ARCHAEOLOGY AND THE LAW

Patrick S. Hallinan

Attorney, Board of Directors
Preservation of American Prehistory

We are all imminently aware of the critical situation which presently confronts the science of archaeology. Our modern industrial society, as a by-product of its technology and population expansion, has laid waste the great bulk of remains of the cultures of the indigenous people who once populated this land. Urban sprawl, highways, dams and multitudinous undertakings required to meet the needs and demands of 230 million people in a free enterprise system have plowed under or capped over with asphalt up to 70 or 80 per cent of the aboriginal sites within the territorial limits of the United States. Unless this trend, which appears to progress geometrically, is reversed in the very near future our time will be spent in the review and analysis of artifacts in museums and universities. Excavation techniques, along with the use of all the new tools available to us through developments in allied sciences (such as obsidian hydration, microanalysis, carbon 14 techniques, etc., as well as the myriad to come in the future which open new doors to understanding Man's past activities) must forever be laid aside as no longer useful in our efforts. No sites will remain for their application.

How may we most fruitfully expend our energies to preserve for future generations what remains of our aboriginal heritage? The answer is patent. We must turn to the Federal and State Governments to enlist their sanctions against further destruction and procure their funding for the preservation or exploration of threatened sites. We must enter into the arena of politics, form pressure and special interest groups, and amass sufficient public support that we can speak to legislators in terms of votes for them or against them when their names appear on the ballot for re-election. We have no funds available with which to make the kind of contributions made by great business and corporate interests who lobby for special privileges. Our hope lies with the public concern for the preservation of the environment and our approach should be to encourage that concern and direct its energies on behalf of our science. We must commit the public to our cause and convince them that the preservation of the aboriginal heritage of this country is in their best interests.

I should like to review, in this discussion, and in a very general manner, some of the Federal and State legislation which presently exists, comment upon the strength or weakness of that legislation, the problem areas and the gaps that exist, and suggest manners of shoring up some of these deficiencies and resolving problems in the area.

LEGISLATION:

Legislation dealing with the protection and preservation of prehistoric sites falls into two categories. The first is "antiquities" laws and the second is so-called "enabling" legislation.

Antiquities laws are negative sanctions which prohibit the defacement or destruction of monuments and sites. Criminal penalities are attached for violation of these laws. Unfortunately, legislation which prohibits and punishes is generally not effective. The crime of Federal bank robbery carries a penalty of 25 years incarceration in a Federal penitentiary. FBI statistics have shown that the number of bank robberies throughout the United States have increased year by year.

Antiquities laws affect the individual, the vilified pot hunter who spends his weekends looting sites for arrow points. They do not affect the great corporate monster whose development activities cause the overwhelming bulk of site destruction.

Finally, and what may the greatest weakness in the utility of antiquities laws, is what borders on a total lack of enforcement. All too frequently, those charged with the enforcement of such laws have large personal collections of local artifacts. Furthermore, they are extremely sensitive to the voting pressure of numerous local pot hunters in small

communities, such as occurs in many areas of Nevada. Some law enforcement officers simply have better things to do with their time than patrolling widely scattered sites looking for collectors.

The second kind of legislation, enabling legislation, is affirmative legislation. It is legislation which provides for the preservation or excavation of sites and the preservation and dissemination of the information derived therefrom.

The problems encountered in such legislation are numerous. In the first instance, vast areas of land and activity are covered not at all. Within the area that is covered by such legislation, the exceptions are often so frequent, as occurs in the applicable California legislation, that the legislation itself becomes virtually meaningless.

Within the structure of government each bureaucracy is jealous of its own prerogatives. These bureaucracies are attached to special interests within the State Government and vie with each other for power, prestige and funding. Therefore, even though the preservation of sites may be encumbent upon the government through legislative mandate, powerful departments, such as highways, water resources, and the like, will brook no encumbrance upon their projects and will pave over or inundate sites with no remorse. All too frequently such legislation is articulated as a policy statement and lacks teeth in it to deter the violator. This is usually compounded by failure to

designate a person or department responsible to enforce the legislation or to provide guide lines by which the person or department should act or the manner in which violations should be treated. The California Environmental Quality Act is an example of this confusion. One frequently becomes so entangled in the bureaucratic structure that he throws up his hands in despair, vowing never to return to Sacramento again, and confines his activities to the local department of archaeology or whatever museum to which he may be attached. This may be inherent in the principles of the formation of bureaucracies and their self-perpetrating and preserving mechanisms, but I personally feel there is actual malice to the madness. True environmental quality legislation would be greatly detrimental to many of the interests of powerful private developers, construction companies and various departments of the State and Federal Government. A ringing policy statement, enacted into legislation, with no teeth in it, serves as a balm for public concern while in reality doing little to deter the money making ventures of private enterprise or the maintenance or acquisition of power by various governmental bureaucracies.

Finally, and what is often the greatest weakness of good legislation, is insufficient funding or funds ear-marked for such limited activities that the project itself is frustrated. An example is the manner in which funds may be expended to

salvage sites lying within the right of way of projects of the Department of Highways of the State of California. These may be excavated. However, according to an opinion of the Attorney General (No. 70/52, June 18, 1970), no funds may be expended for survey in advance of such excavation nor may funds be expended immediately to either side of the right of way nor may funds be allotted for the publication of data recovered. Hence, all too frequently a site is discovered as the bulldozer exits the opposite side and archaeologists become relegated to the role of titled pot hunters, ripping out what artifacts they may whose only value will be as curios, devoid of cultural context forever destroyed.

FEDERAL LEGISLATION:

A review of Federal Legislation is not an exhaustive task. Section 432 of Title 16, USCA, requires a permit for the disturbance or destruction of any object of antiquity situated on lands owned or controlled by the United States. Section 433 of that Title provides that failure to procure such a permit is a misdemeanor, punishable by a period of incarceration of not more than 90 days, and/or a fine of not more than $500. This law was enacted in June, 1906, and except for certain provisions pertaining to National Parks (Sections 9a, 10 and 10a of the same Title) is the sole negative sanction in the United States Codes. It is, however,

sufficient to cover virtually any vandalism on any lands within the jurisdiction of the United States. Its greatest weakness is the manner in which it is enforced. We contacted the Department of Justice in Washington, D.C. and the Executive Secretary of the United States Courts where records are kept relating to prosecutions for the violation of each and every law of the United States. We were informed that their records disclosed not a single prosecution under Section 433 within the past three years, a period in which such data is now computerized, and neither could recall ever having known of a prosecution under this Section.

In 1971, Preservation of American Prehistory caused to be distributed a series of questionnaires to various persons throughout the United States active in the field of archaeology. The responses indicated that great variation in protection and preservation existed within different kinds of Federally owned or controlled lands. The following is a generalized breakdown of the situation, as reflected in the responses, of four gross categories of land within the jurisdiction of the Federal Government:

1. National Parks: Enforcement is very good, generally being restricted to those sections cited above which pertain to National Parks.

2. Lands administered by the Federal Government: These include National Forests, National Monuments, etc., where

preservation and protection of archaeological sites was generally found to be very poor.

3. Operational lands: These include such lands as those ear-marked for Federal projects, dams, roads, etc., where protection and preservation was found to be poor.

4. Open land: Such as that administered by the Bureau of Land Management where protection and preservation was non-existent.

Personal experience supports the conclusion in this last category. My thesis work was devoted to the excavation and study of what apparently was the largest open site in the Great Basin, Churchill 15, intimately associated with the famous Lovelock Cave, in Churchill County, Nevada. This site was situated on lands administered by the Bureau of Land Management. Private collectors had amassed a collection of approximately 25,000 projectile points from this site, while only 250 were included in scientific collections. Pot hunting had reached the point in which debitage from the surface of the site was being picked up by the collectors to make mosaic tables.

What can be done as regards the enforcement of this legislation? It seems to me grossly unfair to expect the archaeologist to perform a citizen's arrest on a law violator, which he has a right to do, and transform himself from a scientist into a police officer. For many it would be distasteful.

For all it would constitute a great waste of time, involving appearances in Court, testifying as a witness, subjecting oneself to cross-examination and, if the prosecution were unsucessful, opening oneself up to actions for civil liability for wrongful arrest and malicious prosecution.

Vigorous enforcement would be helpful at a local level. This must be done by local officers charged with the enforcement of these Statutes and vigorous prosecutions by United States Attorneys before United States Magistrates. Encouragement by the Department of Justice to the local authorities is essential. The Department of Justice is susceptible to pressure at the local level through the United States Attorney as well as in Washington. A hue and cry by the local citizenry will rouse the United States Attorney and pressure from legislators in Washington will frequently cause the Attorney General to react.

A dedication by a sustantial number of the local citizens to the preservation of their own historical resources is critical to both these approaches. The creation of local awareness and concern for archaeology and to unite with non-professionals in a common cause is an end we must strive for on a state-wide or nation-wide level as well.

Federal enabling legislation is generally handled separately by each department of the Federal Government which deals with various lands under its jurisdiction. Enormous variation exists from department to department in the magnitude

of the legislation and the funds available. Basin salvage programs in the Midwest were well funded and ably carried out prior to the damming of various tributaries of the Missouri River, while a brief reading of the pertinent sections dealing with the administration of BLM lands indicates that this department has little legislation and virtually no funds available to it for allocation to the preservation and protection of archaeological sites.

Vast sectors of State and private lands are not included within the ambit of Federal legislation. Opponents of the idea of the extension of Federal control argue that the sacred concept of private property prohibits Federal activity in this area. This is sheer and absolute hogwash. The Federal Government, if it wished, could legislate and protect archaeological sites wherever found as part of the national heritage and natural resources of this country. Their failure to do so is simply an example of the lack of political muscle of archaeologists and conservationists heretofore.

Federal environmental impact legislation is quite similar to State legislation and will be discussed more fully hereafter. Certain problems of enforcement are unique to the Federal system. Who can enforce compliance with the law? Certainly the proper Federal officials, if they are so inclined, can require those within the ambit of environmental preservation legislation to live up to its requirements. However, the

traditional position of the Courts of the United States is that an individual, or even a group of individuals, has no standing to question the expenditure of Federal funds by Federal agencies. The fact that one is a taxpayer, says the Courts, does not invest him with the right to question most Federal activity. A recent and disasterous example of this reasoning was the result of the law suit brought by the Sierra Club against the Walt Disney interests concerning their development of Mineral King. The case was thrown out of Court because the Sierra Club was unable to show a special interest or a particular harm, even though Walt Disney interests were apparently violating the environmental impact laws. Whether or not archaeologists would be able to show a special interest or particular harm to have standing in a Federal Court to raise the issue of violation of Federal environmental laws by private interests, States or agencies of the Federal Government remains an open question. Considerable legal research and thinking needs to be done in this area. If such could be established, then we would have a valuable tool with which to deal with the scoundrels.

STATE LAWS:

California has a single viable antiquities law, Section 5097.5 of the Public Resources Code, which in substance, prohibits site destruction without a permit on State owned or controlled lands. Punishment for violation of this Section is up to six months in the County Jail, and/or a fine of up

to $500. Its infirmities are similar to those commented on above applying to the Federal antiquities law of 1906. However, we have no statistics as to the prosecution under this law, although private communications with students in the field indicate a pattern of enforcement similar to that encountered on Federal lands.

Penal Code, Section 622-1/2 prohibits site destruction by anyone on private land, except by the owner or his agent. This, in effect, prevents nothing but a simple trespass as anyone with consent of the owner is constituted, in law, his agent. Get the owner's O.K., and you can run a bulldozer through the mound to facilitate the collection of arrow points and no offense is committed.

Thus, in the private sector, California in effect possesses no antiquities law except where, under recent decisions, the California Environmental Quality Act may be extended. However, under the police power of the State, California would have the same right to legislate in the private area as does the Federal Government. They have simply refrained from doing so for the same reasons the Federal Government has refrained. We simply have very little political juice.

The State enabling legislation, in part, is found under Sections 5097, et. seq., of the Public Resources Code. These deal with sites located on State owned or controlled land and the legislation provides that whatever State agency is threatening

such sites may submit a report to the Park and Recreation Department who, in turn, may do something about it, as long as what is done does not interfere with whatever project is being conducted. No funding is provided.

That, in effect, is no legislation at all. A field marshall could drive a division of panzer armour through the hole and never touch the sides. It is totally discretionary and, as we have commented above, runs headlong into the teeth of the most powerful bureaucratic interests in the State Government. Coupled with the fact that sites are usually discovered after a State project is well under way, preservation and excavation must, by definiton, interfere with that project's completion.

Environmental quality legislation may be found in Sections 21000 et. seq., of the Public Resources Code, known as the Environemental Quality Act of 1970. In brief, the legislation constitutes a laudable public declaration of the policy of this State to protect, rehabilitate and enhance the environmental quality of the State, including, in Section 21001(c) "...to... preserve for future generations representations of all plant and animal species and examples of the major periods of California history." Theoretically this would include archaeological sites threatened with destruction. However, this legislation is a classic example of the making of a laudatory policy statement while bureaucratically extracting

the teeth from the law. There is no criteria to determine how the impact reports will be judged, the standards that should be used, the manner in which policy shall be enforced, or even who, in the last analysis, is responsible for its enforcement. Section 21103 of that Code states that the Office of Planning and Research shall "in conjunction with appropriate State, Regional and Local Agencies, coordinate the development of objectives, criteria and procedures to assure the orderly preparation and evaluation of environmental reports required by this division." After what would surely be a long and heart-rending effort by Planning and Research, we may, if fortunate, have orderly impact reports prepared. Beyond this no assurance exists for the people of the State California that anything will be done about them.

In spite of these defects, two recent California Court decisions, of great import to conservationists, offer some hope.

In Environmental Defense Fund v. Coastside Company Water District, the San Mateo Water District, proposing a new water supply and storage project, failed to file a sufficient impact report with the County Planning Commission. Certain individuals brought an action to restrain the District from proceeding.

The Court, in granting the injunction, stated that even though the Office of Planning and Research had established no guidelines, in the absence of such guidelines the Court itself

will determine whether impact reports have satisfied the requirements of the law. To do so, the Court held that it will refer not only to the legislative purpose articulated in the statute but to the applicable Federal standards established under the Federal Environmental Quality Act. The Court also enforced the long-standing position in California that individual citizens of our State may bring such actions to contest wrong doing by State or Municipal Agencies.

The second major holding was that of the State Supreme Court in Friends of Mammoth v. The Board of Supervisors of Mono County, 104 Cal. Rptr. 16. In this case, private developers applied for and were granted building permits by the Board of Supervisors of Mono County without filing an impact statement. A class action by residents of the area and by certain individual plaintiffs was brought to enjoin the project. The Supreme Court held that the intent of the California Environmental Quality Act was to include conduct which affected the environment by private individuals as long as there was some connection with State or local agencies. The Court found that the application for and receipt of a permit, license or other permission was sufficient to bring those private interests within the scope of the Act and required the presentation of an impact statement. The Court, while not directly faced with the question, articulated the position that California Courts

would establish standards of sufficient conformity and police enforcement, relying on Federal legislation and findings in the area.

These landmark decisions offer us enormous possibilities. Problems still exist. The major porblem which immediately confronts us is whether or not the preservation of "the major periods of California history" includes prehistoric archaeology. Relying on Federal decisions and a development of the legislative intent at the time of the passage of the California Environmental Quality Act we should find a home in this section. This, however, may very well require a Court finding that archaeology is entitled to the same consideration as botany, geology or like sciences.

A second problem will be the expense and burden on individuals who seek, under the Act, to require compliance where voluntary compliance by State, Municipal or private agencies is sought to be avoided. It is possible that State funds may be available to compensate citizens seeking the enforcement of California laws but that question requires considerable research and investigation.

A possible solution to many of our difficulties would lie in the enactment of legislation similar to Assembly Bill 1788, which was vetoed by Reagan. Not inconsistent with his positon on redwoods, the Governor undoubtedly felt that if you have seen one archaeological site you have seen them all.

This bill, sponsored by the Society for California Archaeology, provided for workable operating procedures dealing with the preservation or exploration of archaeological resources on State lands and furthermore activated the California Archaeological Commission as a watchdog agency responsible to see that the law would be honored and enforced. A task force has since been constituted, made up of some 15 individuals from various departments of the State of California, institutions of higher learning and other interested organizations, whose mandate is to come up with a proposal along the lines of the heretofore vetoed legislation or a viable alternative. Communication of our concern to members of the task force would be advantageous at this juncture and would facilitate the procurement of a reasonable recommendation for legislation.

Finally, local ordinances in some counties exist which tread where the Federal and State Governments have heretofore feared to go. Highly recommended is the ordinance in existence in Marin County, Ordinance No. 1589, which makes it "... unlawful for any person, firm, corporation or co-partnership to knowingly disturb in any fashion whatsoever or excavate, or cause to be disturbed or excavated any Indian midden without a permit being issued therefor by the Department of Public Works." If an area of proposed construction contains a site of some significance, a grace period of 60 days must be allowed for the salvage of materials therein prior to undertaking the project

proposed. If the project is begun and a site encountered, the project must stop and the proper authorities contacted to provide them an opportunity to salvage the material within the above cited 60 day period. Violation of this Ordinance carries with it a penalty of up to six months in the County jail and/or up to $500 in fines.

The problem of these kinds of ordinances, and Marin County's is a good example, is that no funding exists to carry out the purpose of the Ordinance. Salvage, if it occurs at all, must be done on a voluntary basis by some institution or group interested in archaeology. Coordination of efforts on this level is frequently so peripatetic that frustration of the purpose is often assured. Furthermore, this Marin Ordinance relates only to unincorporated areas in the County, those within the jurisdiction of the Board of Supervisors, and does not apply to the Municpal Corporations within the County borders. Be that as it may, such legislation does provide a wedge which archaeologists and other interested groups can use to at least initally impede the destruction of local sites.

From the above discussion it seems obvious in which direction we must turn. Our activities must be in the political sector, at least in the immediate future. And unless such activities are successful, the remainder of our activities will be relegated to museums.

What is the key to success? The key to success, as mentioned earlier, is political muscle. Political muscle, in our case, must be votes and that means public support. I have heard from the inception of my career in archaeology the desire of my colleagues to educate the public. If educated, they claim, then they cannot help but realize the value of our heritage and will desire to see their tax dollars expended for its preservation and protection and will vote into office those legislators who will do just that. We have conducted public forums, opened museums, held summer schools, and we are on the verge of oblivion.

And yet it cannot be denied that the romance and mystery of the science has a great allure for the public. This usually manifests itself through the villain of the piece, the pot-hunter. That term is expanded to include amateur archaeologists, individuals uninitiated into the mysteries of the profession. In fact, so hostile is the professional to the amateur that he has forced the amateur to play the role of the pariah. I am afraid that we have provided the woodsman with his axe handle.

Let's give a share of archaeology back to the people of the State of California. Let's divide the loot and the pleasure among them. If we foster amateur societies and open digs to amateurs, persons interested, and if we set up local museums which are put together from local sources by locals --

indeed, under the direction of a professional -- then maybe we will get the kind of support we must have. We have denied amateurs the right of access to sites so why should they support further legislation which only fosters that position? How do you propose to convince the California taxpayer that an arrow point in the basement of the Lowie Museum at Berkeley is so important that the State should expend several millions of dollars per year to get it there? Indeed, we do not want it hanging on the wall of someone's living room, but what if it were down the street in a local museum where one could take his children and relate to them how that person helped discover it, or his neighbor did, and why it was important as a slice of the history of Contra Costa County or Alameda County or Modoc County or Yolo County.

In conclusion, we need help from the citizens of the State, or the citizens of the United States, to get through the legislation and procure the funding necessary to preserve our prehistoric heritage. Unless we are willing to give the people whose help we need one hell of a lot more than we have given them heretofore, we are going to find ourselves selling pencils in the world of power politics.