



THE UPAC NEWS

Published by the Utah Professional Archeological Council

Published Quarterly
February 1992

Bruce Louthan, President
Diana Christensen, Editor

UPAC SPRING MEETING

The combined meeting of UPAC and the Colorado Council of Professional Archaeologists (CCPA) is not only a milestone, but will offer those who attend much more than a business meeting. The program included in this newsletter shows there will be symposia of substantive content, various opportunities to meet with regional colleagues, and even displays, book sales and other trappings of professional meetings. The CCPA has taken the lead in organizing this meeting. It will certainly be an opportunity for UPAC members as well as something we should support with our attendance. Help the CCPA organizers by participating in advance registration and come represent UPAC.

There will also be a business meeting on Friday, March 27 from 8:30 to 11:30 am. I am organizing the agenda so if you have something you want on the business meeting agenda, either an information or an action item, please contact me

soon. To complete the meeting in a timely manner, the agenda will have to be set beforehand.

---Steve Simms

STATE HISTORY RULES UPDATE

The UPAC "rules committee" reviewed the rules proposed by the Division of State History (State History) to implement Utah Annotated Code 63-18-25 and 63-18-25.1 and provided comments to State History at both a public hearing (December 13, 1991) and in written format (December 16, 1991). You should have received a copy of our written comments in a special mailing from the UPAC Secretary.

The entire rule is referred to as R224. We provided comments on sections R224-6 and R224-7. You may wish to refer to your copy of that letter as you read this update. State History substantially altered the archaeology rule, R224-4, based, in part, on our comments. The revised rule is

now complete and will soon be published, meaning that the new 30 day public comment period will begin soon. If no comments are received, or State History determines that the comments can be handled through non-substantive changes, the rules will be adopted and implemented. If not, the revision and public comment process will begin again.

While it is not possible to reiterate every detail of State History's 49-page response to our comments here, I will highlight some of the major points that may be of interest to most UPAC members.

UPAC spoke out strongly against the requirement that each permittee post a bond equal to the amount of the estimated archaeological work to assure compliance with the terms of the permit. State History has changed this provision to read "A bond or fee for excavating only shall be paid or posted by each permittee. Qualified state employees are exempt. The bond shall be in the amount of \$250 or a fee of \$50 shall accompany each excavation permit application." No fee is required for survey permits.

UPAC requested that State History issue permits for survey and limited testing. State History agreed to do this and revised their rules accordingly. UPAC requested that proof of a curation agreement be required to obtain an excavation permit. State History added this requirement.

UPAC commented that the rules allowed different levels of protection from vandalism and destruction, and different permitting and advisory procedures for sites on school and institutional trust lands (under the jurisdiction of the Division of State Lands and Forestry) versus other state lands. UPAC requested that the rule be revised to provide consistent protection and treatment for sites on ALL lands owned or controlled by the state. Because there is a difference of opinion on how much authority State History has over school and institutional trust lands, they struck a deal with the Division of State Lands and Forestry (State Lands). State Lands will follow 63-18-37 (the State version of Section 106) and State History permit requirements providing they (State Lands) retain final authority for injury and destruction of archaeological sites on school and institutional trust lands. This issue is also being considered in the current session of the Legislature (see related story).

UPAC commented that alternative mitigation appears to have merit in certain situations but voiced strong concerns about possible ramifications and abuses because the mechanics of the plan are vague and unspecified. State History's response did nothing to allay our fears of possible abuses, nor did it offer any additional information on the mechanics of alternative mitigation (see related article on alternative mitigation). Their response:

"As an agency, we feel that alternative proposals should be considered. We have taken into account the comments received from UPAC and amended R224-4 and 5 by changing it to alternative PROPOSALS (emphasis in original) reading: 'No such proposal shall be accepted unless it maximizes, overall, the amount of scientific, archaeological, anthropological, historic paleontological, or educational information or benefit to be recovered or preserved. The division may impanel a third party professional body to review the alternatives. The results of the review will be reported to the board.' We hope this adequately addresses UPAC's concerns, however, you may wish to comment further."

On January 27, 1992 State History informed us our comments on R224-6 and R224-7 were addressed in non-substantive changes, meaning that they made no changes or only minor changes, and that we have no further opportunity to comment. Rules R224-6 and 7 were adopted by the Board of State History in January and will go into effect this month. Our comments on R224-6 were mainly points of clarification regarding the State and Century registers but our comments regarding R224-7 were an objection to alternative mitigation until addition information is provided on how and when it will be applied. State History's response:

"We are retaining this provision [alternative mitigation] in our rule, because of course this would

have to be conducted under the provision of law. We are currently working on provisions with federal agencies in which creative mitigation may be allowed. We are going to retain this latitude in our rules since it is subject to the provisions of properly executed programmatic agreements with the affected agencies and any "creative solution" will any [sic] have to comply with [the] letter and spirit of federal and state law.

If you have comments on the current version of the rules (copy enclosed), please get them to Duncan Metcalfe, Joel Janetski, or me no later than March 10, 1992 so we will have time to summarize them in a comment letter to State History. You may also contact State History directly with your concerns.

Related to the State History rules, we tried to obtain more information about when and how alternative mitigation will be invoked. We obtained a copy of the draft version of the Management Protocol for a Process to Facilitate Alternative Mitigation from a draft Programmatic Agreement between State History, the Utah Dept. of Transportation, and most of the federal agencies. According to this document, stakeholders--those interested in or affected by the decision--will be identified. Stakeholders may include participants, customers [?], suppliers, implementors, and others. After identifying the needs of the stakeholders, alternatives will be formulated following relevant laws, regulations,

guidelines, etc. These alternatives will be compared and ranked based on advantages. The alternative with the greatest total importance of advantages will be selected, reconsidered, and then implemented. The selected alternative must be acceptable to the federal land managing agency and the company paying for the mitigation, if any. We have been informed that State History will accept public comments on this document at a later date. We will keep you informed.

---Betsy Tipps

STATE LANDS REFUSES TO REVISE RULES

On November 14, 1991 UPAC attended a public hearing and provided comments on the cultural resource rules proposed by the Division of State Lands and Forestry (State Lands). UPAC identified three major problems with the proposed rules. One was their failure to require a permit from the Division of State History before archaeological surveys and limited test excavations. Also, the rules allowed the State Lands to give permission to injure or destroy cultural resources without an excavation permit. Finally, they mandated three different categories of ownership and curation of specimens recovered from different types of land owned or controlled by the state; artifacts from school and institutional trust lands were to be managed as assets of the trust and presumably could be sold.

UPAC was encouraged by the receptive nature of some State Land board members. They requested we provide specific suggestions and wording for modifications of the rules. Rules committee members Joel Janetski, Duncan Metcalfe, Jim Wilde, and myself spent many hours preparing specific suggestions and proposed wording. These were transmitted to State Lands on December 4, 1991 along with a request that UPAC continue to be involved in the process.

To our dismay, we recently learned State Lands ignored our comments and those of other interested parties at the public hearing and ADOPTED THE ORIGINAL RULES!

All may not be lost, however, Legislation is currently pending (Senate Bill 128) to prohibit the sale of artifacts from school and institutional trust lands. In part, this provision was included because of the strong stance taken by the University of Utah and Utah State University (see article by Duncan Metcalfe). We have also been told State Lands will turn permitting over to State History on a trial basis for 1-2 years. As long as there are no major problems, State History will continue to issue permits. If Senate Bill 128 passes, the Office of Planning and Budget tells us State Lands will be required to revise their rules regarding artifact sales, permitting, and protection of cultural resources. If it does not pass, we will seek other remedies. We are evaluating those now.

---Betsy Tipps

STATE LANDS

There has been considerable debate on Capitol Hill this past year about if and how archaeological and paleontological resources should be managed on school and institutional trust lands.

These lands were given to Utah when it became a state, and income derived from the sale or use of these lands supports a number of educational and other institutions, referred to as Beneficiaries. State Lands is responsible for managing these lands in a manner consistent with the Utah Enabling Act and Utah Constitution. The Division has interpreted their mandate rather narrowly as requiring that they manage these lands to maximize income. This in turn has led to discussions about whether artifacts and fossils recovered from these lands should be sold for profit or, if not, whether the Division can incur expenses in managing and protecting these non-revenue producing resources.

The University of Utah and Utah State University are both beneficiaries of school and institutional trust lands. We obviously take exception to the Division's narrow interpretation of value and have argued that cultural resources also have educational, scientific, and cultural values. Due primarily to the lobbying efforts of James O'Connell and Steve Simms, Utah State University and the University of Utah have agreed on a policy about the value and management of archaeological

and paleontological resources on state lands. Charles Evans, director of Research Park at the University of Utah, and Margaret Bird, consultant to the Trusts, were both instrumental in gaining the support of public schools. That policy is presented below. Although not legally binding on the Division of State Lands or the Board of State Lands, having the three major beneficiaries of state lands publicly endorse managing and protecting archaeological and paleontological resources for their scientific, educational, and cultural values should go a long way toward undermining efforts to the contrary.

---Duncan Metcalfe

EDUCATIONAL TRUST STATEMENT

The Educational Trust Beneficiaries of the Utah Trust Lands support the following position with respect to the management of archaeological and paleontological resources on and/or recovered from School and University Trust Lands.

POSITION

Significant archaeological and critical paleontological resources on Institutional and School Trust Lands in Utah are of great value to the State and Trust Beneficiaries. They are nonrenewable, irreplaceable, and provide critical information about Utah's prehistoric past. As Beneficiaries of the Trust, the University of Utah, Utah State University and the Public Schools have an interest in the management and

protection of these resources for their scientific, educational, and cultural values. These educational benefits should take precedence over economic returns in establishing management procedures dealing with Trust Lands, insofar as legally possible within Trust principles.

IMPLICATIONS

1. Management of archaeological resources. The Educational Beneficiaries of the Trusts take the position that archaeological resources on Trust Lands be managed in a manner consistent with Section 106 of the National Historic Preservation Act. This policy will insure that maximum benefit accrues to the Trust Beneficiaries by; a) calling attention to the need for planning with respect to these resources early in the course of any proposed land sale or development, thereby reducing the cost of any necessary mitigation and enhancing its chances for success, and b) facilitating proposed exchanges with federal land management agencies. Failure to observe provisions of Section 106 may inhibit such exchanges, contrary to the best interests of the Trust Beneficiaries.

2. Sale of artifacts. The Beneficiaries take the position that significant archaeological artifacts and critical paleontological resources are assets of the respective Trusts and should not be sold. In the Beneficiaries' view, these resources should be preserved in a manner designed to

stimulate knowledge, train students, and support education and research on Utah's prehistoric past to insure maximum educational benefit to the Trust Beneficiaries.

3. Trust obligation. In adopting this position, the Educational Trust Beneficiaries recognize the unique educational benefits associated with cultural and historic resources. All other Trust assets and resources (e.g., mineral resources, surface uses) should continue to be managed in a manner consistent with Trust obligations to maximize long-term economic benefit to the Beneficiaries.

CURRENT LEGISLATION

After State History and State Lands proposed rules for cultural resources last fall, it became evident there were conflicting provisions in the statute that needed to be resolved through legislation. This, UPAC's lawsuits against State Lands, and Governor Bangerter's desire to trade land with the BLM (which requires the state to bring cultural resource procedures up to federal standards) has precipitated an attempt to revise the Utah Antiquities Act.

The proposed bill is the result of several months continuous and time consuming negotiation between State History, State Lands, the Utah Museum of Natural History, the Utah Dept. of Transportation, and UPAC, mediated by John Harja of the Office of Planning and Budget.

The main objective of the legislation was to bring state procedures for cultural resources up to federal standards by establishing parallel permit and curation requirements and Section 106 procedures, and prohibiting artifact sales, among other things. In the process of achieving these goals, numerous alternatives regarding the organizational structure and responsibilities of State History and the Antiquities Section were evaluated. Various options for permitting, such as moving permitting to State Lands or each land managing agency were also examined.

After countless drafts, agreement on a relatively final version was reached in early February. Highlights of the proposed bill (Senate Bill 128) are as follows.

One of the most significant provisions of the bill is clarification of the Legislature's intent regarding cultural resources on school and institutional lands. The Legislature declares the beneficiaries of the school and institutional land grants have an interest in the preservation and protection of the state's archaeological, anthropological, and paleontological resources. This is a significant achievement because in the past State Lands has claimed that the beneficiaries' interest is purely financial.

The Legislature also declares survey and excavation of archaeological and critical paleontological resources, as

well as preservation and curation of specimens from school and institutional trust lands is consistent with school and institutional land grants. State Lands previously claimed they were at odds, and therefore, did not need to consider cultural resources. Finally, the Legislature clearly states artifacts from any state lands may not be sold and sites may only be disposed of after the "appropriate level of data recovery."

For the time being (at least a year), the Antiquities Section will stay at the Division of State History. All archaeological and paleontological work will be carried out under the direction of the State Archaeologist.

The bill provides State Lands with the authority to issue permits for school and institutional trust lands; State History has authority to issue permits for all other lands. However, under a compromise agreement, State History will issue all permits for at least a year. If this arrangement is working (i.e. not impeding the progress of State Lands undertakings), the arrangement will continue indefinitely. If the arrangement is not working, State Lands will invoke their statutory right to issue their permits for work on school and institutional trust lands.

Permit requirements for the two agencies are slightly different. While both require minimum permittee qualifications, proof of