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Pamela D'Innocenzo

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COMMENTS

"NOT IN MY BACKYARD!" PROTECTING ARCHAEOLOGICAL SITES ON PRIVATE LANDS

Pamela D'Innocenzo*

["Black Bird's Grave"] is a celebrated point on the Missouri, and a sort of telegraphic place, which all the travellers in these realms, both white and red, are in the habit of visiting: the one to pay respect to the bones of one of their distinguished leaders; and the others, to indulge their eyes on the lovely landscape that spreads out to an almost illimitable extent in every direction about it. This elevated bluff, which may be distinguished for several leagues in distance, has received the name of the "Black Bird's Grave," from the fact that a famous chief of the O-ma-haws, by the name of Black Bird, was buried on its top, at his own peculiar request; over whose grave a cedar post was erected by his tribe some thirty years ago, which is still standing. The O-ma-haw village was about sixty miles above this place; and this very noted chief, who had been on a visit to Washington City, in company with the Indian agent, died of the small-pox, near this spot, on his return home. And, whilst dying, enjoined on his warriors who were about him, this singular request, which was literally complied with. He requested them to take his body down the river to this his favorite haunt, and on the pinnacle of this towering bluff, to bury him on the back of his favourite war-horse, which was to be buried alive, under him, from whence he could see, as he said, "the Frenchmen passing up and down the river in their boats." He owned, amongst many horses, a noble white steed that was led to the top of the grass-covered hill; and, with great pomp and ceremony, in the presence of the whole nation, and several of the Fur Traders and the Indian Agent, he was placed astride the horse's back, with his bow in his hand, and his shield and quiver slung — with his pipe and his medicine-bag — with his supply of dried meat, and his tobacco-pouch replenished to last him through his journey to the "beautiful hunting grounds of the shades of his fathers" — with his flint and steel, and his tinder, to light his pipes by the way. The scalps that he had taken from his enemies' heads, could be trophies for nobody else, and

*J.D., 1996, University of Oklahoma College of Law; B.A., 1991, State University of New York, College at Oswego.

were hung to the bridle of his horse — he was in full dress and fully equipped; and on his head waved, to the last moment, his beautiful head-dress of the war-eagle's plumes. In this plight, and the last funeral honours having been performed by the medicine-men, every warrior of his band painted the palm and fingers of his right hand with vermillion; which was stamped, and perfectly impressed on the milk-white sides of his devoted horse.

This all done, turfs were gradually brought and placed around the feet and legs of the horse, and gradually laid up to its sides; and at last, over the back and head of the unsuspecting animal, and last of all, over the head and even the eagle plumes of its valiant rider, where altogether have smouldered and remained undisturbed to the present day

Whilst visiting this mound in company with Major Sanford, on our way up the river, I discovered in a hole made in the mound, by a "ground hog" or other animal, the skull of the horse; and by a little pains, also came at the skull of the chief, which I carried to the river side, and secreted till my return in my canoe, when I took it in, and brought with me to this place, where I now have it, with others which I have collected on my route.¹

I. Introduction

The United States, admittedly a relatively young country when compared to many other nations of the world, has until recently been slower to protect its cultural property² than most other nations. It was not until the turn of the century that the United States Congress made any attempt whatsoever to take the steps necessary to ensure that our past not be destroyed or cast aside in the dusty drawers of nameless museums or amateur collections. Recently, however, Congress and state governments have recognized the importance of preserving our cultural heritage and have enacted laws which seek to promote

1. 2 GEORGE CATLIN, LETTERS AND NOTES ON THE MANNERS, CUSTOMS, AND CONDITIONS OF THE NORTH AMERICAN INDIANS 5-6 (Dover ed. 1973).

2. A relatively new term, "cultural property" has no universal definition. [It] encompasses a variety of objects in many different sizes, shapes, and forms. For example, it may be baskets, pottery, masks, tapestries, sculptures, or engravings. . . . It may be described as archaeological resources, antiquities, artifacts, art, cultural items, cultural resources, *objets d'art*, or relics Within the broad scope of cultural property, however, are objects which are invaluable to particular groups of peoples because of their cultural or religious significance. These objects represent the cultural heritage of their creators and are in fact the cultural patrimony of these people.

Antonia M. De Meo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. INDIAN L. REV. 1, 2-3 (1994) (citations omitted).

this objective. This special type of legislation is the result of the realization that our American cultural treasures are in immediate jeopardy, with many items irrevocably destroyed or lost to future generations. Americans have so much to gain from the preservation of our cultural patrimony and so much to lose if we allow it to be obliterated or apathetically excavated and stored in the forgotten boxes comprising countless forgotten collections. Today, even the Supreme Court has acknowledged the problem as one involving the promotion of the general welfare and the enhancement of the quality of life of the American people.³

Since first recognizing our failings in this area, legislation has been enacted to protect historical sites and monuments, historic buildings, sunken treasures, Native American burial sites, and archaeological resources. Unfortunately, the legislation now in force is not without its shortcomings. Most notably, the current protective statutes address only those cultural treasures located on federal or Indian land — virtually no meaningful protection is extended over those artifacts unfortunate enough to be located on privately owned property. Thus, the potential impact of these legislative efforts is significantly diminished in the East where the overwhelming majority of land is privately held.

This paper seeks to address the problem of private site preservation and briefly examine a sampling of the laws enacted that may serve to protect the equally indispensable artifacts now located on privately held lands. Part II discusses the most prominent and reliable laws applicable to federal, Indian, and public land archaeological site protection and explains the importance of extending protection to privately held sites. Part III contains a brief summary of the current state of "uncompensated takings" and the restrictions that the Fifth and Fourteenth Amendments place on the creation of statutory protective measures affecting privately owned sites. Finally, part IV contains a short examination of recent federal and state creative approaches to private site protection and concludes with a discussion of the most recent efforts to rescue privately held archaeological sites from near certain destruction.

II. Overview of Federal, Indian, and Public Land Archaeological Site Protection

While there seems to have been a virtual avalanche of legislation in the area of cultural heritage protection, several major statutes are utilized again and again in the legal arena: most notably, the National Historic Preservation Act (NHPA),⁴ the Archaeological Resources Protection Act (ARPA),⁵ and the

3. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978).

4. Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470-470w-6 (1988 & Supp. III 1991)).

5. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. § 470aa (1988 & Supp. III 1991)).

Native American Graves Protection and Repatriation Act (NAGPRA).⁶ Archaeological protection legislation is often based on the "type" of site sought to be preserved. Burial desecration statutes, for instance, exist in nearly every state, mainly for the simple reason that people of all races find the desecration of gravesites repugnant to their sense of morals or ethics. On the other hand, protections are not so readily available for other types of sites, such as aboveground ruins, fossils, or simple backyard discoveries.

Generally, protecting our cultural patrimony means protecting artifacts of prehistoric, Native American and early "American" origin, but the statutes now in place do not effectively safeguard the resting places of these treasures unless they are located on federal or Indian lands. Given the history of the European conquest of North America, it is obvious that our current statutes could not possibly, and do not, afford adequate protection to all the areas where such objects may be located. Where then do our culturally significant treasures, and specifically those artifacts situated on privately owned land sites, find protection?

A. The Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) has been described as "the single most important piece of human rights legislation for Indian people which has been enacted by Congress since passage of the American Indian Religious Freedom Act of 1973."⁷ NAGPRA is designed to apply to federal agencies and museums receiving federal funding and having possession or control over Native American, Alaska Indian, or Native Hawaiian human remains and associated funerary objects. Each such agency or museum, excluding the Smithsonian Institution,⁸ is required to complete an inventory of their Native American artifacts and return funerary objects and human remains to the Native American lineal descendant or tribe to the extent possible.⁹

NAGPRA prohibits the intentional removal or excavation of Native American funerary items from federal or tribal lands unless a permit is obtained under the Archaeological Resources Protection Act.¹⁰ Tribal

6. Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (Supp. V 1993)).

7. *President Bush Signs Native American Graves Protection and Repatriation Act*, NARF LEGAL REV. (Native American Rights Fund, Boulder Colo.), Fall 1990, at 5.

8. This exception is significant in that the Smithsonian Institution is one of the world's largest holders of Native American artifacts. However, under the Smithsonian Agreement, "human remains are to be returned to tribes upon a showing of cultural affiliation by the preponderance of available evidence. This was signed into law as part of the National Museum of the American Indian Act of 1989." Rita Sabina Mandosa, *Another Promise Broken: Reexamining the National Policy of the American Indian Religious Freedom Act*, 40 FED. B. NEWS & J. 109, 113 (1993).

9. 25 U.S.C. §§ 3003-3005 (1994).

10. *Id.* § 3002(c).

consultation for federal property discoveries or consent of the tribe for tribal property discoveries is required.¹¹ In the event of the inadvertent excavation of Native American remains and objects, the discoverer is required to notify the Secretary of the Interior and the appropriate tribe. Further, if the discovery occurred in connection with mining, logging or agricultural activity, the discoverer must cease the activity, make every reasonable effort to protect the objects, and provide notification to the proper authorities. Upon certification of receipt of notice by the Secretary or the tribe, the activity may resume after thirty days.¹² NAGPRA does not limit the application of state or federal laws pertaining to theft or stolen property.¹³

Although NAGPRA was initially instituted in order to protect Native American graves on tribal lands from desecration by pothunters, the Act focuses mainly on the repatriation of human remains. However, the trafficking provisions may be utilized to prosecute violations occurring on private lands.¹⁴ Trafficking for profit is prohibited under NAGPRA, unless the lineal descendants or tribe consent. Although these provisions do not prevent a private landowner from excavating his own property, they do punish trespassers who excavate and sell funerary items without the consent of the private landowner.¹⁵

B. The National Historic Preservation Act

In enacting the National Historic Preservation Act (NHPA), Congress recognized that

the spirit and direction of the Nation are founded upon and reflected in its historic heritage . . . [which] 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 The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.¹⁶

Through this Act, Congress established, and the Executive Department later affirmed, a federal objective of protection and enhancement of the American cultural environment.¹⁷

11. *Id.* § 3002(c)(2).

12. *Id.* § 3002(d).

13. *Id.* § 3009(5).

14. Constance M. Callahan, *Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property*, 23 ENVTL. L. 1323, 1329 (1993).

15. *Id.*

16. 16 U.S.C. § 470(b)(1)-(4) (1994).

17. Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971).

NHPA expanded the National Register of Historic Places to provide protection to districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.¹⁸ The 1992 amendments to NHPA include significant provisions relating to Indian tribes,¹⁹ with Native American and Native Hawaiians receiving assistance in implementing their own programs with respect to tribal lands.²⁰ A parallel state-level system was also established.

While NHPA surely provides protection vital to our cultural environment by enabling the Secretary to "promulgate, or revise, regulations . . . ensuring that significant prehistoric and historic artifacts, and associated records . . . are deposited in an institution with adequate long-term curatorial capabilities,"²¹ its protections do not adequately protect those sites located on privately held lands. Under NHPA, private property owners who withhold their consent to inclusion on the National Register or designation as a National Historic Landmark will not be included or designated as such.²² Thus, exemption from NHPA protection appears to be simply a matter of choice for private site owners.

C. The Archaeological Resources Protection Act

The Archaeological Resources Protection Act (ARPA), in turn, prohibits excavation or damage to "any material remains of past human life or activities which are of archaeological interest" located on Indian or federal public lands.²³ This definition encompasses graves and skeletal remains, however, it excludes items of less than 100 years of age from ARPA protection.²⁴ In order to legally excavate protected items, a permit must be obtained from the federal land manager; tribes are exempt from the permit requirement with respect to their own lands.²⁵ Tribal consent is required for nontribal

18. 16 U.S.C. § 470(a)(1)(A) (1994).

19. Pub. L. No. 102-575, 106 Stat. 4753 (1992) (codified at 16 U.S.C. §§ 470 to 470w-6 (1994)). The amendments direct the Secretary of the Interior (through the Director of the National Park Service) to "establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties." 16 U.S.C. § 470a(d)(1) (1994). The NPS also administers a Historic Preservation Fund grant program to tribes "for the preservation of their cultural heritage." *Id.* § 470a(e)(3)(B). This grant program has enabled many tribes to begin developing programs dealing with historic preservation and cultural heritage issues. Dean B. Suagee, *Tribal Rights and Interests in Cultural Resources and Places in Indian Country and on Federal Lands*: Paper Presented at the 20th Annual FBA Indian Law Conference, Federal Bar Association, Albuquerque, N.M., at 51 (Apr. 6-7, 1995).

20. 16 U.S.C. § 470a(d)(1)(A)-(2) (1994).

21. *Id.* § 470a(a)(7).

22. *Id.* § 470a(a)(6).

23. *Id.* § 470bb(1).

24. Suagee, *supra* note 19, at 45.

25. 16 U.S.C. §§ 470bb(4) & 470cc (1994).

excavations within Indian country,²⁶ while federal land excavations which may result in harm to any religious or cultural site require both a permit and notification by the Federal land manager to any tribe which may consider the site culturally or religiously significant.²⁷

The recent Seventh Circuit case of *United States v. Gerber*²⁸ shows an increasing awareness of ARPA's inadequacies in regard to private site protection and demonstrates the extent to which the judiciary may reach in order to extend protection to such artifacts. In *Gerber*, the defendant was convicted of removing artifacts in violation of ARPA as well as Indiana law.

What made *Gerber* an unusual case was that the defendant transported in interstate commerce Indian artifacts stolen from a site located on privately owned land in violation of Indiana's laws against trespass and conversion. First, Gerber argued that the ARPA interstate trafficking provision under which he was convicted applied only to artifacts situated on federal or Indian lands.²⁹ In the alternative, Gerber argued that the mention of state or local laws in the ARPA provision limited its application to those cases where the state or local laws specifically addressed the question of archaeological resource protection. In rejecting Gerber's first argument, the Seventh Circuit Court of Appeals found that the ARPA provision under which Gerber was prosecuted was not limited to objects removed from federal or Indian lands.³⁰ Further, the court rejected Gerber's alternative argument by finding that, although the ARPA provision was limited to cases in which violations of state or local law were related to the protection of archaeological resources, the state or local law in question did not need to be specifically limited to that protection.³¹ Thus, Indiana's trespass and conversion laws adequately closed this potential loophole to Gerber and others like him, by providing broad objectives which included the protection of archaeological resources. To ensure that this loophole was closed forever, Indiana later amended its laws to expressly forbid similar acts.³²

The above-mentioned Acts do an adequate job of ensuring the protection and enhancement of the specific types of cultural resources they were designed to protect: Native American gravesites, historic buildings or surface

26. 25 C.F.R. § 262.5(c) (1996).

27. 16 U.S.C. § 470cc(c) (1994).

28. 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).

29. Gerber was convicted under 16 U.S.C. § 470ee(c), which provides: "No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, 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." 16 U.S.C. § 470ee(c) (1994), *quoted in Gerber*, 999 F.2d at 1113.

30. *Gerber*, 999 F.2d at 1116.

31. *Id.*

32. *Id.* at 1117.

structures, and century-old archaeological items on federal or Indian lands. However, they do not sufficiently extend their protections to all archaeological resources deserving of preservation. What of the artifacts located on private lands? Judicial interpretation of federal and state statutes may occasionally be stretched to include these artifacts and *Gerber* seems to suggest that the courts are beginning to close the loopholes. But how ineffective and expensive it is to rely on the judiciary to expand the protection of these laws on a case by case basis.

Cultural objects do not lie neatly beneath boundaries drawn decades or centuries after their creation. And yet, on private sites, we allow the excavation and destruction of artifacts equally precious to our cultural patrimony as those located on protected lands. Legal definitions change nothing of the characteristics or value of these treasures, but our laws currently protect only those items fortunate enough to be obscured beneath the "proper" parcels of land. Private archaeological site protection is crucial for many reasons, including protection for improved archaeological techniques, future enjoyment, tribal rights determinations, and the potential recognition of archaeological relics as "world" treasures belonging to no single person or nation. These treasures — all our cultural treasures — must be protected regardless of the current status of the earth under which they are entombed.

Without adequate protection of all of our culturally significant property, horror stories of widespread destruction of such property for commercial exploitation are likely to become everyday occurrences. Imagine this scene observed by *Los Angeles Times* reporters in Uniontown, Kentucky in 1988:

Crows caw in the distance and a cold drizzle falls from a churning gray sky in this remote corner of northwestern Kentucky where hundreds of freshly dug holes — open wounds upon the land — mar a sloping farm field.

The crude excavations are littered with black fragments of ancient pottery, a few discarded beer cans, abandoned shovels and the broken, mud-stained bones of perhaps 1,200 Indians.

From a nearby rise, a knot of local people watches silently as three American Indians walk among the opened graves and mounds of dirt. They carry a mussel shell filled with burning tobacco as they pray for the disturbed spirits of their ancestors.³³

The Uniontown disgrace was cited by a local forensic anthropologist as "one of the five worst cases nationwide."³⁴ The former townsite had much to offer because of its potential to yield important information about native

33. Larry Green & Wendy Leopold, *Plunder for Profit: Looters Rob Old Graves and History*, L.A. TIMES, Feb. 11, 1988, at 1.

34. *Id.* (quoting David J. Wolf, a forensic anthropologist with the Kentucky State Medical Examiner's Office).

cultures of the region, early white-Indian contact, and why the aboriginal inhabitants disappeared from the area.³⁵ Now, however, with the layers of earth carelessly overturned, and the less commercially valuable objects exposed to the elements, the present value of this ancient mound site is nearly destroyed.

At Uniontown, as is happening with increasing frequency all over the United States, commercial pothunters paid the private landowner for permission to enter the property and remove its valuable archaeological artifacts,³⁶ a completely legal occurrence under the laws of many states. However, such legal exploitation does not, in fact, make it ethically permissible to blatantly disregard the rights of the descendants of the dead or the rights of future generations to know, and perhaps even possess access to, their heritage. And it is not only gravesites that are plundered for profit, but also Civil War battlefields, historically significant sites, and ordinary backyards — any site that may potentially yield a commercially valuable artifact or two. It happened in Uniontown, Kentucky and without the extension of current protections, it is bound to happen again and again with increasing frequency.

We all lose a piece of our heritage and knowledge of ourselves as "Americans" when we lose our cultural patrimony to the greedy hands of those willing to destroy our past for their own immediate commercial gain. Once lost, such sites, like endangered species, cannot be regained.³⁷

In a similar vein, archaeological site protection on private land is also needed to help preserve the archaeologic and anthropologic record for those cultural groups with much at stake in establishing an aboriginal or treaty homeland and the legal status and rights that coincide with such a determination. For instance, if not for the preservation and later interpretation of the tribal archaeological record, the Bay Mills Indian Community would not today be entitled to fish their aboriginal waters.

In *United States v. Michigan*,³⁸ where the Government sued on behalf of the Bay Mills Community, the tribe's fishing rights claim, based on an 1836 treaty with the Ottawa and Chippewa,³⁹ would only be recognized if the tribe could show that their ancestors were using that resource at the time of the treaty. The Bay Mills Community, fortunately, was able to point to documented historic, ethnohistoric, anthropologic, and archaeologic evidence

35. *Id.*

36. *Id.* Items from similar graves fetch increasingly high prices on the black market. "One collector paid \$17,000 for a stone ax. Slate pendants can fetch between \$300 and \$1,000. Pipes have been sold for \$5,000 each. A copper death mask could be worth \$100,000 or more." *Id.* A potential incredible return on the mere \$10,000 the Uniontown "excavators" paid for the privilege to dig at this site. *Id.*

37. *Id.* (quoting Mark Leone, an official of the Society for American Archeology).

38. 471 F. Supp. 192 (W.D. Mich. 1979), *cert. denied*, 454 U.S. 1124 (1981).

39. Treaty with the Ottawas, March 28, 1836, art. 1, 7 Stat. 491.

proving that commercial and subsistence fishing was of significance to those tribes during the treaty period.⁴⁰ Thus, according to the rules of treaty interpretation as applied to American Indians, the reserved right to fish arose by implication.⁴¹ Without an archaeological record, this and other equally crucial legal determinations would not be possible.⁴²

Beyond the obvious benefits of private site protection lies the often overlooked consideration of archaeological objects as "world" treasures — to be viewed not as belonging to any single nation, but to all humankind. It is in this area that the United States particularly lags behind many other nations. Several nations have passed "umbrella statutes" whereby ownership of all archaeological resources discovered within the national boundaries vests in the state.⁴³ The United States, however, remains suspicious of such measures, largely because of the "history of restrictions on uncompensated takings of private property, and the general disfavor for restrictions on alienation of property."⁴⁴ In failing to classify our artifacts as "universal" property, the United States permits ownership of artifacts to vest in individuals rather than the federal government. Consequently, these treasures are open to whatever treatment is deemed befitting by their owners, whether that treatment be commercial exploitation, intentional or unintentional destruction, or honest attempts at preservation or conservation.

III. "Takings" Concerns

The federal government was purposely structured to protect the rights of private property owners, and when private landowners are prevented from using their land in the manner they had hoped due to federal, state, or local laws relating to the protection of archaeological resources, there usually arises a cry of "uncompensated taking!" The Fifth Amendment to the U.S. Constitution, in fact, expressly provides that "private property [shall not] be taken for public use, without just compensation."⁴⁵ This provision is binding on all states through the Fourteenth Amendment.⁴⁶ Therefore, it is not unusual that in the United States the rights of private property owners to utilize their land as they see fit very often prevails over sovereign rights to protect archaeological resources. However, not all regulation of private land use constitutes a "compensable taking."

40. *Michigan*, 471 F. Supp. at 213.

41. *Id.*

42. The archaeological record is also critical to determinations necessary for federal recognition — i.e., whether a "modern" tribe is really a tribe for purposes of federal recognition — and the legal obligations and rights that follow such a determination.

43. Callahan, *supra* note 14, at 1324.

44. *Id.* at 1325-26.

45. U.S. CONST. amend. V.

46. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

Land-use regulation does not effect a taking requiring compensation if it substantially advances a legitimate state interest.⁴⁷ Two exceptions to this rule exist: (1) When the regulation involves a permanent physical invasion of the property; or (2) denies the owner *all* economically beneficial or productive use of the land, the state must pay just compensation.⁴⁸ The state may avoid payment of just compensation if it shows that the landowner's rights never included the right to use the land in a way the regulation forbids.⁴⁹

Such a situation arose in *Hunziker v. Iowa*⁵⁰ when the plaintiff landowners, who wished to develop their property upon which human remains were found, objected to the denial of a building permit based upon a state statute which prohibited disinterment of human remains. The Supreme Court of Iowa applied Iowa nuisance and property law to determine whether the plaintiffs possessed the right to use the land in a way the state statute forbade. The court held that because the owners did not have the right under the statute to disinter human remains and build over them when they took possession of the property, the fact that the bones were not discovered until after the purchase did not amount to a taking without just compensation.⁵¹ At the time the plaintiffs acquired title, the state, under existing law, could have prevented disinterment. Thus, this limitation or restriction on land use inhered in the plaintiffs' title.⁵²

The federal and state governments are free to regulate the uses of private land and the protections accorded private archaeological sites, so long as the federal and state constitutions are not violated and the private landowner's use is not completely stymied. In light of this restriction, states appear to be gaining an awareness of the inherent value in protecting our cultural heritage from despoliation.

Recently, Oregon was embroiled in a controversy regarding the proper balance of property owner versus environmentalist rights. In March 1995, a bill pending before the Oregon Senate proposed that a value be placed on what environmental regulations take from property owners and instead charge that amount to Oregon taxpayers in general.⁵³ The bill's sponsor, State Sen. Rod Johnson (R.-Roseburg), was apparently aiming to protect private property owners from future regulations for environmental, cultural, scenic or historic preservation.⁵⁴ There was, however, much opposition to the bill from all

47. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

48. *Id.* at 1015.

49. *Id.* at 1027; *see also* *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664, 670 (Iowa), *cert. denied*, 508 U.S. 940 (1993).

50. 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 115 S. Ct. 1313 (1995).

51. *Id.* at 371.

52. *Id.*

53. Rob Eure, *Measure Would Compensate Landowners*, PORTLAND OREGONIAN, Mar. 22, 1995, at B03.

54. *Id.* "If the landowner could prove he lost \$10,000 or 10% of his property value from the

sides of the issue, with environmentalists seeing the proposal as a sneaky means of preventing future regulations which could, in fact, cost taxpayers millions of dollars.⁵⁵ Nevertheless, similar proposals are being heard across the country and in Congress.⁵⁶ Keeping this delicate balance in mind, the next section of this article examines several approaches to permissible private land archaeological site protection.

IV. Private Land Archaeological Site Protection

A. State Approaches

The majority of archaeological sites in the western United States receive protection under one federal statute or another, since legislative focus is on preserving artifacts situated on federal or Indian land. Private land archaeological site protection, however, although necessary throughout the United States, is of particular importance in the eastern United States, where most land is privately owned and hence unprotected by the usual federal statutes. Until recently, the East had no collective Indian voice, or any other voice, to clamor for the protection of relics without regard to the status of the land under which our cultural heritage is buried.⁵⁷ Today, fortunately, a strong Indian voice is being heard and joined by many others who see value in looking at our past: They are people who refuse to look the other way while certain members of our society pillage the earth for commercial or professional gain. Slowly, states are responding to these concerns and closing the loopholes which permit such destruction at the expense of the entire nation, as well as the world.

1. Artifact-Specific Protections

Many state statutes are "artifact specific," i.e., they are designed to protect a certain type of artifact typically found in that area, such as human remains, petroglyphs, fossils and paleontological resources, or cliff dwellings and their contents. Burial desecration statutes, for example, are found in almost every

regulation, the state would pay." *Id.*

55. *Id.*

56. *Id.*

57. As the *Los Angeles Times* notes:

Long recognized as a problem in the West and Southwest, the looting of historic sites is now seen as a serious threat in the East and Midwest Currently, it is "probably more serious in the eastern third of the country than it is in the southwest Many of the sites there are on private land and are not protected by [federal] law and there is less of an awareness in that section of the country about Indian cultures."

Green & Leopold, *supra* note 33, at 1 (quoting Mark Michel, president of the Archeological Conservancy, Santa Fe, New Mexico).

state, with NAGPRA protecting Native American gravesites regardless of the status of the property under which they are situated.

When human remains are not involved in an excavation, however, federal and state protections become sketchy at best. As a general rule, excavations of privately owned land archaeological sites are entirely permissible with merely the landowner's permission. Many states, however, are passing laws which regulate to a small extent just what a landowner may consent to without state intervention.

a) Human Remains

Due to cultural beliefs of the sanctity of human remains, almost every state has enacted laws regulating the excavation of gravesites. These state laws, in addition to NAGPRA, provide very thorough protection for all gravesites regardless of the status of the property under which they now lay. The State of Illinois, for example, passed the Human Skeletal Remains Protection Act (HSRPA)⁵⁸ in response to recent incidents in Illinois and neighboring states involving unmarked and unregistered graves.⁵⁹ Not intending to interfere with legitimate scientific study or landowner use of private property, the Act simply requires the inadvertent discoverer to report a find of human remains to the coroner who, in turn, informs the Historic Preservation Agency of the unregistered grave. The Agency then makes the proper arrangements for removal and/or reinterment.⁶⁰

Because Illinois is concerned with deterring the intentional excavation of prehistoric and historic Indian, pioneer, and Civil War veteran's graves, among others, for professional or financial gain, the *knowing* disinterment of human remains, burial artifacts or markers, carries strict penalties. Consequences may include fines of up to \$10,000, imprisonment, forfeiture of all equipment, and costs of restoration and reinterment.⁶¹

b) Rock Art

While all states contain burial grounds and provide adequately for their protection, some states must also consider their unique cultural heritage: underwater sites, fossils, petroglyphs, pioneer trails, and cave dwellings, for example. Several states, including Oklahoma, extend protection over irreplaceable artifacts located on state-owned land, but merely "discourage" excavation and destruction of those same artifacts situated on private land.⁶² Oklahoma, for example, prohibits the knowing defacement of petroglyphs, pictographs or other marks or carvings on rock. Private Oklahoma

58. 20 ILL. COMP. ANN. STAT. 3440/0.01 to 3440/16 (West 1993 & Supp. 1996).

59. *Id.* 3440/2.

60. *Id.*

61. *Id.*

62. *E.g.*, 53 OKLA. STAT. ANN. § 361 (West 1991); DEL. CODE ANN. tit. 7, § 5305 (1991).

landowners, however, may give their consent to the excavation or removal of archaeological relics from their property — private excavations are simply to be discouraged by the State, except those conducted "in the spirit of the statute."⁶³

Conversely, Washington State has recently made concerted efforts to protect Indian burial sites, cairns, glyptic markings, and historic graves whether located on public or private land and encourages the voluntary reporting of such finds.⁶⁴ Additionally, Washington also made provisions designed to prevent the unauthorized removal or defacement of glyptic or painted records.⁶⁵ The permission of the State Historic Preservation Officer (SHPO) is required before removal of these relics and the materials removed must be destined for preservation. The SHPO must also notify any affected Indian tribes before the removal.⁶⁶

Similarly, Iowa County, Wisconsin has also experienced its share of lost artifacts due to the defacement of ancient cave drawings and is now hurrying to devise adequate protective measures.⁶⁷ A public task force was created in 1993 after vandals attempted to cut a section of a thousand-year-old drawing from the cave wall.⁶⁸ In response, public awareness of the protections afforded art located on public land, versus art situated on private land, was brought to the forefront. The task force intends to make formal recommendations aimed at locating, documenting, and protecting *all* of the state's rock art sites.⁶⁹

c) Fossils

Kansas, among other notable "fossil states," has sought to protect its most prominent cultural property through a statute prohibiting commercial fossil hunting without landowner permission.⁷⁰ Under the provisions of this statute, "[n]o commercial fossil hunter shall go upon the land of another in search of fossils unless the commercial fossil hunter has obtained the written authorization of the landowner to go upon such land for such purpose"⁷¹ The commercial fossil hunter, in requesting the landowner's authorization, must identify himself as a commercial fossil hunter who intends to locate and sell his

63. 53 OKLA. STAT. ANN. § 361(K), (M) (West 1991); *see also* Op. Atty. Gen. No. 86-43 (Nov. 24, 1986).

64. WASH. REV. CODE ANN. § 27.44.030(4) (West 1982 & Supp. 1996).

65. *Id.* § 27.44.020.

66. *Id.*

67. *Group Attempting to Document, Protect Ancient Cave Wall Art*, MILWAUKEE J. & SENTINEL, Dec. 28, 1994, at B2.

68. *Id.*

69. *Id.*

70. KAN. STAT. ANN. § 21-3759 (1994).

71. *Id.* § 21-3759(b).

find.⁷² The commercial fossil hunter is prohibited from removing any fossils until the landowner is first provided with a description of the find and provides written authorization for the removal.⁷³ Violations of these provisions are classified as misdemeanors.⁷⁴

2. Trafficking Restrictions

One rather obvious method of curbing the plunder of any archaeologically significant site is to prevent the financial gain sought by looters through statutory provisions regulating the inter- or intrastate traffic in illegally obtained cultural relics. As demonstrated by the *Gerber* decision, states may protect against pothunting and other looting by broadening the scope of existing trespass or conversion laws and linking them to federal anti-trafficking provisions⁷⁵ to restrict the removal of artifacts from private property. "Clearly, the precautions taken by archaeological looters, including visiting sites at night and disguising themselves with government uniforms, suggest that archaeological looters are aware of the law."⁷⁶ A word of caution must be noted however: If state criminal trespass laws are sufficient to trigger federal prosecutions, state or local legislators may overly rely on the federal *interstate* trafficking provisions and fail to pass stringent state or local level measures, leaving yet another loophole available to private property owners who unearth objects and deal with them simply in *intrastate* commerce.⁷⁷

To be effective, courts must consistently interpret federal statutes as applicable to private, as well as public and tribal lands.⁷⁸ States must pass specific legislation affecting *all* archaeological resources, rather than rely on more general state law protections; and landowner permission must be strictly regulated where it could potentially nullify the effectiveness of federal and state law protections or destroy irreplaceable cultural objects.

3. Permit Requirements

State or local statutes work best when tied to a permit requirement for any disruption of archaeological resources. Several states now require permits issued by a State Historic Preservation Officer or similar authority before excavations may begin on *any* site. Some states, such as Washington, require both; landowner consent must be obtained before applying for an SHPO-

72. *Id.*

73. *Id.* § 21-3759(c).

74. *Id.* § 21-3759(b)-(c).

75. NAGPRA contains anti-trafficking provisions as does ARPA. However, ARPA only prohibits *inter-state* trafficking. It does not prohibit purely *intra-state* trafficking.

76. Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 626 (1995).

77. Callahan, *supra* note 14, at 1337-38.

78. *Id.* at 1338.

issued permit.⁷⁹ The SHPO may also consult with affected tribes to develop permit guidelines.⁸⁰

Still other states permit the SHPO or other officer to designate "archaeological landmarks" which cannot be excavated without a state-issued permit. The state usually retains the exclusive right to excavate these areas. Archaeological landmarks located on private land may not be designated as such without the landowner's consent. However, upon consent and designation, these properties also become subject to the permit requirement.⁸¹

New Mexico, as discussed in *State v. Turley*,⁸² combines the above approaches by reserving the exclusive right of field archaeology on public lands to the state⁸³ while requiring permits for private site excavations.⁸⁴ Under the New Mexico statute, no permit is required if a landowner wishes to excavate his own property.⁸⁵ The *Turley* decision, finding the landowner's "agent" guilty of not obtaining a permit, was later reversed, exempting owner agents from the statute's permit requirement.⁸⁶

From these few examples it is clear that states must meticulously draft their permit requirement statutes to cover any and every possible combination of artifacts and land types. Though it is difficult to strike a balance between detail ad nauseam and vague or overbroad provisions, drafters must strive for absolutely precise legislation. Moreover, they must constantly revise the legislation, if necessary, because vandals and looters will inevitably find their way through the smallest of loopholes if left unguarded.

4. Expansion of Existing Regulations

Various states prefer to utilize existing statutory regulations and expand their protection to cover state cultural resources. In *Whitacre v. State*,⁸⁷ for example, amateur archaeologists sought a declaratory judgment determining the coverage of Indiana's Historic Preservation and Archeology Act.⁸⁸ In essence, Whitacre wanted to know whether the Act was applicable to privately owned property, as he and his wife had discovered a Hopewell Indian site on a local farm which they subsequently purchased and wished to excavate.

79. WASH. REV. CODE ANN. § 27.53.060 (West 1982 & Supp. 1996).

80. *Id.*

81. *See, e.g.*, VT. STAT. ANN. tit. 22, §§ 762-763 (1987 & Supp. 1995); MISS. CODE ANN. §§ 39-7-11 & 39-7-13 (1996).

82. 633 P.2d 700 (N.M. Ct. App. 1980) (holding that statute exempts *only* landowners themselves from permit requirement), *rev'd* 633 P.2d 687 (N.M. 1981) (holding that statute does not require landowner's agent to obtain permit).

83. Cultural Properties Act, N.M. STAT. ANN. §§ 18-6-1 to 18-6-17 (1978); *see* § 18-6-9.

84. *Id.* § 18-6-11.

85. *Id.* § 18-6-11(D).

86. *Turley*, 633 P.2d at 688.

87. 619 N.E.2d 605 (Ind. Ct. App. 1993).

88. IND. CODE § 14-3-3.4 (1989).

Whitacre inquired about obtaining a permit and, upon finding one necessary, filed for a declaratory judgment to clarify the Act's requirements. Both the trial and appellate courts found that the Act's purposes were furthered by the interpretation that the Act was intended to apply to private as well as public land.⁸⁹ The court of appeals stated, "Unless the legislature intended to give the state the power to oversee and regulate treatment of historical and archeological findings on private property . . . the act is virtually meaningless."⁹⁰

Under the Act in its original form, Indiana was not able to protect the destruction of artifacts located on private sites. However, amendments enacted prior to *Whitacre* expanded the scope of the statute to include not only "historic sites" and "historic structures," but also to include *any* property where a person discovers artifacts or burial objects.⁹¹ Through these amendments, Indiana directly regulated archaeological activities on private land. Thus, according to accepted standards of statutory construction, the court's interpretation furthered the public policy behind the Indiana Act: "[T]o further our understanding of the state's heritage and historical culture by preserving and studying what has been left behind."⁹²

Alternatively, or in addition to the above method, states have utilized statutes relating to closely regulated industries in order to expand state cultural resource protection. *Department of Natural Resources v. Indiana Coal Council*⁹³ presents such a case. There, the Department of National Resources (the Department) ordered the landowner to cease strip mining until archaeological information could be gathered from the site. The lower court found that certain provisions of the Surface Mining Control and Reclamation Act, under which the Department order originated, amounted to an unconstitutional taking. The Department appealed and the instant case resulted in the holding that the order did not, in fact, constitute a taking.

The *Indiana Coal Council* court applied a two-prong test in making its determination. Under this test, a land use regulation impacting private property does not effect a taking if it: (1) substantially advances a legitimate state interest; and (2) does not deprive the owner of all economically viable use of his property.⁹⁴ Thus, insofar as the order was consistent with legitimate state interests in protecting cultural resources from destruction and did not interfere with the landowner's reasonable investment-backed

89. *Whitacre*, 619 N.E.2d at 606.

90. *Id.* at 607.

91. *Id.* at 608.

92. *Id.*

93. 542 N.E.2d 1000 (Ind. 1989), *cert. denied*, 493 U.S. 1078 (1990).

94. *Id.* at 1002 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)).

expectations,⁹⁵ or with present use of the property, such regulation did not violate the Fifth Amendment.⁹⁶

5. Utilization of State or Local Regulatory Powers

Still, some states choose to regulate private land archaeological site excavations through zoning or other regulatory powers. Survey requirements, planning commissions, land use regulations, and the like are often employed by states as means to balance aesthetic, ecological, and historical concerns with development interests.⁹⁷ Oregon, for instance, permits the subdivision of property into smaller than usual zoning units in order to protect the state's cultural patrimony.⁹⁸

On behalf of the general welfare of the public, Alaska has made a concerted effort to prevent the loss, desecration, and destruction of its archaeological past. Under the Alaska Historic Preservation Act,⁹⁹ the governor may declare the designation of particular structures or sites as state monuments or historic sites. Provisions are also made for the declaration of privately owned sites as state historic sites, with such sites receiving state support for maintenance, restoration and rehabilitation.¹⁰⁰ Notably, privately owned archaeological properties in danger of being sold or utilized so that their historic or archaeological value will be destroyed or otherwise seriously impaired, may be subject to state-imposed land use restrictions. If the owner refuses to comply with the restrictions, the state may acquire the property through eminent domain proceedings.¹⁰¹

Recognizing that the historical, architectural, archaeological, paleontological, and cultural heritage of the state is one of its most important assets, South Dakota has attempted an impressive program of historic preservation.¹⁰² Under the program, any county or municipality may establish an historic preservation commission which is entitled to enter public and private property for the purpose of conducting surveys of local historic properties. The commission may acquire historic properties through purchase, bequest or donation or historic easements in properties through purchase, donation, or condemnation in order to preserve, maintain, or enhance all or part of these areas of cultural significance.¹⁰³ Once title is obtained, the

95. The court noted that the property had not been acquired with the "intent to mine coal" and, further, that the state possessed a legitimate interest in the protection of scenic and historic values. *Id.* at 1003.

96. *Id.* at 1004.

97. Callahan, *supra* note 14, at 1339.

98. *Id.* at 1340.

99. ALASKA STAT. §§ 41.35.010 to 41.53.240 (Michie 1995).

100. *Id.* § 41.35.030, -.040.

101. *Id.* § 41.35.060.

102. S.D. CODIFIED LAWS § 1-19B-1 (Michie 1992).

103. *Id.* §§ 1-19B-13 to 1-19B-16.

commission is authorized to preserve, restore, maintain and operate the property or sell, lease, or otherwise dispose of the property subject to the rights of public access and other covenants or restrictions.¹⁰⁴

Any historic preservation commission may recommend that the local governing body adopt an ordinance designating lands as historic property and require notice to the owners of the proposed action.¹⁰⁵ Once designated, an appropriate sign will be posted on the property and the owners must thereafter give notice to the commission before any demolition, remodeling, or material alteration of the property occurs. The commission may negotiate with the owner to find a way to preserve the property or provide for its acquisition by gift, exchange or purchase.¹⁰⁶

* * *

Despite these various state efforts, other wider-reaching statutes and protections are often necessary to increase the effectiveness of the scattered and widely differing approaches to private land archaeological site protection.

B. Individualized Approaches

1. Registry and Landmark Classifications

Historic registries exist at both the federal and state levels. On the federal level, the National Historic Preservation Act (NHPA) is designed primarily to *encourage* preservation of significant sites in American history, rather than mandate protection.¹⁰⁷ A listing on the National Register, therefore, does not necessarily protect the land or its treasures: the federal agency having jurisdiction must merely *consider* the effect of any project on the site before providing funding or issuing any licenses.¹⁰⁸

Some states have also devised their own counterparts to NHPA registry. Commendably, the State of Kentucky devised a means of protecting sites located on private property without unnecessarily burdening the landowner. Under the Kentucky registry, participating landowners receive special recognition in return for agreeing to avoid harming the site, allowing periodic inspections of the site, and notifying the registry of transfers of title.¹⁰⁹

NHPA also established a National Historic Landmark program which is administered in generally the same manner as national register sites.¹¹⁰ As with national register sites, national landmarks are listed in the National

104. *Id.* § 1-19B-15, -17.

105. *Id.* § 1-19B-19, -20.

106. *Id.* §§ 1-19B-22 to -23, 1-19B-27 to -28.

107. *Lee v. Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1989).

108. 16 U.S.C. § 470f (1994).

109. Callahan, *supra* note 14, at 1344 (citing A. GWYNN HENDERSON, *THE KENTUCKY ARCHAEOLOGICAL REGISTRY: CITIZEN-BASED PRESERVATION FOR KENTUCKY'S MOST SIGNIFICANT ARCHAEOLOGICAL SITES* (1988)).

110. 16 U.S.C. §§ 470 to 470w-6 (1994).

Register and protected from federal action. Although this Act leaves participation to the private landowner's discretion, national landmarks may find protection from private action under the private National Trust for Historic Preservation.¹¹¹ In *Landmarks Preservation Council of Illinois v. City of Chicago*,¹¹² for example, the Illinois Supreme Court held that the National Trust had standing to challenge the destruction of historically significant, privately owned buildings because it was vitally necessary to prevent irreplaceable loss.¹¹³ The buildings at issue had not yet been designated national landmarks.¹¹⁴

If private action is not challenged, or if challenged but lost, private landowners may reject national landmark status. There may be occasions, however, when national landmark status is rejected for reasons other than avoiding the regulations inherent in that status. For instance, many, if not all, Native American tribes have experienced the traumatic exploitation and exhumation of sacred artifacts and human remains from gravesites by collectors and commercial fortune-seekers. Now many tribes merely seek to close such sites to the public. In the early decades of this century, for example, numerous Pawnee gravesites in Salinas, Kansas, were disturbed and their contents put on public display. Incredibly, as a result of this display, the site was declared a National Historic Landmark¹¹⁵ and opened to the public. In the mid-1980s, however, Pawnee leaders were successful in closing the commercial venture and reburying 146 exposed Pawnee remains.¹¹⁶ Ultimately, neither the registry nor the landmark program provide any real protection to privately owned archaeological sites. Although a committed landowner will find these programs very helpful, privately owned sites may be removed from a registry or landmark listing almost as easily as they received the distinction to begin with — simply with the decision of the landowner to change the status of the property.

2. Voluntary Conservation

Bleak prospects face those seeking lasting protection or conservation of privately held sites, and creative solutions are often required. Among the creative approaches taken by interested individuals and groups to secure the protection of private land archaeological sites are conservation easements and the direct-yet-expensive approaches of direct funding of preservation efforts or outright acquisition of historic properties.

111. *Id.* §§ 468-468d.

112. 531 N.E.2d 9 (Ill. 1988).

113. *Id.* at 14.

114. *Id.*

115. Mandosa, *supra* note 8, at 112.

116. *Id.*

a) Conservation Easements

South Dakota statutes define a conservation easement as

a nonpossessory interest of a holder [government body or charitable association or trust] in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forest, recreational or open-space use, protecting natural resources, maintaining or enhancing air or water quality or preserving the historical, architectural, archaeological, paleontological or cultural aspects of real property.¹¹⁷

Numerous states have joined South Dakota in enacting similar statutes to permit such negative easements.¹¹⁸

At common law, a conservation easement was considered an easement in gross, i.e., an easement benefitting a specific individual, which could not run with the land.¹¹⁹ Under these new statutes, however, the holder of a negative easement is permitted to enforce the terms of a conservation easement against the landowner and subsequent landowners to prevent harm to the protected portion of the property.

Typically, conservation easement statutes permit the use of *assignable* negative easements to protect objects of cultural importance from destruction or other harm in the future. The South Dakota provisions, for example, warn that a conservation easement is valid although:

- (1) It is not appurtenant to an interest in real property;
- (2) It can be or has been assigned to another holder;
- (3) It is not of a character that has been recognized traditionally at common law;
- (4) It imposes a negative burden;
- (5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) The benefit does not touch or concern real property; or
- (7) There is no privity of estate or of contract.¹²⁰

Some states have gone so far as to establish conservation easement funds. Rhode Island, for instance, authorizes the general treasurer of the State "to

117. S.D. CODIFIED LAWS § 1-19B-56 (Michie 1992).

118. Callahan, *supra* note 14, at 1346; *see, e.g.*, S.D. CODIFIED LAWS §§ 1-19B-56 to 1-19B-60 (Michie 1992); IDAHO CODE §§ 55-2101 to 55-2109 (1994); MD. ANN. CODE art. 83B, § 5-615 (1992).

119. BLACK'S LAW DICTIONARY 353 (abridged 6th ed. 1991).

120. S.D. CODIFIED LAWS § 1-19B-59 (Michie 1992).

establish a 'historic preservation easement fund' for the purpose of receiving fees charged for acceptance of conservation easements."¹²¹ Monies raised are used for the operating and maintenance costs of the easements.¹²²

b) Funding of Preservation Efforts

State and private funding is also a time-honored method of historic preservation. Rhode Island provided that a separate historical preservation revolving fund be created within the State treasury.¹²³ State and federal monies, as well as gifts, bequests, and donations from public and private sources, all of which were intended to assist historic preservation or restoration, are gathered together into this fund. The fund is then used to grant loans to State and National Register properties and National Historic Landmarks.¹²⁴ Loan money is available for purchase or restoration of properties intended for preservation; to make loans to nonprofit preservation foundations, corporations, individuals, cities or towns for acquisition or restoration efforts; and, to provide equity capital for residential or commercial development of historic properties in order to encourage revitalization of historic buildings and districts.¹²⁵ Loan repayment money and proceeds from the resale of restored properties are returned to the fund to provide capital for other such ventures.¹²⁶

c) Direct Acquisition

When all else fails, and certain destruction of a culturally significant site is near, it is not uncommon for private parties or states to purchase the site. Often, private parties will deed the site to the state but, in other cases, governmental entities are empowered to purchase sites on behalf of the state.¹²⁷

Unfortunately, opening a site up to purchase may also have its drawbacks, for example, where private ownership would serve merely to open the area up to commercial exploitation or site destruction. Such was the case recently of

121. R.I. GEN. LAWS § 42-45-9.1 (1993).

122. *Id.*

123. *Id.* § 42-45-10.

124. *Id.*

125. *Id.*

126. *Id.*

127. Callahan, *supra* note 14, at 1347.

The Delaware Land and Water Conservation Trust Fund is authorized to purchase any right in real property necessary to protect scenic, archaeological, recreational, or wildlife resources. The Georgia legislature also has granted the state authority to purchase or accept by donation private lands with archaeological sites to add to the state park system. The Kentucky legislature has given the University of Kentucky Anthropology Department authority to purchase archaeological sites in fee on behalf of the state.

Id. at 1347-48.

a 700-year-old ruin near Springerville, Arizona. Arizona, which owned the Casa Malpais site, decided to sell the National Historic Landmark when it determined that it could no longer afford to adequately protect the site. The Arizona Constitution, however, required that the land be auctioned to the highest bidder.¹²⁸ The town of Springerville, the site manager for several years, shuddered with the thought of wealthy pothunters purchasing and looting the site for its commercial value. Fortunately luck was with the town: It was the sole bidder at the auction, and financially able to purchase the ruins with the generous help of a \$25,000 grant from the State Historic Preservation Office.¹²⁹

States are not the only saviors of "last chance" private land archaeological sites. Conservation groups or other interested parties will often act to save a particular site if the monetary resources necessary for such acquisitions are available. Such was the case at Springerville, Arizona, in June 1995, and it is very often the case with concerned groups such as the nearly twenty-year-old Archaeological Conservancy.

The Archaeological Conservancy generally acquires archaeological sites through purchase or gift and later conveys them to the government or nonprofit groups with the resources to protect the property.¹³⁰ To date, the Conservancy owns approximately 105 archaeological sites nationwide.¹³¹ Most recently, the Archaeological Conservancy has acquired a thirty-eight-acre Anasazi site in Colorado to protect the ruins from the ravages of pothunters,¹³² a six-acre Monongahela site in Pennsylvania for use as a research preserve, and an eight-acre Monongahela site noted for the ancient village formerly located there.¹³³

Other conservation-oriented groups, such as EarthWatch and tribal corporations, also make similar contributions to the area of archaeological private-site protection. The benefits are limited only to purchaser creativity. Sites may be utilized for a variety of purposes including research, teaching, or mere preservation of the status quo and, ultimately, these valuable, nonrenewable resources are preserved for the future. However, outright purchase is an often impractical, last-ditch approach, regardless of the best of intentions, due to the current predicament of state or local coffers.

128. Guy Webster, *Springerville is New Owner of Ruins*, ARIZ. REPUBLIC, June 21, 1995, at B1.

129. Guy Webster, *State to Auction 700-Year-Old Ruin: Private Buyer Could Plunder Springerville Site, Some Fear*, ARIZ. REPUBLIC, June 20, 1995, at A1 [hereinafter Webster, *State to Auction 700-Year-Old Ruin*].

130. *The Archaeological Conservancy*, N.Y. TIMES, June 27, 1982, at 1-23.

131. Webster, *State to Auction 700-Year-Old Ruin*, *supra* note 129, at A1.

132. Deborah Frazier, *Conservancy Digs Anasazi Sites*, ROCKY MOUNTAIN NEWS, Feb. 13, 1995, at 6A.

133. David Templeton, *Archaeology Group Buys Indian Village*, PITTSBURGH POST-GAZETTE, Aug. 6, 1995, at W3.

3. Universal Property

Perhaps the easiest and most practical approach to private archaeological site preservation is that implemented by Alabama. Alabama reserves the exclusive right of exploration and excavation of all sites within the state, subject to the rights of the owner for agricultural, domestic, or industrial purposes, and anything found belongs to the state.¹³⁴ Moreover, nonresidents of the state are not permitted, either by themselves or as agents of anyone else, to explore, excavate or remove any artifacts from the state.¹³⁵ This approach is bound to make a lot of Americans stand up and scream — but it is effective. By means of pacifying distraught citizens, Alabama will not excavate without landowner consent and unless damage will not be done to crops or structures upon the site.¹³⁶ The state will also restore the area to the same or like condition.¹³⁷ Additionally, no artifact recovered will be disposed out of state, but rather, remains in state collections.¹³⁸

Alabama follows a line of thought that views our cultural heritage as the property of no individual. Many nations throughout the world share this view.¹³⁹ In these countries, title to all cultural property inheres in the state and the state decides who is qualified to receive excavation permits, as well as when it is appropriate and where it is safe to display these world treasures. This system, of course, necessitates a government sensitive to the values and beliefs of those culturally diverse peoples within its borders or, perhaps, simply a government with the foresight to consult the affected peoples and educate itself before displaying certain relics. These nations, on the forefront of cultural preservation and appreciation, could well be considered among the most enlightened in the world, and the rest of us would do well to learn from their example.

V. Conclusion

Protecting archaeological sites on any property is not a simple task. Many competing interests are involved in determining whether or not to exploit the limited supply that is our cultural heritage. Fortunately, Congress and state legislatures, as well as the judiciary, have recognized that not everything should have a price attached to it and have consequently extended protections over archaeological sites on public and Indian lands. To date, the same general security granted to these sites has not been extended in full force to

134. ALA. CODE § 41-3-1 (1991).

135. *Id.* § 14-3-2.

136. *Id.* § 41-3-3.

137. *Id.* § 41-3-4.

138. *Id.* § 41-3-5.

139. Examples include several "Fertile Crescent" nations (Egypt, Jordan, Lebanon) as well as countries in Central and South America (Mexico, Belize, Argentina, Venezuela). Callahan, *supra* note 14, at 1325.

archaeological sites situated on private property. This is largely due to the American aversion to restrictions on alienation or uses of privately owned land, and ultimately, raises Fifth Amendment "takings" concerns. Thus, federal and state protection over privately owned sites consists mainly of a hodgepodge of scattered statutes and common law rulings.

Fortunately, there appears to be an increasing awareness of existing loopholes and the price we all will pay if they are not closed, but, as yet, no comprehensive form of protection has been created. It will be up to all interested parties — federal, state and local governments, conservation organizations, and private individuals — to work jointly to increase the effectiveness of existing protections or devise new options. This work cannot wait, for if not immediately protected, our cultural heritage will quickly and irretrievably slip through the fingers of mercenary looters and vandals. Our cultural patrimony must not be allowed to take a back seat to commercial exploitation. It simply has too much to offer, whether excavated or not, to our national sense of being and the needs and mores of past and future generations.