**The Archeological and Historic Preservation Act of 1974: A Panacea?**

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**ABSTRACT**

In May of 1974 the Moss-Bennett Bill became the Archeological and Historic Preservation Act of 1974. Archeologists had long awaited this act as a panacea for their problems which were perceived mainly as a lack of adequate funding. After more than 2 years it is apparent that there are both strengths and weaknesses in the structure of the act, and while some funding clarification has occurred, it has not cured all of the archeologists' problems. Additional unforeseen effects of the passage of this act may ultimately have a greater impact than the long sought-after funding authorities.

This paper dissects the law and examines its components, sets forth the current interpretation and philosophy of the Interagency Archeological Services of the National Park Service, the principal agency for the Secretary of the Interior responsible for implementation of the act, and discusses as unforeseen implications of the law the changes required in contracting procedures, the introduction of competition into archeological contracting, the integration with other cultural resource management laws, the coordination of recovery activities, reporting responsibilities, and funding limitations.

On May 24, 1974, the long-awaited Moss-Bennett bill was signed into law as the Archeological and Historic Preservation Act of 1974 (Public Law 93-291), amending the Reservoir Salvage Act of 1960. Archeologists had looked forward to this moment for over 5 years (McGimsey 1969), and a great many saw this bill, with its funding for archeology tied to a percentage of project funds, as the panacea for archeology. A funding source which would at last, it was thought, provide enough funds to do an adequate job of archeological investigation. The question now is: has this proved to be the case?

**The Act**

In addition to the funding authorities, the act contains several other provisions. For clarity and to provide a common background for further discussions, it is appropriate to dissect the act and examine all its provisions.

Section 1. Expands the Reservoir Salvage Act of 1960 to include all Federal or Federally-licensed projects, activities, or programs resulting in the alteration of terrain.

Section 2. Continues the authorities of the Reservoir Salvage Act (Public Law 86-523).

Section 3. (a.) Authorizes 2 alternatives for Federal agencies when notified that cultural resources are present or when they find cultural resources present in a project area. (1) They may request the Secretary of the Interior (referred to as the Secretary hereafter) to do the necessary work to recover the resources, or (2) they may do the work with funds appropriated for the project. (b.) Applies to loan and grant agencies and allows the Secretary to initiate work with specially appropriated funds. The Secretary is authorized to compensate for the temporary loss of use of private or non-federally owned land resulting from such recovery, or losses due to construction delay for archeological recovery. Section 3 does not indicate that there is the alternative of not doing the work.

Section 4. (a.) Authorizes the Secretary to conduct archeological work upon notification by specified appropriate authorities. This authority is viewed by the Secretary as transitional authority until Federal programs and Federal financial assistance can be adjusted to meet this legislation (National Park Service 1976a).

(b.) Excludes work associated with a national disaster from this section.

(c.) Establishes a 60-day limitation after negotiation for initiation of work.

(d.) Authorizes the Secretary to make payment of compensation for temporary loss of the use of private or non-federal land, or due to construction delay for archeological recovery.

Section 5. (a.) Charges the Secretary with keeping the funding or licensing agency informed of progress.

(b.) Empowers the Secretary to negotiate the ownership and appropriate repository of data recovered.

(c.) Places coordinating responsibility on the Secretary for all Federal survey and recovery activities under Public Law 93-291. Sets up a reporting obligation for the Secretary to the Congress.

Section 6. Authorizes the Secretary to enter contracts, obtain expert services and accept funds for salvage from Federal, corporate, and private sources.

Section 7. Establishes funding for Public Law 93-291 provisions. (a.) Allows Federal agencies to transfer to the Secretary up to 1% of project funds for salvage, or to assist the Secretary in salvage.

(b.) Funds financial aid situations.

(c.) Funds transitional carryover of Reservoir Salvage Act programs and other projects not funded under 7(a.) which the Secretary determines are in the public interest (Reaves 1974).

This act greatly expanded the authority, responsibilities, and funding of the Interagency Archeological Salvage Program. This expansion stimulated a reorganization of the traditional Salvage Program to meet these new authorities, responsibilities, levels of funding, and to unify a national program.

Interpretations

The initial steps in this reorganization were taken in November 1973 when the Division of Anthropology and Archeology in the National Park Service was divided in 2 parts. One, the Division of Anthropology and Archeology was to handle only internal (National Park Service) programs. The Interagency Archeological Serv-

ices Division was to handle only external (interagency) archeological programs. To more effectively deal with the agencies at a field office level, 3 field offices were established in Atlanta, Georgia, Denver, Colorado, and San Francisco, California (Reaves 1975).

The intent of this separation of external and internal archeological functions is twofold. First, it is intended to facilitate a more uniform national program for the conservation of archeological resources under the authorities of the several laws and Executive Order dealing with cultural resources preservation; and secondly, the separation is meant to result in a better controlled expenditure of funds which are separately appropriated to support these functions (Theissen 1975).

Few laws exist completely unto themselves and must be interpreted as they relate to other laws and regulations and ultimately as they relate to the Constitution.

Public Law 93-291 is best seen as a salvage bill. The authority it provides should not become operative until all planning activities required by other laws have taken place. The Interagency Archeological Services, in light of the National Historic Preservation Act, the National Environmental Policy Act and Executive Order 11593, feels any use of these authorities can only occur after the alternatives to destruction have been explored and after a systematic attempt has been made to reduce the harmful effects of the project.

In order for this program to function properly, it must be integrated with other responsibilities of the Federal Government to the maximum extent possible. It will place additional responsibilities on the archeologists who are doing the work to assure that they fully understand the implications of their actions. Work done to satisfy the requirements of the National Environmental Policy Act, Executive Order 11593, or Section 106 of the Historic Preservation Act, will have an effect on what options remain open for expending funds under the Archeological and Historic Preservation Act. Sites that have not been identified or that have been determined to be insignificant for nomination to the National Register.
of Historic Places, will probably not receive funds for mitigation under this act.

As the lead agency in fulfilling the Secretary's responsibilities under this act, the Interagency Archeological Services is preparing implementing regulations and guidelines. In the interim, until these have been fully reviewed and published, the Interior Department policies were spelled out in a Statement of Program Approach which was sent to all Federal agencies and State Historic Preservation Officers. This statement is available from the United States Department of the Interior, National Park Service, Office of Archeology and Historic Preservation, Washington, D.C. It is expected that regulations and guidelines implementing these policies will be codified within a short time.

Basic to these policies is that archeological resources are a limited, irreplaceable part of the environment and must be so considered in accomplishing the requirements of the laws dealing with the preservation of the environment. To further this concept the Statement of Program Approach is based on the premise that it is better to preserve sites in situ in most cases, than to preserve data derived through archeological investigations. To assure that the resources have gotten full consideration, the Department of the Interior will typically not fund recovery until Section 106 of the National Historic Preservation Act, Executive Order 11593, and the National Environmental Policy Act requirements have been completed (National Park Service 1975a).

Unforeseen Implications

Changes in Contract Administration

With the reorganization of the archeological programs in the National Park Service came a commitment to change some of the methodology of the past, which through no particular fault had created an unwieldy, scientifically marginal response to the needs of archeology and had brought much criticism from the profession regarding the standards of salvage archeology.

More or less simultaneously with this commitment came advice from the legal counsel of the Department of the Interior that serious defects existed in the procurement practices for obtaining archeological recovery investigations. Federal Procurement Regulations (Title 41, Code of Federal Regulations) designed to assure quality and equitability in such procurement were not being fully complied with, leaving the program vulnerable to probable litigation (National Park Service 1976b).

The 3 offices of the Interagency Archeological Services Division accomplish the role of administering the act through a contracting program with competent, qualified, professional individuals and organizations.

Basically, there are 2 types of procurement in the Federal Government: procurement by formal advertisement and procurement through negotiation. Negotiated contracts are an exception to the standard means of procurement by advertisement and must meet certain requirements. They are always under suspicion by those responsible for Federal audits; therefore, the Interagency must be in a position to show that it has proceeded properly. A basic premise of Government contracts is competition. A negotiated contract does not mean a contract without competition. Federal Procurement Regulations (41 CFR 1-3.101(c)) states that whenever property or services are to be procured, the Contracting Officer must seek proposals from the maximum number of qualified sources including small business concerns, and 41 CFR 1-3.101(d) states that there will be competition to the maximum extent possible (Reaves 1976).

Since the premise of an advertised contract is that the product desired can be adequately described so as to allow all offers to make equivalent bids, and since it is not possible to know before excavation what discoveries will be made in archeology, it was determined that negotiated procurement was most appropriate. In order to comply to the greatest possible extent with the Federal Procurement Regulations, and at the same time fulfill professional responsibilities and desires, the following steps were instituted.
1. The first step is the identification of need. The National Environmental Policy Act and other legislation require Federal agencies to assess the effects their projects, programs, and activities have on the environment (including consideration of cultural resources). Agencies may obtain the necessary information by contract, may develop an in-house capability to compile and assess the necessary data, or they may pass this responsibility to the private, state, or local beneficiaries of their programs. Once specific resources are located, they must be assessed against the criteria for nomination to the National Register of Historic Places. These requirements call for professional judgment and, likewise, may be done under contract, done with in-house capability, or passed on to the beneficiary. Once this evaluation is completed and sites are determined to be present that qualify for the National Register of Historic Places, the agency is obliged to afford the Advisory Council on Historic Preservation an opportunity to comment on the proposed undertaking in accordance with Section 106 of the National Historic Preservation Act of 1966 and Sections 1(3) and 2(b) of Executive Order 11593. In most instances, the Interagency Archeological Services Division should be notified at this point to determine the appropriate Public Law 93-291 funds, and what studies it will need to undertake to mitigate defined project impacts. The Interagency Archeological Services Division may have had a prior involvement in advising and assisting the agency to comply with Executive Order 11593. The Section 106 compliance procedures should result in agreement regarding the measures necessary to mitigate losses caused by the project.

2. The next step is the formulation of a Scope-of-Work. Once mitigation needs have been identified, and all relevant parties have indicated concurrence through the Section 106 consultation process, the Interagency Archeological Services professional staff draws up a Scope-of-Work based on a Memorandum of Agreement and the results of any previous investigations.

3. The Federal Procurement Regulations (41 CFR 1-1.301-1) state that all Federal procurement, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent. The regulations (41 CFR 1-3.101(c)) state further that whenever property or services are to be procured, the Contracting Officer must seek proposals from all interested and qualified sources, including small business concerns. In order to accomplish these requirements, notice of proposed contracts are published in the Commerce Business Daily, a publication of the Department of Commerce. Notice is also circularized directly to all known sources in the state in which the investigation is to take place, and in all contiguous states. The notice requests anyone interested in the work to submit their qualifications and an expression of interest by a specified date.

4. Requests for Proposals (REP) in the form of the Scopes-of-Work are sent to those expressing interest. The RFP outlines the minimum Scope-of-Work needed to fill the Government’s legal responsibilities and satisfy the professional requirements that are identifiable from the literature and any previous Federal investigations. Except to indicate the minimum work acceptable, it in no way inhibits the exercise of professional responsibilities by the potential contractor. The RFP calls for a proposal to be submitted in the form of a research design to accomplish the needed work and may give financial parameters for creating the research design. The financial parameters are included as an indication of the level of effort sought in this procurement.

5. Once proposals are received from the several offerors, a selection of the successful proposal must be made. A panel of at least 3 Interagency Archeological Services professional staff members evaluates the proposals to determine how they address the problems identified in the Scope-of-Work. The overriding principle guiding these evaluations is that the Government must buy the best archeology possible for the available money; proposals are
not evaluated on the basis of cost alone. The result of the evaluations is a numerical score applied to each individual proposal. The clustering or distribution of these scores in turn constitutes the basis for establishing the competitive range, which consists of those proposals considered to be the most responsive and suitable. Negotiations regarding their strengths and weaknesses are entered into with each of the offerors whose proposals fall into this range in order to improve the proposals or make them more responsive to the needs of the Government. At the conclusion of the individual negotiating sessions, the offerors are asked to submit best and final offers, which are subsequently evaluated by the review panel. All other factors being equal, the contract is awarded to the proposal providing the research design for an investigation which will best fulfill the Government's legal requirements and provide the most solid problem-oriented professional contribution.

The obvious result of these newly-adopted procedures is that considerably more time will be required to negotiate and award contracts than in the past. It is estimated, conservatively, that a minimum of 90 days is the necessary time-frame for implementing these procedures from project advertisement to contract award. However, while this contracting process is considerably more laborious than that used in the past, it is felt that the end product (i.e., the final reports of investigations) will more than justify the additional effort on the part of both the profession and the bureaucracy. It is already apparent that the majority of the proposals received in response to Scopes-of-Work are of vastly improved quality, highly competitive, and more responsive to both professional and legal needs (Reaves 1976).

Once a contract is let, the involvement of the Interagency Archeological Services does not end. Another premise of a negotiated cost-reimbursable contract is that the Government participates fully in administration of that contract. The field offices of Interagency Archeological Services accomplish this by monitoring ongoing projects and providing technical redirection as necessary. **Integration With Other Laws**

The case for integration has been demonstrated earlier in this paper; the subtle implications, however, are perhaps not clear from that statement. The National Environmental Policy Act requires in Section 102 “... that, to the fullest extent possible... the policies, regulations, and public laws of the United States be interpreted and administered in accordance with the policies set forth in this act.” Carrying forth this philosophy, Section 1500.9 of the guidelines formulated by the Council on Environmental Quality called for integrating to the greatest possible extent the other legal requirements such as the National Historic Preservation Act, Section 106, and Executive Order 11593 with the Environmental Assessments and Environmental Impact Statements called for in Section 102 of the National Environmental Policy Act. Where loss of resources is to be mitigated under Public Law 93-291, the adequacy of such mitigation is an appropriate topic to be considered in the environmental impact statement requiring Public Law 93-291 to thereby be integrated with other appropriate laws.

The laws dealing with cultural resources management are all under the general management authority of the Office of Archeology and Historic Preservation within the National Park Service. It is only logical that all of the components of the program will be administered to create a consistent management philosophy.

This has, in part, led to the stated interpretation that only sites on or eligible for the National Register will receive funding. The National Register, in spite of the arguments presented by some (Lipe and Grady 1976), is basically a management tool; “... the nation’s official inventory of properties that merit preservation, and it is grounded in statutory requirements that discourage adverse treatment of registered properties by any Federal agency, or by any state or private agency using Federal funds, licenses, or permits” (Utley 1973). Since the criteria for nomination to the National Register of Historic Places are broad and since this management
tool is an official definition of what constitutes significance, the Interagency Archeological Services has taken the position that only sites meeting the criteria will be funded. Criteria four is the one most frequently applied to archeological resources. It states, "The quality of significance in American history, architecture, and archeology is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling and association, and that have yielded, or may be likely to yield, information important in prehistory or history (National Park Service 1975b). The task of the archeologist in such an event is to decide what sites are likely to yield important archeological information. Archeologists' responsibility is to be neither too broad nor too narrow in their interpretation. The result of either extreme is not in the best interests of either the agency or the profession. The archeologist, in making an evaluation judgment, should justify or substantiate that opinion with explanations of what kinds of important information are expected or known or why important information is not expected (King 1975).

Coordination Role

Section 5 of the act directs that the Secretary shall coordinate all Federal survey and recovery activities. In this role Interagency Archeological Services, on behalf of the Secretary, advises Federal and non-federal agencies regarding their responsibility under the several integrated cultural resource preservation acts and the National Environmental Policy Act, inspects on request ongoing recovery efforts under the auspices of the act, and provides professional assistance to agencies in development of their internal policies and procedures. The principal impact of coordination is in the preparation of procedures, guidelines, and standards for archeological work carried out by the Federal Government.

The extent of the ability of the Secretary and Interagency Archeological Services to become directly involved in coordinating the activities of other agencies can easily be misunderstood by someone not directly involved with the bureaucracy. Only relatively few agencies, who are independent of the traditional Government structure, can have a direct effect on the programs and activities of another department or agency (i.e., Council on Environmental Quality, Advisory Council on Historic Preservation).

Reporting Responsibility

Section 5 of the act also charges the Secretary with a responsibility to report to Congress on the scope, effectiveness, and costs of the program. Such a report requires that information be provided to the Secretary. The same kind of problem exists here as exists in coordination of programs. There is no line of control to assure that the required data are provided. The first report for Fiscal Year 1975 (National Park Service 1975c) indicates a lack of response based on the reasoning that the program was new. The necessary data for Fiscal Year 1976, however, in spite of several requests for information, has been sparse.

The Interagency Archeological Services is responding to other reporting needs. For many years reports created in response to Federal contracts existed only in a few copies within the agency for whom they were created. Reports now are required to contain an abstract stating what contributions were made under the archeological contract. These abstracts are intended for publication in an abstracts journal. Additionally, all contracts are now required to meet the specifications of the National Technical Information Center and are placed on repository there to be available on microfiche or photo print to all interested persons.

Funding Limitations

Probably the most serious unforeseen implication was the limitation on the amount of funding available for archeology. Agencies are limited to expenditures not to exceed 1% of the project costs. Looking at only the large river basin projects having flood control or hydroelectric dams, 1% may be sufficient to mitigate the losses. A majority of Federal projects, however, are not of such magnitude.
Many, if not most, are under $500,000. One percent of $500,000 is only $5,000. In today’s economy, $5,000 will not purchase much archeology. New techniques requiring expensive equipment, newer standards for adequate recovery, and inflation have all contributed to making 1% an inadequate sum. The Interagency Archeological Services position has been that the 1% limit is only for the agency contribution and that the Department of the Interior is only limited by the extent of appropriations from Congress. Such appropriations, however, are small and at this time will only allow supplementation of a few of the most glaring examples to occur. Many, if not most, projects are seriously underfunded. The long sought panacea has fallen short of the mark. Rather than providing for adequate funds, the most important aspect of the act may have been that it authorized agencies to expend their own funds rather than placing the whole burden on the appropriations of the Secretary of the Interior.

Reauthorization

In 1978, the Archeological and Historic Preservation Act of 1974 will come due for reauthorization. An opportunity will exist at that time to clarify meanings and strengthen perceived weaknesses in the law. Reauthorization efforts should begin at least 18 months in advance to obtain a satisfactory reauthorization. The professional community should be beginning now to alert the Interagency Archeological Services as the lead agency and to work through their appropriate representatives to assure that the reauthorization is accomplished and that any changes are those needed and desired by the profession.

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