be under the protection of federal law, the operator of the grader which exposes such evidence may be ignorant of that fact. He may also be unaware of the often subtle signs of the existence of an archaeological site or feature. The judgmental component of site assessment further complicates the issue.

A final and more plausible partial explanation for the nonuse of some of this legislation is that early laws had little built-in enforcement. The amended Salvage Act and NEPA contain reporting provisions which tend to make those acts self-executing. Moreover, the single criminal provision which protects archaeological resources is perhaps understandably low on the F.B.I.'s priority list of criminal targets.

Despite the fact that much of the federal statutory protection has lain dormant for nearly 70 years, it is hoped that newer statutory provisions and the continuing interest in a broad spectrum of environmental concerns will help to slow down the alarming rate at which we are destroying our prehistory.