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Mary Ann Bagus

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NOTE

CULTURAL RESOURCE PRESERVATION IN OHIO: THE DEVELOPMENT OF FEDERAL AND STATE LAW

I. INTRODUCTION

PREVIOUS GENERATIONS HAVE LEFT BEHIND TANGIBLE VESTIGES of their way of life in their physical remains and the products of their activity. These have come to be regarded as valuable resources because of their cultural significance. They form an irreplaceable, uniquely human component of the environment that is both a legacy from the past and a trust for the future. Although these cultural resources are a treasured part of our heritage, they are also threatened by competing public and private interests, natural forces and a concept of progress oriented toward physical expansion and alteration of the environment. Growing public concern with this dilemma has given rise to legislative action to safeguard these properties.

This note will examine the legal protection afforded to cultural resources located in the state of Ohio. It will begin with a brief description of the nature of cultural resources, the dangers confronting them and the resulting efforts to protect them through appropriate legislation. The changing concepts of cultural resources and their social values will be considered in a statutory context. The development of federal preservation law will be traced from the turn of the century to the present with emphasis on the diverse approaches employed by Congress. This discussion will demonstrate that a comprehensive body of federal legislation has emerged to safeguard culturally significant properties through federal ownership, regulation, financial incentives and criminal sanctions. Ohio preservation efforts will then be examined with critical attention to the limitations of these measures. Amended Substitute House Bill No. 418,¹ the major piece of state legislation, will be discussed at length and the programs established by this 1976 statute will be evaluated. Recommendations will also be offered for additional legislation.

II. THE STATUS OF CULTURAL RESOURCES

The term "cultural resources" embraces a broad spectrum of sites, structures and artifacts which are intimately associated with our collective heritage. Their significance may lie in their archaeological,

¹ Am. Sub. H.B. No. 418, 111th Gen. Assy., Reg. Sess. (1975-76) (codified at OHIO REV. CODE ANN. §§ 149.51-55 (Page 1978)).

historical, or architectural characteristics, but they share a common denominator—they are the tangible remains of our predecessors and they form a palpable link with our past.

Cultural resources face serious threats from a variety of sources. Public and private development projects have been particularly destructive.² Many properties have been damaged by neglect or the natural elements; vandalism has further compounded the problem. Paradoxically, our heightened appreciation of cultural resources has also posed a danger to them. The escalating commercial value of antiques has led to the widespread plundering of archaeological sites in search of marketable artifacts.³ In addition, numerous sites have been damaged by amateur archaeologists and collectors.⁴ Once a site has been disturbed, its scientific value is destroyed and its hoarded messages from the past are irretrievably lost.

These cultural remains constitute a unique body of nonrenewable resources. Their conservation is a matter of national interest and their protection has become recognized as an appropriate area of increasing governmental concern. This has given rise to a complex body of preservation legislation. In order to understand the present legal status of cultural resources in Ohio, it is essential to examine the development and integration of protective statutes at the federal and state levels.

III. FEDERAL LEGISLATION

During the nineteenth century, the protection of cultural resources was largely a haphazard collage of private and state action.⁵ The limited federal involvement was primarily aimed at preserving properties of national significance through public ownership. This was accomplished

² In Arkansas, for example, an estimated 703,000 acres were cleared between 1960-64. Within a 10 year period from 1962-72, 25% of the known archaeological sites in the state were destroyed. C. MCGIMSEY, *PUBLIC ARCHEOLOGY* 3 (1972). Ohio has also lost valuable cultural resources. A 1966 survey by the Ohio Historical Society indicated that numerous properties throughout the state were lost or threatened in the preceding decade. *See* note 121 *infra*. Between 1976 and 1978 at least six publicly owned Ohio properties were destroyed even though they were listed on the National Register of Historic Places. G. Klimoski, *A Proposal for Preservation Legislation* (November 21, 1978) (unpublished report at Ohio Historical Society).

³ *See* H. R. REP. NO. 311, 96th Cong., 1st Sess. 7 (1979) (prepared by the House Committee on Interior and Insular Affairs when considering H.R. 1825 to protect archaeological resources); note 98 *infra* and accompanying text.

⁴ *See* MCGIMSEY, *supra* note 2, at 4.

⁵ *See generally*, I. KING, P. HICKMAN & G. BERG, *ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE'S CLUTTER* (1977) [hereinafter cited as *ANTHROPOLOGY*]; Fowler, *Protection of the Cultural Environment in Federal Law*, in *FEDERAL ENVIRONMENTAL LAW 1466* (1974) [hereinafter cited as *FED. ENV'TL LAW*].

through piecemeal legislation designed to acquire and maintain individual sites with an emphasis on those of exceptional importance to archaeology or military history.⁶

Although Congress did not articulate an official policy favoring historic preservation, such action was considered socially beneficial since it tended to promote patriotism. In an 1896 decision, *United States v. Gettysburg Electric Railway*,⁷ the United States Supreme Court upheld the Secretary of War's condemnation of a railroad's right of way pursuant to a congressional directive to acquire the Gettysburg battlefield for a national park. The Court unanimously approved of this as "[a]n act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them. . . ."⁸ This essentially chauvinistic concept of public benefit dominated federal preservation policy for the next seventy years.

A. *The Antiquities Act of 1906*

After six years of debate,⁹ Congress passed the first major piece of federal legislation for the protection of cultural resources, the Antiquities Act of 1906.¹⁰ This Act continued the policy of government protection through public ownership. It authorized the President to declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . ." situated on federal lands to be "national monuments."¹¹ Cultural resources on federal land which were not part of a national monument were also protected by a permit requirement¹² and criminal sanctions.¹³

For nearly seventy years there was little effort to enforce the criminal provisions of the Antiquities Act but in 1973 the defendant in *United States v. Diaz*¹⁴ was convicted of selling Indian religious artifacts taken from federal land. An anthropologist testified that these objects,

⁶ FED. ENVTL LAW, *supra* note 5, at 1468-73.

⁷ 160 U.S. 668 (1896).

⁸ *Id.* at 681.

⁹ ANTHROPOLOGY, *supra* note 5, at 18.

¹⁰ 16 U.S.C. §§ 431-33 (1976).

¹¹ *Id.* § 431.

¹² A federal permit must be obtained "for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity . . ." on federal lands. *Id.* § 432.

¹³ The Act declared that "any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity . . ." situated on federal land without permission is guilty of a misdemeanor with a maximum penalty of a \$500 fine and 90 days imprisonment. *Id.* § 433.

¹⁴ 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).

which were less than five years old, were considered "antiquities" within the profession because of their association with ancient ceremonies and traditions.¹⁵ The Ninth Circuit reversed, holding that the statutory language was unconstitutionally vague, since "there was no notice whatsoever given by the statute that the word 'antiquity' can have reference not only to the age of an object but also to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge."¹⁶

The Antiquities Act represented some major changes in the federal approach to historic preservation. Congress no longer focused on specific legislation for the acquisition of important individual sites.¹⁷ This was a much broader statute extending protection to cultural resources situated on all land under federal control. In addition, the major responsibility for federal preservation efforts was shifted from the legislative to the executive branch of government. Previously, Congress had determined which properties merited federal protection, but this Act empowered the President to designate sites of national landmark status.

Although the Antiquities Act was a step in the right direction, it had several major shortcomings. It extended protection only to cultural resources which were of national significance and were situated on federal land. The Secretary of the Interior was authorized to accept privately owned land voluntarily relinquished to the federal government,¹⁸ but there was no provision for acquisition by other means, such as condemnation or purchase. The Act afforded no protection for cultural resources which were of state or local significance or which were situated on state or privately owned land. Furthermore, it did not protect even the national monuments from the harmful actions of federal governmental agencies.

It is not really surprising, however, that the first generalized effort of Congress to preserve cultural resources should be so limited in scope. The Act comported with the previously accepted goal of promoting national pride. As noted, it applied only to properties with the strongest claim to federal protection, those of *national* significance located on *federal* land. These sites were also the least likely to involve areas of potential conflict with state and private interests.

¹⁵ 368 F. Supp. at 858.

¹⁶ 499 F.2d at 115.

¹⁷ For example, during the nineteenth century Congress had enacted legislation to preserve various individual sites such as Yosemite and Yellowstone National Parks, the Casa Grande Indian Ruins and various major Civil War battlefields. FED. ENVTL. LAW, *supra* note 5, at 1468-70.

¹⁸ 16 U.S.C. § 431 (1976).

B. *The Historic Sites Act of 1935*

The next step in the development of federal preservation law was the passage of the Historic Sites Act of 1935¹⁹ in which Congress, for the first time, declared cultural resource preservation to be a federal policy, albeit one couched in familiar terms.²⁰ The purpose of the Act was to protect properties of national significance through public ownership in order to promote a sense of national pride and patriotism.²¹

The Act authorized the Secretary of the Interior to investigate properties of potential archaeological or historical interest, to collect and to preserve data from them and to conduct the National Survey of Historic Sites and Buildings.²² The executive power of acquisition was expanded to allow the Secretary to acquire "by gift, purchase, or otherwise any property, personal or real, or any interest or estate therein. . . ."²³ In *Barnidge v. United States*,²⁴ the Eight Circuit held that "otherwise" included the power of condemnation. The Act also provided for limited federal financial aid and technical assistance to preserve non-federally owned properties that were dedicated to public use.²⁵ This was the first halting extension of federal protection to non-federally owned sites.

These modest statutes constituted the total body of federal preservation law until the 1960's. At that time national policy began to reflect a growing public association of cultural resources with environmental quality. This association was coupled with a concern for the potentially damaging consequences of governmental agency actions.²⁶

C. *The Reservoir Salvage Act of 1960 and the Amendments of 1974*

With the Reservoir Salvage Act of 1960,²⁷ Congress began in a limited way to extend its preservation efforts to the activities of federal agencies. This statute originally applied only to cultural resources endangered by federal water projects.²⁸ It was amended by the Ar-

¹⁹ *Id.* §§ 461-67.

²⁰ This statute proclaimed that "it is a 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." *Id.* § 461.

²¹ FED. ENVTL LAW, *supra* note 5, at 1474-76.

²² 16 U.S.C. §§ 462(a)-(c) (1976).

²³ *Id.* § 462(d) (emphasis added).

²⁴ 101 F.2d 295 (8th Cir. 1939).

²⁵ 16 U.S.C. § 462(e) (1976).

²⁶ See ANTHROPOLOGY, *supra* note 5; CONSERVATION ARCHAEOLOGY (1977) [hereinafter cited as ARCHAEOLOGY].

²⁷ 16 U.S.C. § 469 (1976).

²⁸ The Act directs any agency involved in the licensing or construction of a federal dam to notify the Secretary of the Interior of the proposed project. *Id.* § 469a. The Secretary must then conduct a survey of the site for any data of excep-

chaeological and Historic Preservation Act of 1974²⁹ which extended its application to the preservation of "scientific, prehistorical, historical and archaeological data . . ." endangered not only by federal dam projects, but by "any alteration of the terrain caused as a result of any Federal, federally assisted, or federally licensed activity or program."³⁰ Pursuant to the amended act, federal agencies must notify the Secretary of the Interior of a possible adverse effect on cultural resources from a project which involves any alteration of the land. The agency may undertake the recovery and preservation of data or request the Secretary of the Interior to do so.³¹ An important source of financing was also provided through the allotment of agency project funds to assist the salvage program.³² The amended act further reflected the expanding concept of the federal preservation interest. It authorized the Secretary of the Interior to conduct surveys and salvage operations for projects undertaken by private parties or state agencies on private or state property when federal financing was involved and all interested parties consented.³³ If the salvage work caused delay, however, the Secretary of the Interior was obliged to pay compensation.³⁴ Thus, with federal funds providing the required nexus, federal involvement moved beyond the mere regulation of federal land and federal activity into areas of stronger state and private interest.

D. *The National Historic Preservation Act of 1966*

This trend of federal intervention continued in the National Historic Preservation Act of 1966.³⁵ This Act introduced several important changes in federal preservation policy. For the first time, the inherent public benefit was no longer articulated in terms of promoting

tional archaeological or historical significance. Such material is to be collected and preserved whenever feasible. To carry out these tasks, the Secretary may enter into agreements with federal or state agencies, and private individuals or organizations, and he may use donated or appropriated funds. *Id.* § 469b.

²⁹ *Id.* § 469. This Act is also known as the Moss-Bennet Amendment to the Reservoir Salvage Act.

³⁰ *Id.* §§ 469-469a-1(a).

³¹ The Secretary of the Interior may also undertake such recovery and preservation on his own initiative if he determines that adequate provision has not been made, but he must act within 60 days to avoid burdensome delays. *Id.* § 469a-2(a) to -2(c).

³² The particular federal agency involved is directed to transfer to the Secretary of the Interior a sum not to exceed one percent of the project appropriations to finance the survey and the recovery and preservation activities. There are further provisions for appropriations for salvage activities which are not associated with specific projects. *Id.* § 469c.

³³ *Id.* § 469a-1(b).

³⁴ *Id.*

³⁵ *Id.* §§ 470-470t [hereinafter referred to as NHPA].

patriotism. Instead NHPA acknowledged cultural resources to be valuable community assets which contributed to a sense of identity and cohesiveness.³⁶ In addition the Act extended federal protection to a much broader range of properties encompassing cultural, architectural, archaeological and historical resources.³⁷ Thus, protection was no longer restricted to properties of national significance nor was preservation to be effected solely through public ownership.

The major substantive innovations consisted of an incentive program for financial aid³⁸ and a regulatory system aimed at promoting the participation of federal agencies in preservation efforts.³⁹ The Secretary of the Interior was directed to "expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture. . . ."⁴⁰ This National Register of Historic Places drew upon the earlier Registry of National Landmarks⁴¹ for its original core of properties and eligibility guidelines,⁴² but the scope of eligibility was broadened to include properties which have made important contributions to the heritage of a region, state, or local community.⁴³

The National Register has served as the country's official inventory of significant cultural resources. As such, it is a major planning tool that federal agencies must use in assessing the impact of their undertakings and those of federally financed or licensed activities on such properties.⁴⁴ In order to qualify for federal financial assistance, the

³⁶ NHPA declared "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people. . . ." *Id.* § 470.

³⁷ *Id.* § 470a(a)(1).

³⁸ Matching funds are made available to the states for preservation activities. The federal grants are generally limited to 50% of the cost, but they can amount to 70% for eligible projects. Although the states initially receive the federal funds, they may transfer them to qualified public and private programs. *Id.* §§ 470a-e.

³⁹ Folwer, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31 (1976).

⁴⁰ 16 U.S.C. § 470(a)(1) (1976).

⁴¹ The National Registry of Historic Landmarks was established in 1960. It is an inventory of properties based on the National Survey of Historic Sites and Buildings which had been authorized by the Historic Sites Act. As noted, eligibility was originally based on national significance in American history. FED. ENVTL LAW, *supra* note 5, at 1477-78, 1484.

⁴² For a comparison of the criteria of evaluation developed for the National Survey and those of the National Register see FED. ENVTL LAW, *supra* note 5, at 1477-78, 1484-87.

⁴³ *Id.* at 1484-88.

⁴⁴ Barnes, *The National Register of Historic Places and the Grant-in Aid Program*, in CULTURAL RESOURCES: PLANNING AND MANAGEMENT 55 (1978).

states must prepare statewide historic preservation plans under the direction of a State Historic Preservation Officer.⁴⁵ This has extended federal protection to the great body of cultural resources which have contributed to the quality of life in different parts of the country but which have not played a substantial role in national history.⁴⁶

NHPA also authorized the creation of the Advisory Council on Historic Preservation to administer the regulatory provisions of the Act and to provide a cabinet level review for the preservation related activities of other federal agencies.⁴⁷ The primary regulatory provisions under section 106 of NHPA⁴⁸ require all federal agencies to consider the effect of their activities on cultural resources. If a federal agency undertakes a project or exercises control over a non-federal project through licensing or funding, the agency must take into account any consequences for protected properties.⁴⁹

⁴⁵ The State Historic Preservation Officer (SHPO) serves as a liaison between the federal and state governments in matters concerning preservation activities. He is appointed by the governor to administer the National Register program within his jurisdiction. The SHPO is responsible for the development and implementation of a comprehensive statewide historic preservation plan which conforms to federal, state and local law. He supervises preservation projects, distributes federal funds, conducts a state-wide survey to inventory cultural resources and nominates eligible properties within the state to the National Register. 36 C.F.R. § 61.2 (1979). In Ohio, the SHPO is the Director of the Ohio Historical Society in Columbus.

⁴⁶ FED. ENTL LAW, *supra* note 5, at 1484-88.

⁴⁷ The Council has been an independent federal agency since 1977. It presently consists of 29 members: the Secretaries of Agriculture—Commerce—Defense—Health, Education and Welfare—Housing and Urban Development—Treasury—Interior—and Transportation; the Attorney General; the Administrator of the General Services Administration; the Secretary of the Smithsonian Institute; the Chairmen of the National Trust for Historic Preservation—the Council on Environmental Quality—the Federal Council on the Arts and Humanities; the Architect of the Capitol; the President of the National Conference of State Historic Preservation Officers; the Director of the International Communication Agency; plus 12 representatives of state and local government and private citizens appointed by the President on the basis of their experience in the field of historic preservation. Representatives of other government agencies dealing with cultural resources are invited to sit on the Council in a non-voting capacity. 16 U.S.C. § 470i (1976 & Supp. 1979).

⁴⁸ National Historic Preservation Act of 1966, § 106, 16 U.S.C. § 470f (1976).

⁴⁹ Section 106 provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic

The Council has established compliance procedures⁵⁰ which delineate agency responsibilities under section 106.⁵¹ Pursuant to these regulations, the agency must first determine whether a proposed undertaking will affect a protected property by causing a change in the historical, architectural, archaeological, or cultural character which originally made it eligible for the National Register.⁵² If the property will be unaffected, the project may proceed; but if the property will be affected adversely, the agency must try to find an acceptable alternative course of action. The Council then reviews the proposed undertaking and considers the compliance efforts of the agency.⁵³ If the proposal is unsatisfactory, the Council works with the agency to reach a compromise which is effected in a memorandum of agreement. If no agreement is possible, the full Council meets to consider the problem and sends its comments to the agency head.⁵⁴ Although the Council recommendations do carry considerable influence, they are not legally binding. The federal agency can ultimately reject the Council's section 106 comments, but it cannot do so arbitrarily.⁵⁵ The agency's good faith consideration of the Council's comments is relevant in determining the agency's compliance with the National Environmental Policy Act of 1969.⁵⁶

Preservation established under sections 470i to 470t of this title a reasonable opportunity to comment with regard to such undertaking.

Id.

⁵⁰ See 36 C.F.R. §§ 800.1-15 (1979). The application of section 106 has gradually been broadened. Originally it protected only properties which were actually listed on the National Register. The review was first extended to properties which had been nominated but not yet accepted to the National Register. Executive Order No. 11593 then directed federal agencies to follow section 106 procedures for federally owned or controlled properties which were likely to qualify for the National Register and to adapt their programs to further the preservation of non-federal properties. Executive Order No. 11593, 36 Fed. Reg. 8921 (May 15, 1971) *reprinted in* 16 U.S.C. § 470 (1976). NHPA as amended in 1976 now requires section 106 compliance for all properties eligible for the National Register. 16 U.S.C. § 470f (1976). Congress has thereby accorded statutory recognition to the executive order directives on procedural review. For a discussion of the 1976 amendment to NHPA, see PARK PRACTICE PROGRAM, NATIONAL PARK SERVICE, TRENDS IN HISTORIC PRESERVATION 5 (1977).

⁵¹ Procedures for the Protection of Historic and Cultural Properties, 36 C.F.R. §§ 800.1-15 (1979).

⁵² *Id.* § 800.3

⁵³ *Id.* §§ 800.4(d), 800.6(b)(1)-(4).

⁵⁴ *Id.* §§ 800.6(b)(5)-(7), 800.6(c)(1)-(5).

⁵⁵ *Id.* § 800.6(c)(6)-(8).

⁵⁶ 42 U.S.C. §§ 4321-47 (1976) [hereinafter referred to as NEPA]. NEPA requires a federal agency to prepare an Environmental Impact Statement (EIS) in which it describes the environmental consequences of any major undertakings. Prior to making the EIS, the responsible federal official must consult with and obtain the comments of any federal agency which has jurisdiction or special expertise in the subject area. *Id.* § 4332(2)(C). The good-faith consideration given to

Section 106 has some further limitations. Only federal agencies are required to comply with its procedures.⁵⁷ Absent a federal nexus, the review process does not apply to state or private actions which threaten National Register properties. Such a problem arose in *Ely v. Velde*⁵⁸ where suit was brought to enjoin the construction of a state prison in the vicinity of historic properties until the review requirements of NHPA and NEPA were satisfied. The court held that a *state* agency receiving a federal grant for a prison construction project was not required to comply with NHPA section 106 requirements, although the *federal* agency was obliged to do so before dispensing any funds.⁵⁹ Even though the project was fully planned and carried out by the state, the court found federal agency compliance to be required so long as there was some federal contribution to the undertaking.⁶⁰

The state then attempted to circumvent the NHPA and NEPA compliance requirements by reallocating the federal grant to other projects and building the prison with state funds. This precipitated a new round of litigation.⁶¹ The appellate court ultimately held that the prison project retained its federal character so long as the state retained the federal money since the reallocation merely freed state funds to finance the project.⁶²

Other courts have indicated a willingness to go to considerable lengths to find federal agency involvement in essentially non-federal projects. For example, in *Edwards v. First Bank of Dundee*,⁶³ an action was brought to enjoin the demolition of a National Register property for the relocation of a bank until the Federal Deposit Insurance Corporation (FDIC) complied with section 106 procedures. Although this was a private undertaking, the district court held that there was sufficient federal involvement for purposes of NHPA because the bank was licensed

the Council's comments is significant in determining the adequacy of the EIS. NEPA procedures specifically require the EIS to contain the information considered by the agency in its preparation, including "surveys and studies required by . . . agencies . . . under the National Historic Preservation Act of 1966." 40 C.F.R. § 1502.25 (1980). For a full discussion of NEPA, *see* notes 65-87 *infra* and accompanying text.

⁵⁷ 16 U.S.C. § 470f (1976).

⁵⁸ 451 F.2d 1130 (4th Cir. 1971).

⁵⁹ *Id.* at 1137, 1139. There is one situation in which the section 106 review applies to non-federal agencies. Local community development programs accepting federal funds under the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-17 (1976), are required to comply with the review provisions of NHPA and NEPA. *See* Fowler, *supra* note 39, at 48.

⁶⁰ *Ely v. Velde*, 451 F.2d 1130, 1137-38 (4th Cir. 1971). NEPA was also held to apply. *Id.*

⁶¹ *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974).

⁶² *Id.* at 257.

⁶³ 393 F. Supp. 680 (N.D. Ill. 1975), *rev'd*, 534 F.2d 1242 (7th Cir. 1976).

and insured by FDIC. The Seventh Circuit refused to countenance such "legerdemain" and declared that this relationship did not amount to the requisite federal agency involvement since the FDIC's licensing authority did not give it any control over the bank directors with regard to non-banking activities.⁶⁴

In summary, NHPA provides a large measure of protection to those properties which can satisfy its threshold requirement of National Register eligibility. A federal undertaking with any adverse effect on such a property will precipitate a section 106 review. Although the NHPA—created Advisory Council has no enforcement powers, its recommendations focus attention on the cultural value of an endangered property and place the onus of a good faith evaluation on the federal agency.

E. *The National Environmental Policy Act of 1969*

With the passage of the National Environmental Policy Act in 1969,⁶⁵ Congress declared a national policy of environmental protection which encompassed the preservation of cultural resources.⁶⁶ The Act acknowledged that the nation has a responsibility to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice. . . ."⁶⁷ Economic and technological benefits are to be weighed against these values when assessing proposed undertakings.⁶⁸ Federal agencies are also required to consider the impact of the proposed activities on the environment as a fundamental part of their planning process. This goal is attained through the agency's preparation of an Environmental Impact Statement (EIS).⁶⁹ This statement must detail the environmental impact of the proposed

⁶⁴ 534 F.2d at 1245-46.

⁶⁵ 42 U.S.C. §§ 4321-47 (1976).

⁶⁶ NEPA provides:

[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.

Id. § 4331(a).

⁶⁷ *Id.* § 4331(b)(4).

⁶⁸ *Id.* § 4332(B).

⁶⁹ All federal agencies must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the environment, a detailed statement. . . ." *Id.* § 4332(2)(C).

action, any unavoidable adverse effects on the environment, alternatives to the proposed action, the relationship between short-term environmental consequences and long-term effects on productivity and any irreversible and irretrievable resource commitments required to implement the proposal.⁷⁰

Litigation dealing with historic preservation under NEPA has usually involved activities affecting both cultural and natural resources.⁷¹ Sometimes cases have been brought under both NEPA and NHPA.⁷² Once NEPA has been held to apply, however, the property comes under the protection of the extensive body of NEPA case law and administrative regulations. NEPA and NHPA can complement each other, but they are not necessarily coincident in their application.

This relationship in the application of NEPA and NHPA becomes evident when key provisions of the two statutes are compared. NHPA protects properties which are either listed⁷³ or eligible for listing on the National Register.⁷⁴ NEPA, however, applies to "preserve important historic, cultural and natural aspects of our national heritage. . . ."⁷⁵ It does not require the property to meet some minimum standard of importance, such as National Register eligibility. On the other hand, NEPA does require an EIS for "major Federal actions significantly affecting the quality of the human environment. . . ."⁷⁶ The protection of a NEPA review is thus afforded only to those undertakings which satisfy the threshold determination of a 1) "major," 2) "federal action," 3) that

⁷⁰ *Id.* NEPA also created the Council on Environmental Quality (CEQ) which has primary responsibility for coordinating federal environmental activities and administering the Act. The CEQ also assists the President in the investigation and formulation of environmental programs and in the preparation of an annual Environmental Quality Report to Congress. The CEQ is also authorized to issue guidelines for the federal agencies to assist them in implementing the provisions of NEPA. *Id.* §§ 4342-47.

⁷¹ One commentator reviewing the litigation in this area has observed:

Generally, the cases that have dealt with effects upon cultural resources have been cases where the impacts upon cultural resources have accompanied effects on the natural environment. These cases have considered the effect on the cultural environment as one factor to be weighed in determining the total environmental impact of a project as required by NEPA. The opinions draw no distinction between natural and cultural resources as proper considerations for NEPA review.

FED. ENV'TL. LAW, *supra* note 5, at 1511-12.

⁷² See, e.g., *WATCH v. Harris*, 603 F.2d 310 (2d Cir. 1979); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971) (*Ely I*); *Ely v. Velde* 497 F.2d 252 (4th Cir. 1974) (*Ely II*).

⁷³ Prior to the 1976 amendments to NHPA, some actions were also brought under Executive Order No. 11593 in cases where the properties were nominated or eligible for the National Register but were not yet listed. See, e.g., *James v. Lynn*, 374 F. Supp. 900 (D. Colo. 1974).

⁷⁴ 16 U.S.C. § 470f (1976).

⁷⁵ *Id.* § 4331(b)(4) (1976).

⁷⁶ *Id.* § 4332(2)(C) (1976).

has a "significant effect" on the environment. NHPA, however, requires a section 106 review and comment for any undertaking that has an adverse effect on a property eligible for the National Register.⁷⁷

The 1979 decision of *WATCH v. Harris*⁷⁸ demonstrated some interesting developments in the complementary use of NHPA and NEPA in preservation litigation. A community action group sought a preliminary injunction against a Housing and Urban Development (HUD) financed urban renewal project which threatened a carriage house found in 1978 to be eligible for the National Register. The lower court held HUD had not fulfilled its obligations under NEPA since the discovery of the historic property required the agency to make a new threshold EIS determination.⁷⁹ The court found, however, that NHPA did not apply because HUD had approved the project prior to the 1976 amendments which extended the section 106 review to National Register eligible properties and prior to the discovery of the carriage house's historic value.⁸⁰ The lower court relied upon a "cut off" principle first advanced in *Kent County Council for Historic Preservation v. Romney*⁸¹ which distinguished between the ministerial expenditure of federal funds and the discretionary approval of the expenditure.⁸² The lower court apparently reasoned that the NHPA section 106 requirement should be met prior to the discretionary approval of a federal expenditure since the purpose of the section 106 review is to consider the consequences of an undertaking while the federal agency still exercises some control over it. But where federal involvement is limited to financing, the agency's ability to modify the project ceases when it makes a

⁷⁷ Procedures for the Protection of Historic and Cultural Properties, 36 C.F.R. § 800.1(b)(1) (1979).

⁷⁸ 603 F.2d 310 (2d Cir. 1979).

⁷⁹ *Id.* at 317-18.

⁸⁰ *Id.* at 316-17. The court also found the federal agency guidelines issued pursuant to Executive Order No. 11593 to be inapplicable since they did not extend the section 106 review to National Register eligible properties until 1974. 36 C.F.R. § 800.4 (1979). In this case, the HUD contract had been executed in 1973.

⁸¹ 304 F. Supp. 885 (W.D. Mich. 1969).

⁸² In *Kent County*, the district court refused to enjoin the destruction of a historic building pending a NHPA section 106 review. The demolition was part of a local urban renewal project approved by HUD prior to the enactment of NHPA. Plaintiffs conceded that NHPA was not retroactive, but they maintained a section 106 review was still required because the approved federal funds had not yet been disbursed. In rejecting this argument, the court distinguished between the agency approval of federal funding and the disbursement of the money. It held the former to be a discretionary action, while the latter was characterized as ministerial in nature. The cut-off for the application of section 106 was at the time of project approval because afterward the agency was committed to make payment. At that point the project ceased to be a federal undertaking since the federal agency no longer had any control over it. The subsequent disbursement of funds was insufficient to invoke the application of a NHPA review. *Id.* at 888.

funding commitment.⁸³ All that then remains is the ministerial expenditure of these funds which does not precipitate a section 106 review.

On the appeal of *WATCH*, the Second Circuit held that both NEPA and NHPA applied,⁸⁴ but it distinguished between the approval of a project as a single comprehensive undertaking or as a series of severable phases.⁸⁵ This enabled the court to circumvent the strict application of the "cut off" principle. In this case, the contract called for HUD to approve each stage before the disbursement of funds. Since section 106 could be interpreted to require either a single or a periodic review in this situation, the court held that the latter would more closely fulfill the purpose of the statute to provide a "meaningful" review.⁸⁶ HUD was therefore required to comply with the amended NHPA for subsequent phases of the project and an account of these compliance efforts was to be incorporated into the EIS.⁸⁷ In this way, NHPA served to strengthen the procedural safeguards of NEPA.

F. *Executive Order No. 11593*

In 1971, President Nixon issued Executive Order No. 11593, entitled "Protection and Enhancement of the Cultural Environment,"⁸⁸ which represented an effort to integrate the growing body of preservation law. This order reaffirmed the national commitment to cultural resources and placed an affirmative duty on federal agencies to seek out, inventory and nominate to the National Register all eligible properties under their control. Federal agencies were also to comply with the section 106 review procedures even if the properties had not yet been nominated to the National Register.⁸⁹ In addition, the agencies were required to institute procedures to assure that federal programs contributed to the preservation and enhancement of non-federally owned cultural resources.⁹⁰ In this way, the section 106 review process was extended to non-federally owned properties eligible for the National Register. The directives of the Executive Order were subsequently incorporated into NHPA by amendment in 1976.⁹¹

⁸³ See generally *Watch v. Harris* 603 F.2d 310, 315-17 (2d Cir. 1979).

⁸⁴ *Id.* at 319.

⁸⁵ *Id.* at 323-24.

⁸⁶ *Id.*

⁸⁷ The threshold question of whether there is a need for an EIS must be answered here in the affirmative since the adverse effect on a National Register eligible property constitutes a "significant" environmental effect. 42 U.S.C. § 4332(c) (1976).

⁸⁸ 36 Fed. Reg. 8921 (May 15, 1971) reprinted in 16 U.S.C. § 470 (1976).

⁸⁹ *Id.* § 470(2)(b).

⁹⁰ *Id.* § 470(1).

⁹¹ *Id.* § 470f.

G. *The Archaeological Resources Protection Act of 1979*

By the early 1970's the fundamental body of contemporary federal preservation law was already in existence. This reflected the changing public attitude toward cultural resource protection since the turn of the century and offered a variety of approaches to implementation through public ownership, criminal penalties, regulation and economic incentives. Subsequent expansion of federal protection was accomplished largely through a broadening application of existing legislation by amendment, executive order, administrative regulation and judicial decision.⁹²

After the 1974 *Diaz*⁹³ decision successfully challenged the criminal provisions of the Antiquities Act,⁹⁴ there remained no clearly enforceable federal criminal penalties for damaging cultural resources.⁹⁵ At the same time, growing public interest in our national heritage and its tangible remnants stimulated both the commercial exploitation of cultural resources and a desire to protect them through appropriate sanctions.⁹⁶ Although the criminal provisions of the Antiquities Act had lain dormant for nearly seventy years,⁹⁷ Congress felt obliged to

⁹² Congress did introduce some tax incentives to encourage historic preservation in the 1976 tax code reform, but this topic is beyond the scope of the present article. See generally, Note, *State and Federal Tax Incentives for Historic Preservation*, 46 U. CIN. L. REV. 833 (1977).

⁹³ *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). For a discussion of this case, see notes 14-16 *supra* and accompanying text.

⁹⁴ It has been suggested that the court did not find the 1906 Act unconstitutional on its face, but only in its application of the undefined term "antiquities" to a four year old religious artifact. The provision might have been upheld in a case involving the application of the term in line with common usage, *e.g.*, to an indisputably ancient object. Palacios & Johnson, *An Overview of Archaeology and the Law*, 51 NOTRE DAME LAW. 706, 709-10 (1976). When a similar challenge arose in the Tenth Circuit, that court upheld the Act finding that the language was not unconstitutionally vague when the term was used in reference to an artifact over 800 years old. *United States v. Smeyer*, 596 F.2d 939 (10th Cir. 1979). This split between the circuits has been resolved with the passage of the Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470).

⁹⁵ Of course the *Diaz* decision was only binding in the Ninth Circuit, but this encompasses most of the western states and the Pacific islands with their huge tracts of federal lands and rich Hispanic, Indian and Polynesian heritage. Even in the Ninth Circuit, however, archaeological resources were not totally without protection. In *United States v. Jones*, 607 F.2d 269 (9th Cir. 1979), the court held that neither the Antiquities Act nor *Diaz* precluded the prosecution of site looters under general theft statutes. The defendants subsequently waived their *ex post facto* immunity because of the harsher penalty of the general theft provisions. They were convicted under the 1979 Act and were sentenced to prison terms ranging from one year to 18 months.

⁹⁶ H.R. REP. NO. 311, 96th Cong., 1st Sess. 7 (1979).

⁹⁷ In *Diaz*, the court noted that "[c]ounsel on neither side was able to cite an

reassert their validity and strike down the *Diaz* decision.⁹⁸ In October of 1979, the Archaeological Resources Protection Act was passed.⁹⁹

The new statute begins with a particularized statement of congressional findings,¹⁰⁰ followed by a declaration of purpose which is framed in general terms of public benefit without any reference to patriotic inspiration.¹⁰¹ The scope of this Act is much more restricted than NHPA, NEPA and the Archaeological and Historic Preservation Act of 1974¹⁰² in that it protects only archaeological resources on federal and Indian lands.¹⁰³ No mention is made of other cultural resources, *e.g.*, those of

instance prior to this in which conviction under the statute was sought by the United States." *United States v. Diaz*, 499 F.2d 113, 114 (1974).

⁹⁸ In a discussion of the background of the proposed 1979 Act, the Report from the House Committee on Interior and Insular Affairs stated:

In a 1974 decision, the United States Court of Appeals for the Ninth Circuit held that the 1906 Act was unconstitutional. . . . [T]herefore, the Act is legally unenforceable in . . . Arizona, California, Nevada, Oregon, Washington, Montana, Idaho, Alaska, Hawaii and Guam.

That court decision, coupled with the dramatic rise in recent years of illegal excavations on public lands and Indian lands for private gain, prompted Members of the House and Senate to introduce legislation intended to provide adequate protection to archaeological resources located on public lands and Indian lands.

H.R. REP. NO. 311, 96th Cong., 1st Sess. 7 (1979).

⁹⁹ Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470). For a discussion of the background and provisions of the 1979 Act, see Rosenberg, *Federal Protection for Archaeological Resources*, 22 ARIZ. L. REV. 701 (1980).

¹⁰⁰ Congress acknowledged that "archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage; these resources are increasingly endangered because of their commercial attractiveness; existing Federal laws do not provide adequate protection. . . ." and that much important archaeological data in the hands of private individuals could be made available voluntarily to professional archaeologists and institutions. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, § 2(a), 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470aa).

¹⁰¹ The Act states:

The purpose of this Act is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act.

Id. § 2(b) (to be codified in 16 U.S.C. § 470aa).

¹⁰² 16 U.S.C. § 469 (1976). See note 29 *supra* and accompanying text.

¹⁰³ With *Diaz* in mind, Congress was careful to define key terms: "[A]rchaeological resource' means any material remains of past human life or activities which are of archaeological interest. . . . No item shall be treated as an archaeological resource . . . unless such item is at least 100 years old." "Public lands" are those lands owned or administered by the United States as part of the

historic or architectural significance, or of those resources which are not on federally controlled lands. This limited and carefully circumscribed application is perhaps attributable to the stronger penalty provisions; those properties which do come within its scope are provided a much higher level of protection through realistic deterrents.¹⁰⁴

Anyone wishing to excavate or remove archaeological resources on public or Indian lands must first obtain a federal permit¹⁰⁵ for which the Act sets definite guidelines aimed at curbing commercial exploitation.¹⁰⁶ The new permit requirement supersedes that of the Antiquities Act for prospective applicants, but it does not affect permits already issued under the earlier law.¹⁰⁷ Compliance with NHPA section 106 requirements are also waived,¹⁰⁸ presumably because the process of permit issuance has its own procedural safeguards. Violation of the permit requirement and traffic in illegally acquired artifacts are declared to be criminal acts.¹⁰⁹ Even a violation of state or local law with some connec-

national park, wildlife refuge and forest systems and all other lands held in fee by the United States, except the Outer Continental Shelf and those lands under the jurisdiction of the Smithsonian Institution. "Indian lands" are those lands of Indian tribes or individuals that are either held in trust by the United States or subject to a federally imposed restraint against alienation. *Id.* § 3 (to be codified in 16 U.S.C. § 470bb).

¹⁰⁴ *Id.* §§ 6-8 (to be codified in 16 U.S.C. §§ 470ee-470gg).

¹⁰⁵ *Id.* § 4 (to be codified in 16 U.S.C. § 470cc). Application for the excavation permit must be made to the "Federal land manager." This is the head of the department or agency having primary management authority over the property or the Secretary of the Interior for those properties not under the control of another department or agency. *Id.* § 3 (to be codified in 16 U.S.C. § 470bb).

¹⁰⁶ The applicant must establish that he is qualified to undertake the activity, that the excavation is for the purpose of furthering archaeological knowledge, that the project will not conflict with any land management plans and that any artifacts removed will remain federal property to be preserved in a suitable scientific or educational institution. *Id.* § 4(b) (to be codified in 16 U.S.C. § 470cc).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Section 6 provides:

(a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit . . . or . . . exemption. . . .

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource . . . excavated or removed from federal lands or Indian lands in violation of—

(1) the prohibitions contained in subsection (a), or

(2) any provision, rule, regulation, ordinance or permit in effect under any other provision of Federal law.

(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

Id. § 6 (to be codified in 16 U.S.C. § 470ee).

tion to interstate commerce is made a federal crime,¹¹⁰ subject to both federal court jurisdiction and stringent criminal sanctions.¹¹¹ In addition, the Act imposes civil penalties for the violation of "any prohibition contained in an applicable regulation or permit."¹¹² Procedures are established for an administrative determination of civil liability with limited judicial review¹¹³ and a system of rewards¹¹⁴ and forfeitures.¹¹⁵

Thus the Archaeological Resources Protection Act reinstates a strengthened criminal penalty; in addition, it introduces several new tools to promote enforcement. Other provisions exempt information on the location of archaeological sites from the Freedom of Information Act,¹¹⁶ promote the cooperation of private collectors with professional archaeologists¹¹⁷ and require an annual report to Congress on the im-

¹¹⁰ Congress stated:

[Section 6] prohibits on public or Indian lands the excavation, removal, alteration, or defacement of archaeological resources except in accordance with permits or exemptions; prohibits dealing in those resources which are excavated or removed illegally, and precludes the sale and transportation in interstate or foreign commerce when the resources are involved in violations of State or local law.

H.R. REP. NO. 311, 96th Cong., 1st Sess. 11 (1979).

¹¹¹ The maximum penalty is a \$10,000 fine and one year in prison, but this is doubled if the value of the archaeological resource and the cost of restoration exceed \$5,000. A second offense is subject to a maximum \$100,000 fine and five years in prison. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, § 6, 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470ee). Although these measures are considerably harsher than those of the Antiquities Act, Congress considered them necessary to deter proscribed activity. "Much has changed since the 1906 Act was passed. The commercial value of illegally obtained artifacts has substantially increased and the existing penalties under the 1906 Act have proven to be an inadequate deterrent to theft of archaeological resources from public lands." H.R. REP. NO. 311, 96th Cong., 1st Sess. 7 (1979).

¹¹² Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, § 7, 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470ff). The civil sanction is to reflect the value of the archaeological resource and the cost of restoration and repair of the artifact and the site. For a second offense the penalty may be twice the fair market value of destroyed or unrecovered artifacts plus twice the cost of restoration and repair of damaged archaeological resources and sites. *Id.*

¹¹³ Suit must be brought within 30 days of the assessment. The federal district court must hear the action on the record of the administrative hearing and must sustain the decision if there is substantial evidence to support it. *Id.*

¹¹⁴ *Id.* § 8 (to be codified in 16 U.S.C. § 470gg). Anyone furnishing information which ultimately leads to the collection of a criminal or civil monetary penalty is entitled to a reward of one-half the amount collected. The maximum reward is \$500. *Id.*

¹¹⁵ Any vehicle or equipment used in prohibited activities is subject to forfeit. *Id.* Such a penalty is potentially more costly than monetary payments based on commercial value and repair costs.

¹¹⁶ *Id.* § 9 (to be codified in 16 U.S.C. § 470hh).

¹¹⁷ *Id.* § 11 (to be codified in 16 U.S.C. § 470jj).

plementation of the Act.¹¹⁸ But as with earlier preservation innovations, the initial application is limited. Among the total body of cultural resources, archaeological sites and artifacts on federally controlled lands have the most firmly established federal nexus and generally involve the least intrusion on state and private interests. A sensitivity to such interests is exhibited in provisions allowing for some participation of state governors and Indian tribes in the permit issuing process, the disbursement of penalties and forfeitures, and the disclosure of archaeological site locations. Mining interests and collectors of rocks and small surface artifacts of negligible value, such as arrowheads, coins and bullets, are also specifically exempted from the Act.¹¹⁹

It is still too early to assess the effect of this new statute. Although the criminal provisions of the Antiquities Act were seldom applied, Congress has reaffirmed the validity of punitive sanctions to protect archaeological resources and this encourages enforcement. Undoubtedly the Act will have its greatest impact in the western states with their large concentrations of public and Indian lands. This is especially true of those states comprising the Ninth Circuit where the *Diaz* decision can no longer be relied upon. In the eastern states and in urban areas, fewer properties can meet the threshold requirement of federal ownership or control.

As its title indicates, the new law protects only archaeological resources. It has no application to those cultural resources which are more appropriately considered to be within the ambit of historic preservation.¹²⁰ An examination of federal preservation law reveals, however, that it frequently follows a pattern of limited initial application with gradual extension through legislative and judicial action. Of course, the detailed definitions of this act allow less leeway for interpretation via administrative regulations and court opinions. However, the 1979 Act could well serve as a foundation for additional legislation at the federal or state level. In this way its now limited application to archaeological resources eventually may be extended to a broader range of cultural resources.

This diverse collection of statutes comprises the current federal protection for cultural resources. Unfortunately, many properties still do

¹¹⁸ *Id.* § 13 (to be codified in 16 U.S.C. § 470ll).

¹¹⁹ *Id.* § 6(g) (to be codified in 16 U.S.C. § 470ee).

¹²⁰ As noted the term "archaeological resources" is expressly defined within the Act. See note 103 *supra*. Although there is some room for additional inclusions through administrative regulation, the limits of the term are clearly set by the Act itself. The scope of application is much more limited than that allowed by the more general language of the Antiquities Act which protected "historic . . . monuments." 16 U.S.C. § 433 (1976). These might include "historic landmarks, historic and prehistoric structures, and other objects of historic . . . interest" so long as they are of national significance and situated on federal land. *Id.* § 431.

not come within its boundaries since the federal safeguards do not apply in the absence of a federal nexus. In some cases, however, a state nexus exists which can bring an endangered property under the protection of state preservation law.

IV. STATE LEGISLATION

A. *Background and Initial Efforts*

In Ohio, cultural resource protection at the state level has left much to be desired. In 1966 the national concern which culminated in NHPA also focused state attention on the problem. This stimulated a certain amount of soul-searching and self-criticism in state surveys and reports. Although these efforts did not lead to any extensive reforms, they do give some insight into the status of cultural resource protection in Ohio at that time.

The reports and surveys revealed that numerous historic sites had been lost or were being threatened because of inadequate protective measures.¹²¹ Preservation activities were fragmented among state agencies, local authorities and private organizations, all loosely associated under the leadership of the Ohio Historical Society (OHS).¹²² These disorganized efforts were hampered by the lack of adequate centralization, information and funding.¹²³ Preservation related legislation was piecemeal, limited in scope, and poorly co-ordinated.¹²⁴ To the extent

¹²¹ In January, 1966 the Ohio Historical Society and the Legislative Service Commission conducted a survey of the state's 152 local historical societies. They inquired whether any significant historic sites had been demolished within the preceding 10 years and whether any such sites were in danger of destruction within the next 20 years. Of the 85 local societies responding, 52 claimed that 167 historic sites had been destroyed and 64 societies indicated that 166 properties were endangered. OHIO LEGIS. SERV. COMM'N, PRESERVATION OF HISTORIC SITES, STAFF RESEARCH REP. NO. 77, 8 (1966) [hereinafter cited as STAFF REP.].

¹²² *Id.* at 11.

¹²³ The state survey indicated that the local historical societies often were unaware of the existence of a historic property until it was already demolished. Indeed, the societies did not even agree on a common meaning for the term "historic site." This is not surprising, however, since they had neither a statewide inventory of historic properties nor official guidelines establishing uniform criteria of historic significance. Even when local groups did recognize that a significant property was endangered, they were often thwarted by community indifference, lack of knowledge concerning restoration and maintenance techniques or insufficient funds to procure or restore the property. *Id.* at 11-12.

¹²⁴ At that time, Ohio law did not clearly vest any one state agency with primary responsibility for the protection of cultural resources, although some government departments did have a peripheral interest in historic sites. Under Ohio Revised Code section 1501.02, the Department of Natural Resources was authorized to enter into agreements with federal agencies and to accept federal funds for the acquisition of lands for historical purposes. OHIO REV. CODE ANN. § 1501.02 (Page 1978). Its subdivision, the Division of Lands and Soils, was obliged

that any organization could have been said to have primary authority over cultural resources, it was the OHS.¹²⁵

to formulate its programs with due consideration for state lands under the control of the Ohio Historical Society. Under Ohio Revised Code section 155.21-26, the Department of Public Works, and subsequently the Director of Administrative Services, were required to cooperate with the OHS in the preservation of historic sites, artifacts and data found on state owned canal lands. *Id.* §§ 155.21-26. These state departments were vested with extensive power of eminent domain to carry out their responsibilities.

There were also some miscellaneous provisions in effect that dealt with historic properties. Ohio Revised Code section 5709.18 granted a tax exemption for lands containing "prehistoric earthworks" or "an historic building" if the property was dedicated to public use and was not held for profit. *Id.* § 5709.18. Ohio Revised Code section 307.23 authorized county commissioners to make appropriations to local historical societies. *Id.* § 307.23. Ohio Revised Code section 713.02 gave city planning commissions the power to control, preserve and care for historical landmarks. *Id.* § 713.02. Various local zoning and planning ordinances also could be applied to the protection of cultural resources. For a discussion of Ohio preservation law just prior to the passage of NHPA, see STAFF REP., *supra* note 121, at 13-16.

¹²⁵ The OHS was founded in 1885 as a non-profit corporation to promote the knowledge of history and archaeology. It gradually evolved into a quasi-public agency standing in a contractual relationship with the state. The OHS performs public functions for which it receives public funds. Its director is named to public commissions along with state department heads; six of its 15 trustees are appointed by the Governor; its financial records are examined by the State Auditor; and its employees are members of the state retirement system. Under Ohio Revised Code section 149.30, the responsibilities of the OHS include the creation, operation and maintenance of state memorials, the protection and restoration of structures, earthworks and monuments in its care, the collection and preservation of artifacts, data and documents, the preparation of a statewide inventory of significant archaeological and historical sites and criteria for eligibility, the administration of a marking system for designated properties and various research and educational obligations. OHIO REV. CODE ANN. § 149.30 (Page 1978). The OHS also administers the National Register program in the state and the Director is the State Historic Preservation Officer (SHPO) for Ohio. *See* note 45 *supra*.

Although the power of eminent domain has not been granted to the OHS by name, Ohio Revised Code sections 155.27 and 1743.06 authorize a corporation organized for the preservation of public parks and memorials to acquire the site of any battlefield or burial ground of American soldiers. OHIO REV. CODE ANN. §§ 155.27 & 1743.06 (Page 1978). Ohio Revised Code section 1743.07 authorizes a corporation maintained by and operating on behalf of the state for the preservation of historic or prehistoric sites or monuments to acquire sites of historic or archaeological significance. *Id.* § 1743.07.

The scope of these provisions is unclear and there have been no cases to illuminate them. Apparently they refer to the OHS, however, Ohio Revised Code sections 155.27 and 1743.06, which are virtually identical, might apply to local historical societies as well. *Id.* §§ 155.27 & 1743.06. Perhaps such local associations receiving county subsidies under Ohio Revised Code section 307.23 could also be considered to be "maintained by and operating on behalf of the state" for purposes of Ohio Revised Code section 1743.07. In any case, the condemnation power extended by these provisions is poorly demarcated and potentially

In November of 1966,¹²⁶ the Ohio Legislature's Committee to Study Historic Site Preservation issued a report in which it suggested that OHS be required to assume additional public duties.¹²⁷ This report recommended that the OHS devise uniform criteria for the designation of historic sites and advise local historical societies on their usage; initiate and conduct a continuing statewide inventory of state and locally significant historic sites; maintain an active and current registry of all designated historic sites; establish a marking system to identify eligible historic sites; and provide advisory, technical, and if necessary, financial assistance to local historical societies in their preservation and restoration work.¹²⁸ The Committee also recommended the creation of a state advisory board representing preservation related interests to advise and assist the OHS in devising and implementing a comprehensive preservation program for the state.¹²⁹

These recommendations clearly reflected the influence of concurrent federal developments. The incipient NHPA established a pattern for the states to follow: A central agency must prepare an inventory of cultural resources to serve as a planning tool while an advisory council monitors, advises and establishes guidelines for activities affecting protected properties. The spirit of NHPA also motivated some state level activity in Ohio. Before the Committee had even issued its report, the OHS had begun to prepare an inventory of historic sites, although the legislature had neither delegated this responsibility to the Society nor granted it the necessary funds.¹³⁰

In 1967, the legislature added the Committee's recommendations to the duties of the OHS¹³¹ and created the Ohio Historic Site Preservation Board¹³² to assist OHS in its preservation program. The Governor also

abusive. It is also interesting to note that these parallel code sections reflect the emphasis on military history and public ownership that dominated early federal preservation efforts. For a discussion of the OHS and related legislation, see STAFF REP., *supra* note 121, at 14-16; 6 O. JUR. (THIRD) ASSOCIATIONS §§ 155-58 (1978).

¹²⁶ NHPA had just been enacted in the preceding month.

¹²⁷ REPORT OF THE COMMITTEE TO STUDY HISTORIC SITE PRESERVATION, reprinted in STAFF REP., *supra* note 121, at 23-26.

¹²⁸ *Id.* at 25.

¹²⁹ *Id.* at 25-26.

¹³⁰ STAFF REP., *supra* note 121, at 17-18.

¹³¹ OHIO REV. CODE ANN. § 149.30 (Page Supp. 1978).

¹³² The Ohio Historic Site Preservation Advisory Board presently consists of 17 members who are appointed by the Governor and serve for three years. The membership must include at least one historian, archaeologist, architectural historian, architect, historical architect and American Indian. Additional members may include professional planners, engineers, attorneys and representatives of the Recreation and Resources Commission, Ohio Travel Council, Department of Economic and Community Development, Department of Ad-

designated the director of the OHS to serve as State Historic Preservation Officer.¹³³ After this brief flurry, there was little legislative activity on behalf of cultural resources for nearly a decade.

B. *Am. Sub. H.B. No. 418*

The impetus for additional state legislation was initially provided by Ohio's American Indian groups. They were concerned about the destruction of their ancestral burial sites and wanted a law to curtail the desecration of Indian graves and skeletal remains. The Ohio archaeological community became interested in the initial legislative proposals which were redrafted to extend protection to a comprehensive class of archaeological sites and artifacts. As something of an afterthought, some parallel provisions were also included for the protection of historic properties.¹³⁴ Finally in 1976, after more than a year of consideration and extensive revision, Amended Substitute House Bill No. 418 was enacted by the Ohio Legislature.¹³⁵

The federal influence is apparent in this statute.¹³⁶ Significant cultural resources are to be nominated to a central register of protected properties. This brings them under an umbrella of procedural safeguards. Potentially damaging activities are restricted and access to the properties is controlled through a state administered permit system with modest criminal sanctions for violation.¹³⁷ The OHS is responsible for implementing the provisions of House Bill 418 while its subdivision, the Ohio Historic Preservation Office, administers both the National Register and the State Registry programs.¹³⁸

Ohio Revised Code section 149.51 directs OHS to prepare a State Registry of Archaeological Landmarks "[i]n order to ensure that the

ministrative Services, Department of Natural Resources, Ohio Archaeological Council, Ohio Arts Council, patriotic and veterans' organizations and local historical societies. The Advisory Board is to assist the OHS in its preservation program, to suggest preservation related legislation and to facilitate state compliance with federal preservation programs and SHPO responsibilities. *Id.* § 149.301.

¹³³ Klimoski, *supra* note 2, at 4.

¹³⁴ Conversation with Franco Ruffini, State Registries Program Manager, Ohio Historical Society, Columbus, Ohio (March 21, 1980).

¹³⁵ The major provisions of this statute are codified at OHIO REV. CODE ANN. §§ 149.51-.55 (Page 1978). For a discussion of this legislation, see Shipley, *Am. Sub. H.B. No. 418—A Review*, 28 OHIO ARCHAEOLOGIST (Supp. 1978).

¹³⁶ The amended duties of the Ohio Site Preservation Advisory Board now expressly require it to "encourage the designation of suitable sites on the National Register of Historical Places and under related federal programs" and to assist the SHPO in carrying out his duties. OHIO REV. CODE ANN. § 149.301 (Page Supp. 1979).

¹³⁷ OHIO REV. CODE ANN. § 149.54 (Page 1978).

¹³⁸ *Id.* §§ 149.51, .55. See also Ruffini, *Ohio State Registries Program*, 26 CITES & VILLAGE 7, 8 (1978).

scientific knowledge about both prehistoric and historic North American Indian cultures is made available to the public and is not willfully or unnecessarily destroyed or lost. . . ."¹³⁹ Eligibility for the Registry is based on an OHS determination of "archaeological significance,"¹⁴⁰ however, there is no further clarification of the criteria. Placement on the Registry depends upon the voluntary, uncompensated compliance of the property owner. If he is unwilling to accept restrictions on his land, the OHS cannot impose a landmark designation on the site.

If the owner is willing to comply, he and the Society execute a written agreement which is then recorded. The agreement must contain a legal description of the land parcel and "the accurate location of any known Indian mounds, earthworks, or burial or settlement sites. . . ."¹⁴¹ but the landmark is not otherwise delimited. Presumably, the entire parcel will not be so designated, although the statute does not indicate how the landmark area is to be determined. Procedurally, the agreement is treated as a deed for the conveyance of a property interest. Subsequent owners take title subject to the agreement, but they may terminate the agreement within sixty days of recording the transfer.¹⁴²

After the property is registered, several requirements must be satisfied by anyone wishing to remove skeletal remains or to dig, excavate, or remove any Indian mounds, earthworks, burial or settlement sites, or other recognizable evidence of prehistoric or historic Indian settlement or occupation. He must give the director of the OHS written notice before disturbing the site; he must afford an OHS representative access to the site to assist in planning, recording the excavation and gathering data; and finally, he must submit a written report to the director on the results of the excavation and the disposition of any artifacts or skeletal remains.¹⁴³ No one, including the landowner, may engage in archaeological survey or salvage work on a landmark property without obtaining a state permit, nor may anyone sell, offer for sale or possess any artifacts or skeletal remains removed from an archaeological landmark, unless he is authorized to do so.¹⁴⁴ A violation of this section can be enjoined. It is also a second degree misdemeanor which carries a maximum penalty of ninety days imprisonment, a \$750 fine,¹⁴⁵ and the cost of restoration.¹⁴⁶

¹³⁹ OHIO REV. CODE ANN. § 149.51 (Page 1978).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ OHIO REV. CODE ANN. § 2929.21(B) -.21(C) (Page 1975).

¹⁴⁶ OHIO REV. CODE ANN. § 2929.21(E) (Page 1979).

The meaning of these provisions is somewhat ambiguous. Presumably the property owner or public entities can excavate, build upon, cultivate and even destroy an archaeological landmark, so long as they afford the OHS an opportunity to minimize damage and to salvage artifacts and data. However, anyone wishing to undertake a formal archaeological survey or salvage project must meet requirements of professional competence to obtain a permit.

Since the Archaeological Landmark Registry has not yet been implemented,¹⁴⁷ comments on its operation are necessarily speculative. The Registry would appear to offer limited protection in that the landmark designation focuses public consciousness on the cultural value of the site. It also imposes some restrictions and procedural safeguards, although these only bind those parties who are willing to comply. The landmark status really depends on the cooperation of the land owner rather than on the archaeological value of the property or potential threats to its integrity. If the owner does not wish to accept the landmark designation, the OHS has no recourse for it cannot impose the status without his consent.

It is perhaps naive to assume that an owner will voluntarily surrender an interest in his land without compensation. The state controls not only reduce the owner's property rights in the site itself, but they also affect the surrounding land as well. For example, an owner must afford the OHS representative access to the landmark which is in effect the grant of an easement over the adjoining land. If the owner contemplates a future use of the landmark site, it is unlikely that he will readily commit himself to avoidable state controls that could cause him inconvenience and expense. To the extent that the presence of an archaeological landmark diminishes the owner's interest in the land with no economic offset, it also reduces the commercial value of the property as well.

If the owner does accept the landmark designation and later changes his mind, he can void the agreement with the OHS by transferring the title to the site. The new owner can then unilaterally cancel the agreement and the land will revert to its unencumbered status.

Ohio Revised Code section 149.55 establishes a State Registry of Historic Landmarks "[i]n order to assure that the scientific knowledge about Ohio's history is made available to the public and is not willfully destroyed or lost. . . ."¹⁴⁸ No person or government entity may "demolish, improve, remove, or otherwise destroy any historic building, or structure, or other historic place . . ."¹⁴⁹ on the Registry without following the prescribed procedure to provide notice, access and a

¹⁴⁷ As of January, 1981.

¹⁴⁸ OHIO REV. CODE ANN. § 149.55 (Page 1978).

¹⁴⁹ *Id.*

report to the OHS. The language and substance of this section parallel those which create the State Registry of Archaeological Landmarks. The previous comments regarding Ohio Revised Code section 149.51 apply to this section as well.¹⁵⁰

Ohio Revised Code section 149.52 provides for the dedication of archaeological preserves. This status affords a site a higher level of protection than that of a registered landmark, but it requires the owner to relinquish a greater interest in his land.¹⁵¹ It also places a greater responsibility on the OHS which is authorized to "accept articles dedicating as preserves real property upon which significant archaeological sites are located if funds are available for their preservation and protection."¹⁵² For purposes of this section, an "archaeological site" is defined as "any mounds, earthworks, burial or settlement sites, or other place where evidence of prehistoric or early historic settlement or occupation lies on or below the surface of the ground."¹⁵³

The creation of an archaeological preserve requires the cooperation of the owner who must execute and record "articles of dedication"¹⁵⁴ which are regarded as a conveyance of an interest in real property. The statute does not stipulate what this interest is. It might be the fee or some lesser interest, but this is negotiated on an individual basis.¹⁵⁵ The

¹⁵⁰ *Id.* § 149.51. See notes 139-46 *supra* and accompanying text. Brief mention might be made at this point of Ohio Revised Code section 149.30.41 which was also enacted in 1976. This statute authorizes the OHS to establish a Register of Historic Ohio Homesteads and Tracts of Land. If anyone can establish that a homestead or land parcel has been owned by or in the possession of his family for over a hundred years, he can list it on the Register. This entitles him to display an OHS approved plaque indicating participation in the program. This is largely a vanity provision since registration of a property conveys no additional protection obligation or privilege. The program might have some indirect benefit, however, for it promotes a sense of heritage and historical interest. OHIO REV. CODE ANN. § 149.30.41 (Page 1978).

¹⁵¹ *Id.* § 149.52.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ The phrase "articles of dedication" is not a term of art and its meaning is unclear. Apparently it was used in an earlier statute creating nature preserves and the legislature retained the language for the sake of consistency. It has been suggested that the vague terminology was deliberately employed to induce landowners to cooperate. A more precise and familiar term such as "deed" might cause "an adverse psychological reaction" in property owners who are apt to associate it more clearly with a surrender of the fee interest. Shipley, *supra* note 135, at 2.

¹⁵⁵ The statute provides in part:

Articles of dedication may contain provisions for the management, custody, and transfer to the state or the society of real property or any estate, or right therein, provisions defining the rights of the owner or operating agency and of the society and its agents, and such other provisions as may be necessary or advisable to carry out the uses and pur-

owner cannot dedicate property unless it is accepted by the OHS. He is not compensated for the land, but he can receive an exemption from local real estate tax for that portion of the property constituting the preserve.¹⁵⁶ All state agencies, subdivisions and other public entities, such as universities, may dedicate sites under their control as archaeological preserves.

Although the OHS must identify and salvage data from an archaeological landmark, the Society has neither the authority to prevent its destruction nor the responsibility for its maintenance. However, the OHS has a higher level of duty toward an archaeological preserve for such a site approaches the status of public property.¹⁵⁷ The OHS cannot accept articles of dedication unless it has sufficient resources to care for the property. Furthermore, since the Society does expend public funds on a preserve which is also apt to be removed from the tax roll, the dedication should provide more than a nominal public benefit. To that end, the director cannot accept a proposed preserve unless the articles "contain terms restricting the use of the property which adequately provide for its preservation and protection, for restoration where appropriate, and for archaeological research and study. Wherever possible . . . the articles shall provide for public access in order that the maximum benefit be obtained."¹⁵⁸

The dedication of an archaeological preserve can be amended by mutual agreement, but it cannot be revoked unless provision for rescission is expressly made in the articles of dedication.¹⁵⁹ The conveyance passes as an encumbrance on the land. The state cannot accept a property as an archaeological preserve and later convert it to another use except upon a finding by a court of common pleas of "an imperative and unavoidable public necessity for such other public use or purpose."¹⁶⁰ The Attorney General can bring suit for injunctive relief to enforce the terms of dedication.¹⁶¹ Violation of these terms or the sale, offer or

poses for which the property is dedicated. They may contain conditions under which the owner and the society may agree to rescind the articles. OHIO REV. CODE ANN. § 149.52 (Page 1978).

¹⁵⁶ As observed at note 124 *supra*, a tax exemption was already available for those archaeological sites and historic buildings which are held "for the purposes of preservation . . . and are not held for profit but dedicated to public use as prehistoric parks or historic grounds. . . ." *Id.* § 5709.18. House Bill 418 added the phrase, "or which are dedicated under section 149.52 of the Revised Code. . . ." *Id.* It would appear that the pre-existing language was broad enough to encompass the archaeological preserves so that the amendment actually added nothing of substance to this section.

¹⁵⁷ *Id.* § 149.52.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

possession of artifacts or skeletal remains improperly removed from an archaeological preserve is a second degree misdemeanor.¹⁶² Such acts are also subject to injunctive relief.

It is clear that the dedication of a preserve is a more formidable undertaking than the registration of a landmark. It is a mutually binding contract in which the owner gives up a substantial interest, perhaps even the entire fee, and the OHS obligates itself to preserve and maintain the property for the public benefit. Although the dedication cannot be unilaterally terminated, it is not altogether irrevocable. The parties can agree on terms of rescission and a cautious property owner might well insist on such an escape clause as a requirement for his compliance. The terms of dedication can be equitably enforced and violation is subject to criminal sanctions.

As in the landmark program, the creation of a preserve is wholly dependent on the cooperation of the landowner. The status of landmark, preserve or unprotected properly does not derive from the inherent archaeological value of the site, but rather from the extent of the uncompensated interest in the land that the owner can be persuaded to surrender to the state. Of course, the preserve program does offer a modest tax incentive, but this is a questionable inducement, particularly for a financially motivated landowner. Furthermore, the tax exemption plan might well cause future problems since local government entities are apt to view it as an encroachment by the state on their taxing authority.

Ohio Revised Code section 149.53 directs all state departments, agencies, units, instrumentalities and political subdivisions to "cooperate" with the OHS and the Historic Site Preservation Advisory Board in the preservation of archaeological and historic sites and in the recovery of data from them.¹⁶³ "[W]henever practical," state entities are to provide for survey and salvage work during the planning phases of their projects or before work begins. They must also require contractors working on public projects to "cooperate" with survey and salvage projects and to notify the OHS or the Historic Site Preservation Advisory Board of any archaeological discoveries.¹⁶⁴

This mandate presents certain problems of vagueness. The term "cooperation" is not defined or otherwise clarified, so it is uncertain what state entities must do to be in compliance. This allows them considerable discretion in interpreting the directive. It means, in effect, that they can "cooperate" to the extent that they choose to do so and their efforts sometimes leave much to be desired.¹⁶⁵ The preliminary

¹⁶² *Id.*

¹⁶³ *Id.* § 149.53.

¹⁶⁴ *Id.*

¹⁶⁵ Conversation with Franco Ruffini, *supra* note 134.

survey and salvage requirement can also be easily avoided if the state unit in question decides it is impractical.

Ohio Revised Code section 149.54 imposes a permit requirement for archaeological work on public or protected lands. The director of the OHS is authorized to establish rules for archaeological survey and salvage projects on state owned and administered land and on archaeological preserves and landmarks.¹⁶⁶ Anyone wishing to undertake such a project must satisfy the OHS concerning his professional competence and methodology in order to obtain a permit. A violation of the permit requirement may be enjoined or subject to criminal action as a second degree misdemeanor.¹⁶⁷

Although House Bill 418 was strongly influenced by NHPA, it also exhibits pronounced similarities to the Antiquities Act of 1906. It protects archaeological resources on public or quasi-public lands through landmark dedication, voluntary donations of property interests, regulation via government permit, and modest criminal sanctions. It also suffers from the same potentially fatal vagueness of language. Apparently the Ohio Legislature gave little heed to the *Diaz* decision.¹⁶⁸ This is in sharp contrast with Congress' approach when it reaffirmed the federal permit requirement and criminal sanctions in the 1979 Act.¹⁶⁹ Although a challenge has not yet arisen, it is questionable whether the penalty provisions of House Bill 418 could be enforced without further clarification.

Although the statute has been on the books since 1976, its programs are not yet in operation. In 1978, a Registration Department was established as a subdivision of the Historic Preservation Office of the OHS and staff positions were filled.¹⁷⁰ The Department has prepared procedural guidelines, forms and criteria of eligibility which are based largely on those of the National Register, but all of these have yet to be implemented. At present the Department is awaiting approval by the OHS Board of Trustees.¹⁷¹

C. *Suggested Legislation*

House Bill 418 represents the first legislative effort to deal with cultural resource protection at the state level in a centralized, coordinated program. Its provisions are weak, however, and implementation has been painfully slow. It is perhaps best viewed as a tentative,

¹⁶⁶ OHIO REV. CODE ANN. § 149.54 (Page 1978).

¹⁶⁷ *Id.*

¹⁶⁸ *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). For a discussion of this case, see notes 14-16 *supra* and accompanying text.

¹⁶⁹ *Archaeological Resources Protection Act of 1979*, Pub. L. No. 96-95, 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470).

¹⁷⁰ Ruffini, *supra* note 138, at 8.

¹⁷¹ Conversation with Franco Ruffini, *supra* note 134.

preliminary phase laying the foundation for stronger provisions. Additional legislation is needed to provide an effective level of protection.

Any new legislation should contain a policy statement in which the state acknowledges the intrinsic value of its cultural resources and commits itself and its agents to their protection. Such a demonstration of leadership would serve to clarify priorities for state entities and to provide them with a mandate to integrate preservation interests into their activities.

Key terms in the new statute should be clearly defined. House Bill 418 should also be amended to incorporate definitions, perhaps in a separate section similar to that of the federal Act of 1979.¹⁷² This would serve to clarify some of the uncertainties in the current law. For example, what constitutes "archaeological" or "historical significance"? Ohio Revised Code section 149.51 speaks of archaeological resources in terms of Indian cultural and skeletal remains¹⁷³ and these concerns figure prominently in the legislative history, but what about the remains of early non-Indian settlements? Do they come within the ambit of this section, or should they be considered historical landmarks? On the other hand, Ohio Revised Code section 149.55 speaks of "any historic building, or structure, or other historic place thereon. . . ."¹⁷⁴ This apparently pertains to extant surface structures and scenes of historic events, but does it also encompass ruins, subsurface remains and artifacts? The confusion is compounded when these sections are compared with Ohio Revised Code section 149.52 which authorizes the creation of archaeological preserves. In the latter, an "archaeological site" is defined as "any mounds, earthworks, burial or settlement sites, or other place where evidence of prehistoric or early historic settlement or occupation lies on or below the surface of the ground."¹⁷⁵ Is this definition meant to apply to the former sections or to distinguish them? The OHS is presently preparing criteria which deal with some of these ambiguous determinations, but legislative guidance would be desirable.

What is the scope of articles of dedication and what interest is conveyed to the state? It has been observed that this varies with the intent of the landowner, but it would be helpful if a statute set out the scope of the interest that could be transferred and established a presumption subject to alternative stipulation in the instrument.

Ohio Revised Code section 149.53 also lacks substance in its present form due to its imprecise language.¹⁷⁶ Both the OHS and state entities

¹⁷² Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, § 3, 93 Stat. 721 (1979) (to be codified in 16 U.S.C. § 470bb).

¹⁷³ OHIO REV. CODE ANN. § 149.51 (Page 1978).

¹⁷⁴ *Id.* § 149.55.

¹⁷⁵ *Id.* § 149.52.

¹⁷⁶ *Id.* § 149.53.

need to know what constitutes satisfactory "cooperation" in preservation and data recovery efforts and when such activities should properly be considered "practical." Clarification of these vague terms would do much to strengthen the statute.

Another major shortcoming of the landmark and preserve programs is their total dependence on the voluntary compliance of the landowner. If he is unwilling to cooperate, the OHS can do nothing. Furthermore, when the owner does participate, the level of protection afforded the property is based on the interest relinquished rather than on the cultural importance of the site. This dilemma could be remedied in part by the creation of another recognized class of cultural resources akin to the National Register. Eligibility would be based on cultural significance and nomination would not require the approval of the owner. Of course, such a classification could not require any use limitations since the designation could be imposed on the property without the owner's consent. Any restrictions which diminish the owner's interest raise some delicate constitutional question concerning the uncompensated taking of property. This problem does not arise in the landmark and preserve programs where participation is voluntary. Even without concomitant restraints on private action, however, the recognized status of the property would promote public consciousness of its cultural value and this would afford it an added measure of protection.

Such a designation could carry with it substantial protection from state action in the same way that National Register eligibility protects properties from federal action. Eligibility for the National Register would also qualify a property for the State Register. State agencies and subdivisions would then be required to consider cultural resources in their undertakings. A section 106 type review and comment procedure would be especially desirable. Perhaps this responsibility could be entrusted to the Ohio Historic Site Preservation Advisory Board.

Finally, some form of affirmative financial incentives should be considered for the archaeological preserve program since it requires a high level of owner cooperation. As noted, the dedication of an archaeological preserve does entitle the owner to a proportionate property tax reduction, but it must be remembered that for all practical purposes he is giving up the site and encumbering an access corridor as well. Furthermore, the presence of the preserve might well prove to be a nuisance for him. To say that he need no longer pay taxes on land which he has ceded to the state is hardly a meaningful concession.

The form of the present tax benefit is also particularly troublesome. The reduction is granted by the state in the furtherance of the state's interest, but the impact falls upon the local government. Both the local government's power to tax and its revenue are diminished. It would be more equitable, as well as politic, to advance the state's interest with state funds.

Most land in Ohio is privately owned and the rapid escalation in property values makes it unfeasible for the state to give compensation for a fee or easement interest in numerous sites.¹⁷⁷ Such payments would require a prohibitive capital commitment. If the owner received a conditional subsidy from the state, however, he would have a meaningful financial incentive to participate in the program. This would help offset the restrictions and inconvenience and it would allow the property to remain on the local tax roll. In effect, the state would pay the owner to leave the site alone. This approach has been used effectively, particularly in various agricultural subsidy programs, and it is familiar to rural landowners.

The owner would receive modest payments so long as the site remained a culturally significant property, that is, so long as it remained reasonably intact. The site would be inspected and recertified periodically by an OHS agent. The owner would then have an interest in maintaining the integrity of the site and in cooperating with preservation efforts. A concerned owner might well reduce the maintenance task of the OHS so that the subsidy program could defray its cost in part. It could be introduced on an experimental basis with initial application only in selected cases involving endangered properties of exceptional cultural significance.

As an alternative to the subsidy concept, compensation might be based on the theory of the state negotiating a renewable lease-hold interest in the site. The payments would then constitute rent. In either case, it seems only fair that the private citizen should not be asked to bear the full cost of the public benefit.

V. CONCLUSIONS

Cultural resources in Ohio come under the protection of a vigorous body of federal legislation supplemented by some anemic provisions at the state level. An examination of federal preservation law reveals several pronounced trends. Public policy concerning cultural resources has changed dramatically in the past century. Initially the public benefit to be derived from them was thought to lie in their capacity to stimulate a sense of national identity and pride. Consequently, early legislation was oriented toward safeguarding properties associated with prehistoric cultures and national history. In recent years, however, cultural resources have come to be recognized as important and unique components of the human environment. As such, they have an intrinsic social value in that the quality of life is enriched by their existence.

This evolving concept has been accompanied by major changes in policy. The scope of the federal interest in preservation has broadened in response to heightened public appreciation and concern for our

¹⁷⁷ Shipley, *supra* note 135, at 4.

cultural heritage. Congress originally restricted its protection to a very limited class of properties, namely those of national significance situated on federal land. This narrow ambit has expanded progressively so that the federal interest now extends to non-federally controlled properties, federal agency action, federally assisted or regulated projects, properties of architectural and cultural, as well as historical and archaeological significance and properties of less than national importance. The federal interest has also expressed itself in a variety of legislative approaches, including the permit process and criminal sanctions of the Antiquities Act and the Archaeological Resources Protection Act, the procedural requirements of NHPA, NEPA and the Reservoir Salvage Act, and the financial assistance of NHPA and the Archaeological and Historic Preservation Act.

Congress has implemented its policy of cultural resource preservation through an extensive corpus of legislation based upon an increasingly attenuated federal nexus. Nevertheless, this federal umbrella still does not protect numerous properties such as non-federally controlled sites threatened by state or private action. This problem could be remedied in part by a complementary body of state law integrated with the federal program for maximum effectiveness. Such a statutory scheme could, for example, afford properties protection from state action such as they now enjoy with respect to federal undertakings.

At present, however, Ohio preservation law consists largely of a few weak provisions establishing an excavation permit requirement and a system of landmark registries and public preserves which depend on voluntary and uncompensated participation. Although this represents a beginning, it is hardly adequate. Our cultural resources are a precious legacy and they are exceedingly vulnerable. It will take more than token efforts to safeguard them. Ohio needs to commit itself to the protection of its cultural heritage through a more aggressive program based on cogent legislation.

MARY ANN BAGUS

