

# Historic Preservation on the Public Domain

## The Bureau of Land Management

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A shared take-into-account compliance standard makes the National Historic Preservation Act of 1966 (NHPA) and the National Environmental Policy Act of 1969 (NEPA) closely comparable. Weak predictors of outcome, both are powerful compellers of orderly, open, federal decisionmaking.

In 1974, the Bureau of Land Management's (BLM) managers were suddenly obliged to implement both NEPA and NHPA, without the necessary staff to help, after the Council on Environmental Quality and the Advisory Council on Historic Preservation within a short period published compliance procedures, respectively 40 CFR Part 1500 (August 1, 1973) and 36 CFR Part 800 (January 25, 1974).

Not only were the Ford administration and the Congress ordering agencies to answer these unprecedented environmental protection requirements, at the same time they were urging energy development with all possible dispatch in response to the 1973-1974 "Arab oil embargo." The BLM, overseer of federal oil reserves, was sharply jolted by this collision of environmental law and energy policy. As partial response, the BLM began early in 1974 to hire historic preservation professionals. The BLM administers unoccupied public lands in western states and Alaska, lands with few standing historic structures, so nearly all of these new BLM specialists were archeologists. It was a bit of a shock all the way around; neither we archeologists nor the BLM will ever be quite the same again.

### ***BLM's Parent Agency—General Land Office***

In 1812—after the original states had relinquished their western land reserves to create a revenue base for the cash-strapped central government—the rectangular land survey had commenced under the Land Ordinance of 1785 to identify and describe lands so they could be sold, the Louisiana Purchase had vastly enlarged fed-

eral land holdings, and the frontier had begun expanding rapidly westward—the BLM's parent agency, the General Land Office (GLO), was created in the Department of the Treasury and set on a course of disposing of the national lands. Upon the Department of the Interior's founding in 1849, the GLO came to Interior as its most important operating bureau.<sup>1</sup>

The GLO was responsible for the care of the public lands until they left government control, but activities beyond the service of disposal were very limited. After all, management was scarcely needed if one assumed the land would shortly pass into private ownership. However, with creation of "the National Park" (Yellowstone) in 1872,<sup>2</sup> the Casa Grande archeological reserve in 1889, forest reserves in 1891, and wildlife refuges in 1903, the retention value and long-term protection needs of certain public lands was recognized as a public-interest counterpoint to the prevailing disposal philosophy.

During Theodore Roosevelt's conservation-minded presidency, the Commissioner of the GLO, W.A. Richards (1903-1907), following the lead of his predecessor Binger Hermann, became the administration's champion for insulating significant public lands from disposal or inappropriate use. As he stated in his annual report for the fiscal year ending June 30, 1904:

This Office has repeatedly drawn attention to the need for action on the part of Congress in respect to making provision for the proper care of those portions of the public lands which, for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest . . . it is desirable to protect and utilize in the interest of the public. . . .

It is clearly the duty of the Government to protect these objects from appropriation under the various public land laws, and also to preserve them from spoliation and injury of all kinds. Upon this point there appears to be no room for doubt.<sup>3</sup>

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## William Alford Richards

William Alford Richards was born in southwestern Wisconsin in 1849. As a young man he trained as a surveyor and civil engineer. He surveyed the Wyoming Territory's southern and western boundaries in the mid-1870s, then held county and city surveyor and engineer positions in California

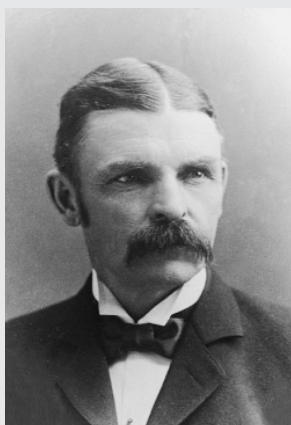


Photo courtesy Wyoming Division of Cultural Resources

and Colorado. He was elected Commissioner of Johnson County, Wyoming, in 1886. President Benjamin Harrison appointed him as the Territory's U.S. Surveyor-General in 1890, and he was elected fourth governor of Wyoming in 1895. In 1899 he was admitted to practice in the Wyoming Supreme Court. President William McKinley

appointed him Assistant Commissioner of the General Land Office, and he moved up to Commissioner under President Roosevelt (1903-1907).

As GLO Commissioner, Richards expressed himself strongly about protecting from loss the special places on the public domain that should be set apart in the interest of science and for the benefit of the public at large. He was a persistent proponent of "parks" legislation that would allow the President at his discretion to designate and reserve such special places, but he was not satisfied to wait for the legislative permission to take action. In correspondence with archeologist Edgar L. Hewett, who had provided him with information and recommendations on some of the most outstanding archeological ruins in the Southwest, Richards wrote:

The need for adequate legislation on this subject has ... been called to the attention of congress by this department for a number of years, but as yet without avail.

In the meantime, every effort has been made to extend such protection to the various regions known to contain objects of interest as is possible without the requested legislation. Certain of the tracts have been protected from appropriation by

being temporarily withdrawn from disposal under the public land laws. This action has been taken in the following cases:

In New Mexico: The Pajarito Cliff Dwellers' region, the Jemez Cliff Dwellers' region, the tract known as El Moro, or Inscription Rock.

In Colorado: The Mesa Verde Cliff Dwellers' region.

In Arizona: The tract containing the petrified forest; the greater portion of that part of the district designated by you as the Rio Verde district which lies outside of the Black Mesa Forest Reserve. This withdrawn area contains, among other ruins, the one known as Montezuma Castle.

... As regards the regions which you mention as containing ruins of unknown importance, which fall within the boundaries of tracts that have been permanently set aside as [GLO] forest reserves, or just outside the boundaries thereof, you are advised that they are ... under the patrol of the forest force patrolling the reserves, and that instructions have ... been issued to the forest officers in respect to having a general care of the ruins. Further and more specific instructions will now be given in regard to their care, based upon the information furnished by you."<sup>1</sup>

Hewett also quoted subsequent orders from Richards to GLO forest supervisors and special agents in the Southwest, including the text of notices to be posted. Hewett praised the Interior strategy, stating: "It establishes the broad and liberal policy that any competent scientist, who desires to place the material secured in a reputable public museum, will be authorized by the department of the interior to examine ruins, but that no person will be permitted to enter and excavate them for the purpose of acquiring specimens for traffic or private gain, and that willful destruction of valuable historic and prehistoric landmarks must cease."<sup>2</sup>

Foreshadows of the Antiquities Act of 1906 are evident in Hewett's words. Richards and his associates on their own authority had taken actions effectively anticipating the law, arguably serving as a significant example for the Antiquities bill's proponents and an effective goad to the Congress.

1 October 5, 1904, letter from W.A. Richards to Edgar L. Hewett, quoted in Edgar L. Hewett, "Government Supervision of Historic and Prehistoric Ruins," *Science*, Vol. XX, No. 517 (1904 N.S.): 723.

2 *Ibid*, 727.

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Richards argued that separate congressional actions for individual cases was unsatisfactorily slow, and pressed for general legislation “empowering the President to set apart, as national parks, all tracts of public land which, for any of the reasons above stated, it is desirable to protect.”<sup>4</sup> As support, Richards appended to his report a detailed “Memorandum Concerning the Historic and Prehistoric Ruins of Arizona, New Mexico, Colorado, and Utah and Their Preservation,” by Prof. Edgar L. Hewett.

In an article published in *Science* in 1904, Hewett quoted excerpts from Richards’ correspondence with him, illustrating the GLO Commissioner’s deep concern at congressional inaction and describing his own actions to fill the gap (see p. 25). Were it not for Richards’ foresight and commitment, we would most likely be archeologically much poorer today.

#### ***The BLM, 1946 to Present***

The BLM came into being when the GLO and the recently established Grazing Service (Taylor Grazing Act of 1934) were consolidated under President Harry S Truman’s Reorganization Plan No. 3 of 1946. Congressional disagreement with the Grazing Service’s grazing fee structure very nearly sank the Reorganization Plan.<sup>5</sup>

The new bureau’s purposes were ambiguous and changeable for the next 30 years, reflecting the inherent tension between land-disposal and resource-management purposes. Given the fledgling bureau’s predominant lands, minerals, and grazing orientations, the Department deemed some functions, which required specialized expertise, best left to others. For example, the Antiquities Act of 1906, as a misdemeanor-level enforcement tool and permitting authority, was administered in other Department offices until the 1970s and 1980s.<sup>6</sup> First the Undersecretary (until 1968) and then the National Park Service (until 1984) issued Antiquities Act permits for the whole Department.<sup>7</sup> Unsurprisingly, BLM managers tended to think of jobs assigned to others as not their responsibility.

The Classification and Multiple Use Act of 1964 began to reconcile the BLM’s split purposes, but still the BLM was subject to thousands of land laws of which many were in direct conflict.

Finally, passage of the Federal Land Policy and Management Act in 1976, BLM’s “organic act,” removed most (but not all) of the legal con-

flict and gave the BLM clear congressional direction, much of it responsive to recommendations of the Public Land Law Review Commission (1970). Under FLPMA, the public lands are to be retained in public ownership and managed for multiple use and sustained yield in a manner that will protect scientific, historical, and archeological values, among other things, based on a continuing inventory of all public lands and resources and a comprehensive land-use planning process.

The BLM’s original comprehensive land-use planning process, the model endorsed in FLPMA, was designed in 1968 and put to its most ambitious test in the California Desert, a 16-million-acre hotbed of competing land use pressures. The Desert Planning Staff’s lead archeologist was Rick Hanks, who joined the staff in 1972. In 1976, Hanks moved to Washington as BLM’s first cultural resource program leader. His strong planning credentials led Hanks to shape the burgeoning program around an explicit management-planning framework.

By 1978 the BLM had staffed its field offices adequately to keep up with the demands of complying with Section 106 of NHPA, reaching a count of approximately 120 cultural resource specialists (still nearly all archeologists). The number has held in the 120-150 vicinity ever since. A BLM staff this size is able to meet Section 106 compliance, but little else.

The legal requirements, however, did not stop with NHPA. For example, the American Indian Religious Freedom Act of 1978, the Archaeological Resources Protection Act of 1979 (ARPA), the Native American Graves Protection and Repatriation Act of 1990, and the NHPA Amendments of 1992 require agencies to coordinate and consult regarding Native American religious and cultural concerns. The BLM’s manuals hold managers responsible for affirmative coordination and consultation. Generally, though, it is the cultural resource staff who do the coordination work. Just under half the State Offices have full-time Native American coordinators, but in the others and in virtually all field offices, Native American coordination duties are assigned part-time to the cultural resource specialist. They are big duties for someone already fully assigned.

Beyond Section 106 compliance and required Native American consultation, comprehensive cultural resource inventory, evaluation, and nomination to the National Register of

| Office         | BLM State Office & Headquarters Cultural Resource Program Leaders 1972-1999 (in order of service) |
|----------------|---|
| Alaska         | Gary Matlock, Ray Leicht, Beth Walton, Bob King   |
| Arizona        | John Douglas, Pat Giorgi, Gary Stumpf   |
| California     | Bill Olsen, Russ Kaldenberg   |
| Colorado       | Gardiner Dalley, Gary Matlock, Dan Martin, Rick Athearn, Rich Fike                                |
| Eastern States | Kevin Kilcullen, Kathy Miller, Richard Brook, Sarah Bridges, Jan Townsend                         |
| Idaho          | Rich Harrison, Dan Hutchison, Linda Clark   |
| Nevada         | Bob York, Richard Hanes, Linda Armentrout, Pat Barker   |
| New Mexico     | Leo Flynn, Chris Kincaid, Stephen Fosberg   |
| Oregon         | Don Grayson, Jack Witherspoon, Richard Hanes  |
| Utah           | Rich Fike, Craig Harmon, Shelley Smith, Garth Portillo  |
| Wyoming        | Hal Jensen, Dan Hutchison, Ray Leicht, Jerry Clark, Tim Nowak                                     |
| Headquarters   | Rick Hanks, John Douglas  |

| Office                  | Other BLM Lead Archeologists and Historians Various, 1965-82 |
|-------------------------|--|
| Monticello District, UT | Jack Rudy  |
| Desert Planning Staff   | Rick Hanks, Eric Ritter                                      |
| Denver Service Center   | Lloyd Pierson, Roberto Costales, Don Rickey, Rick Athearn    |

Historic Places, and planning, protection, enhancement, public education, and related activities expected under FLPMA, ARPA, Section 110 of NHPA, the BLM's manuals, and other administration policy have been very difficult to achieve with a fully occupied, compliance-sized staff. Necessarily, with some 8-10,000 Section 106 repetitions per year, the staff—advised by consultants to land use applicants and State Historic Preservation Office (SHPO) and Council staffs—has become expert and efficient at completing the technical compliance steps. Still, other important jobs receive divided attention.

It helps that the Council's governmentwide Section 106 regulations, 36 CFR Part 800, have changed little in design. The original 1974 regulations were changed for the better in 1979, then the 1979 regulations lost some of their structural elegance in 1986 revisions due to political jiggering. The most recent revision (1999) maintains the familiar construction, adding welcome new emphasis on agencies' options.

The Council's regulations are sometimes criticized for their very stability. The BLM is not among those critics, but we have urged the Council to consider dual compliance tracks, one for the dozen land-managing agencies<sup>8</sup> and the other for the 50-some agencies that do not have a continuing management responsibility and a continuing presence on the land. While not exactly accepting this idea, the Council did suggest, in its October 1994 rule proposal, letting agencies develop counterpart procedures (not regulations) to guide Section 106 compliance in agency-specific ways. With Council concurrence, the BLM in 1995 proceeded to explore a fully customized compliance track supported by internal manuals.

After several steps, in March 1997 the BLM Director, the Council Chairman, and the president of the National Conference of SHPOs signed a national programmatic agreement (PA) that makes BLM much more self-sufficient for complying with Section 106. The PA depends on State Director-SHPO protocols to set day-to-day working relations, emphasizes the responsible manager's role, and focuses more on long-term resource management goals than on compliance per se (which in practice means undertaking management more than resource management).

Each manager, to operate under the PA, must have the appropriate kinds of historic preservation expertise on staff or readily available. Staff and managers are mutually responsible for the adequacy of staff work and the suitability of decisions.

A Preservation Board links the Headquarters-based Preservation Officer and the State Office cultural resource program leaders, who are known for this purpose as Deputy Preservation Officers, plus four field office managers and two field office cultural resource specialists. The Board works as a team and functions as a staff body to advise the Director and State Directors on historic preservation matters, to ensure national coordination, and to provide oversight for field operations. In a way, the Preservation Board internalizes some Council functions within the BLM. The Council now seldom needs to be directly involved in day-to-day BLM preservation business.

Protocols aim to recapture the complementary, collaborative roles of BLM and SHPO working in concert to achieve the best preservation outcomes from a statewide perspective, as was more common when Section 106 and 36

CFR 800 were new. Interstate communication among Preservation Board members and the Western SHPOs promises to improve preservation throughout the West. We stress oral communication over written communication. Excellent preservation is a higher goal than excellent paperwork.

The payoffs of this tailored approach are to make compliance more responsive and predictable for the sake of land use applicants, and more responsible and prudent for the sake of the resource base, science, and the public interest. Emphasis on results, seen broadly, instead of on process, seen narrowly, changes the emphasis on products—less on formulaic validation of obedience, and more on useful analytical tools to assist in weighing resources' relative worth. For example, the BLM is cooperating with other agencies and SHPOs to promote automation of SHPO records, synthesis of data, and development of thematic resource evaluations as steps in this direction. These will not only help to satisfy Section 110 of NHPA, but will also give Section 106 decision making a well-reasoned contextual foundation.

Most of all, the new emphasis on working smarter is meant to bring about relief from time-consuming but unproductive detail work, freeing BLM and the SHPO staffs to use the saved time to collaborate, pooling knowledge and insights to make the little decisions contribute to a larger outcome—preserving the cultural resources that really matter to science and the public—by design instead of by chance.

Ninety-five years ago, W.A. Richards was making crucial, long-term cultural resource management decisions based on the advice of well-qualified, well-informed professionals. He was a pioneer whose vision we can gratefully appreciate today. The BLM's managers and their staffs are now gaining the tools to emulate, in finer resolution, Richards' thoughtful approach to preserving and protecting some of the nation's most important historical assets. We are pleased to be catching up.

#### Notes

- <sup>1</sup> Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* (Washington, DC: Government Printing Office, 1970), 281.

- <sup>2</sup> Thomas Donaldson, *The Public Domain: Its History, With Statistics, With References to the National Domain, Colonization, Acquirement of Territory, the Survey, Administration and Several Methods of Sale and Disposition of the Public Domain of the United States, With Sketch of Legislative History of the Land States and Territories, and References to the Land System of the Colonies, and Also That of Several Foreign Governments* (Washington, DC: Government Printing Office, 1884), 1294.
- <sup>3</sup> W.A. Richards, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior for the Fiscal Year Ended June 30, 1904* (Washington, DC: Government Printing Office, 1904), 59.
- <sup>4</sup> *Ibid.*, 60.
- <sup>5</sup> *Ibid.*
- <sup>6</sup> The BLM had neither law enforcement authority nor officers until the Federal Land Policy and Management Act (FLPMA; 43 U.S.C. 1701 et seq.) was enacted in 1976.
- <sup>7</sup> In 1984, 43 CFR Part 7 implemented the Archaeological Resources Protection Act, and Secretarial Order 3104 (September 28, 1984) delegated permit authority to Assistant Secretaries, whence it flowed to bureau heads.
- <sup>8</sup> In descending order by relative size, BLM, Forest Service, Fish and Wildlife Service, National Park Service, Air Force, Navy, Army, Reclamation, Corps of Engineers, Indian Affairs, Energy, and Tennessee Valley Authority administer one million acres or more.

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