CULTURAL RESOURCES LAW ENFORCEMENT

Prepared by:

Peter K. Nigh
Park Ranger/Instructor
Albright Training Center
Grand Canyon, Arizona
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INTRODUCTION

People have lived on this continent for thousands of years, leaving behind them reminders of their lives, evidence of their societies, clues to their cultures. These clues constitute our cultural resources, the material remains of former times and previous occupants which are scattered over the landscape.

Cultural resources are numerous and varied, including such prehistoric sites and structures as pueblos and house pits, rock art and intaglios, trails and lithic scatters, rock shelters and caves, burial grounds and quarry areas. Historic resources include logging roads, mining sites, cabins and recreation areas, early industrial development and homesteads. The American people value this heritage, as is evidenced, for example, by the enormous popularity of interpreted sites as tourist attractions, and by the public initiation and support for protective legislation.

These nonrenewable cultural resources must be managed and used intelligently. Use may involve interpretation of a site for public education and enjoyment, excavation to increase scientific knowledge, or salvage to preserve data. Historic buildings may be used for their original function, or adaptively reused. Archaeological sites may be left protected in the ground for use by future generations. Cultural sites may be documented and then destroyed when other public needs outweigh the need for site preservation. But the specific management decisions must be made based on knowledge of the values and alternatives and with an awareness of the irreplaceable and nonrenewable nature of cultural resources.
NATIONAL PARK SERVICE

ARCHAEOLOGICAL RESOURCES PROTECTION ACT

PL 96-95

FEDERAL LAW ENFORCEMENT TRAINING CENTER
GLYNCO, GEORGIA

(1-80)
An Act

To protect archaeological resources on public lands and Indian lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as the "Archaeological Resources Protection Act of 1979".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

(2) these resources are increasingly endangered because of their commercial attractiveness;

(3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

(4) there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this Act is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act.

DEFINITIONS

SEC. 3. As used in this Act—

(1) The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological
context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

(2) The term "Federal land manager" means, with respect to any public lands, the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands. In the case of any public lands or Indian lands with respect to which no department, agency, or instrumentality has primary management authority, such term means the Secretary of the Interior. If the Secretary of the Interior consents, the responsibilities (in whole or in part) under this Act of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary of the Interior with respect to any land managed by such other Secretary or agency head, and in any such case, the term "Federal land manager" means the Secretary of the Interior.

(3) The term "public lands" means—
(A) lands which are owned and administered by the United States as part of—
(i) the national park system,
(ii) the national wildlife refuge system, or
(iii) the national forest system; and
(B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution;

(4) The term "Indian lands" means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688).

(6) The term "person" means an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision thereof.

(7) The term "State" means any of the fifty States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

EXCAVATION AND REMOVAL

Sec. 4. (a) Any person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application shall be required, under uniform regulations under this Act, to contain such information as the Federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work.
(b) A permit may be issued pursuant to an application under subsection (a) if the Federal land manager determines, pursuant to uniform regulations under this Act, that—

1. the applicant is qualified, to carry out the permitted activity,
2. the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,
3. the archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution, and
4. the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

(c) If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9.

(d) Any permit under this section shall contain such terms and conditions, pursuant to uniform regulations promulgated under this Act, as the Federal land manager concerned deems necessary to carry out the purposes of this Act.

(e) Each permit under this section shall identify the individual who shall be responsible for carrying out the terms and conditions of the permit and for otherwise complying with this Act and other law applicable to the permitted activity.

(f) Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of subsection (a), (b), or (c) of section 6. Any such permit may be revoked by such Federal land manager upon assessment of a civil penalty under section 7 against the permittee or upon the permittee's conviction under section 6.

(g)(1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.

(2) In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

(h)(1) No permit or other permission shall be required under the Act of June 8, 1906 (16 U.S.C. 431-433), for any activity for which a permit is issued under this section.

(2) Any permit issued under the Act of June 8, 1906, shall remain in effect according to its terms and conditions following the enactment of this Act. No permit under this Act shall be required to carry out any activity under a permit issued under the Act of June 8, 1906, before the date of the enactment of this Act which remains in effect as provided in this paragraph, and nothing in this Act shall modify or affect any such permit.
(i) Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 106 of the Act of October 15, 1966 (80 Stat. 917, 16 U.S.C. 470f).

(j) Upon the written request of the Governor of any State, the Federal land manager shall issue a permit, subject to the provisions of subsections (b)(3), (b)(4), (c), (e), (f), (g), (h), and (i) of this section for the purpose of conducting archaeological research, excavation, removal, and curation, on behalf of the State or its educational institutions, to such Governor or to such designee as the Governor deems qualified to carry out the intent of this Act.

CUSTODY OF RESOURCES

SEC. 5. The Secretary of the Interior may promulgate regulations providing for—

(1) the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this Act, and

(2) the ultimate disposition of such resources and other resources removed pursuant to the Act of June 27, 1960 (16 U.S.C. 469-469c) or the Act of June 8, 1906 (16 U.S.C. 431-433).

Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands. Following promulgation of regulations under this section, notwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this Act.

PROHIBITED ACTS AND CRIMINAL PENALTIES

SEC. 6. (a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 4, a permit referred to in section 4(h)(2), or the exemption contained in section 4(g)(1).

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—

(1) the prohibition contained in subsection (a), or

(2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or 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.

(d) Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both: Provided, however, That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $5,000, such person shall be fined not more than $20,000 or impris-
on not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $100,000, or imprisoned not more than five years, or both.

(e) The prohibitions contained in this section shall take effect on the date of the enactment of this Act.

(f) Nothing in subsection (b)(1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to the date of the enactment of this Act.

(g) Nothing in subsection (d) of this section shall be deemed applicable to any person with respect to the removal of arrowheads located on the surface of the ground.

CIVIL PENALTIES

Sec. 7. (a)(1) Any person who violates any prohibition contained in an applicable regulation or permit issued under this Act may be assessed a civil penalty by the Federal land manager concerned. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Federal land manager concerned.

(2) The amount of such penalty shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

(A) the archaeological or commercial value of the archaeological resource involved, and

(B) the cost of restoration and repair of the resource and the archaeological site involved.

Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person. The amount of any penalty assessed under this subsection for any violation shall not exceed an amount equal to double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources destroyed or not recovered.

(3) No penalty shall be assessed under this section for the removal of arrowheads located on the surface of the ground.

(b)(1) Any person aggrieved by an order assessing a civil penalty under subsection (a) may file a petition for judicial review of such order with the United States District Court for the District of Columbia or for any other district in which such a person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the record made before the Federal land manager and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become a final order and such person has not filed a petition for judicial review of the order in accordance with paragraph (1), or

(B) after a court in an action brought under paragraph (1) has entered a final judgment upholding the assessment of a civil penalty,
the Federal land managers may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In such action, the validity and amount of such penalty shall not be subject to review.

(c) Hearings held during proceedings for the assessment of civil penalties authorized by subsection (a) shall be conducted in accordance with section 554 of title 5 of the United States Code. The Federal land manager may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Federal land manager or to appear and produce documents before the Federal land manager, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

REWARDS; FORFEITURE

Sec. 8. (a) Upon the certification of the Federal land manager concerned, the Secretary of the Treasury is directed to pay from penalties and fines collected under sections 6 and 7 an amount equal to one-half of such penalty or fine, but not to exceed $500, to any person who furnishes information which leads to the finding of a civil violation, or the conviction of criminal violation, with respect to which such penalty or fine was paid. If several persons provided such information, such amount shall be divided among such persons. No officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall be eligible for payment under this subsection.

(b) All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of section 6 occurred and which are in the possession of any person, and all vehicles and equipment of any person which were used in connection with such violation, may be (in the discretion of the court or administrative law judge, as the case may be) subject to forfeiture to the United States upon—

1. such person’s conviction of such violation under section 6,
2. assessment of a civil penalty against such person under section 7 with respect to such violation, or
3. a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation.

(c) In cases in which a violation of the prohibition contained in subsection (a), (b), or (c) of section 6 involve archaeological resources excavated or removed from Indian lands, the Federal land manager or the court, as the case may be, shall provide for the payment to the Indian or Indian tribe involved of all penalties collected pursuant to section 7 and for the transfer to such Indian or Indian tribe of all items forfeited under this section.
CONFIDENTIALITY

Sec. 9. (a) Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of title 5 of the United States Code or under any other provision of law unless the Federal land manager concerned determines that such disclosure would—

1. further the purposes of this Act or the Act of June 27, 1960 (16 U.S.C. 469–469c), and
2. not create a risk of harm to such resources or to the site at which such resources are located.

(b) Notwithstanding the provisions of subsection (a), upon the written request of the Governor of any State, which request shall state—

1. the specific site or area for which information is sought,
2. the purpose for which such information is sought,
3. a commitment by the Governor to adequately protect the confidentiality of such information to protect the resource from commercial exploitation,

the Federal land manager concerned shall provide to the Governor information concerning the nature and location of archaeological resources within the State of the requesting Governor.

REGULATIONS; INTERGOVERNMENTAL COORDINATION

Sec. 10. (a) The Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority, after consultation with other Federal land managers, Indian tribes, representatives of concerned State agencies, and after public notice and hearing, shall promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this Act. Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996). Each uniform rule or regulation promulgated under this Act shall be submitted on the same calendar day to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives, and no such uniform rule or regulation may take effect before the expiration of a period of ninety calendar days following the date of its submission to such Committees.

(b) Each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations under subsection (a), as may be appropriate for the carrying out of his functions and authorities under this Act.

COOPERATION WITH PRIVATE INDIVIDUALS

Sec. 11. The Secretary of the Interior shall take such action as may be necessary, consistent with the purposes of this Act, to foster and improve the communication, cooperation, and exchange of information between—

1. private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act, and
2. Federal authorities responsible for the protection of archaeological resources on the public lands and Indian lands and
professional archaeologists and associations of professional archaeologists.

In carrying out this section, the Secretary shall, to the extent practicable and consistent with the provisions of this Act, make efforts to expand the archaeological data base for the archaeological resources of the United States through increased cooperation between private individuals referred to in paragraph (1) and professional archaeologists and archaeological organizations.

SAVINGS PROVISIONS

SEC. 12. (a) Nothing in this Act shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.

(b) Nothing in this Act applies to, or requires a permit for, the collection for private purposes of any rock, coin, bullet, or mineral which is not an archaeological resource, as determined under uniform regulations promulgated under section 3(1).

(c) Nothing in this Act shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.

REPORT

SEC. 13. As part of the annual report required to be submitted to the specified committees of the Congress pursuant to section 5(c) of the Act of June 27, 1960 (74 Stat. 220; 16 U.S.C. 469-469a), the Secretary of the Interior shall comprehensively report as a separate component on the activities carried out under the provisions of this Act, and he shall make such recommendations as he deems appropriate as to changes or improvements needed in the provisions of this Act. Such report shall include a brief summary of the actions undertaken by the Secretary under section 11 of this Act, relating to cooperation with private individuals.

ARCHEOLOGICAL RESOURCES PROTECTION ACT

16 USC 470aa et seq

PROHIBITIONS

(1) NO PERSON MAY EXCAVATE, REMOVE, DAMAGE, OR OTHERWISE ALTER OR DEFACE ANY ARCHEOLOGICAL RESOURCE LOCATED ON PUBLIC LANDS OR INDIAN LANDS UNLESS SUCH ACTIVITY IS PURSUANT TO A PERMIT.

(2) NO PERSON MAY SELL, PURCHASE, EXCHANGE, TRANSPORT, RECEIVE, OR OFFER TO SELL, PURCHASE, OR EXCHANGE ANY ARCHEOLOGICAL RESOURCE IF SUCH RESOURCE WAS EXCAVATED OR REMOVED FROM PUBLIC LANDS OR INDIAN LANDS IN VIOLATION OF (A) THE PROHIBITION CONTAINED IN (1 ABOVE), OR (B) ANY PROVISION, RULE, REGULATION, ORDINANCE OR PERMIT IN EFFECT UNDER ANY OTHER PROVISION OF FEDERAL LAW.

(3) NO PERSON MAY SELL, PURCHASE, EXCHANGE, TRANSPORT, RECEIVE, OR OFFER TO SELL, PURCHASE, OR EXCHANGE, IN INTERSTATE OR FOREIGN COMMERCE, ANY ARCHEOLOGICAL 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.

PENALTIES

CRIMINAL - $10,000 AND/OR 1 YEAR. IF COMMERCIAL VALUE OR RESTORATION COSTS EXCEED $5000 PENALTY IS $20,000 AND/OR 2 YEARS

SECOND OR SUBSEQUENT CONVICTION - $100,000 AND/OR 5 YEARS

CIVIL - AMOUNT PURSUANT TO REGULATIONS PROMULGATED UNDER THE ACT TAKING INTO ACCOUNT THE ARCHEOLOGICAL OR COMMERCIAL VALUE OF THE RESOURCE AND THE COST OF RESTORATION AND REPAIR OF THE RESOURCE WITH PROVISION FOR DOUBLE PENALTIES FOR SECOND OR SUBSEQUENT VIOLATION

FORFEITURE OF ALL ARCHEOLOGICAL RESOURCES INVOLVED AND ALL VEHICLES AND EQUIPMENT INVOLVED
Archaeological Resources Protection Act of 1979; Final Uniform Regulations
These regulations implement provisions of the Archaeological Resources Protection Act of 1979 ("Act"); 47 U.S.C. 470a-1/l. They were prepared by an interagency rulemaking task force composed of representatives of the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Board of the Tennessee Valley Authority, as directed in section 10(a) of the Act.

The Act has two fundamental purposes: (1) To protect irreplaceable archaeological resources on public lands and Indian lands from unauthorized excavation, removal, damage, alteration, or defacement; and (2) to increase communication and exchange of information among governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained prior to enactment of the Act.

Provisions of the Act which address the first purpose, protection, include requirements for a permit, to be issued by the appropriate Federal land manager to any qualified person who would make use of archaeological resources for the purpose of furthering archaeological knowledge in the public interest. For any person who would make unauthorized use of archaeological resources, without a permit, criminal and civil penalty and forfeiture provisions are prescribed in the Act. Basic government-wide standards for the issuance of permits and for the implementation of civil penalty provisions are a principal focus of these regulations. Also, preservation of collections and data, and protection of locational information, when its disclosure might result in harm to archaeological resources, are provided for in the Act and these regulations.

With regard to the second purpose, section 11 of the Act directs that the Secretary of the Interior shall take such action as may be necessary to foster and improve the communication, cooperation, and exchange of information among private individuals. Federal authorities responsible for the protection of archaeological resources on public lands and Indian lands, and professional archaeologists and archaeological organizations, in order to expand the archaeological data base for the archaeological resources of the United States. Because of the specific assignment, this purpose will be addressed separately.

Section 10(a) of the Act calls for the Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority, after consultation with other Federal land managers, Indian tribes, representatives of concerned State agencies, and after public notice and hearing, to promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of the Act. Consideration of the provisions of the American Indian Religious Freedom Act is specified as a prerequisite to preparing such regulations. Specific reference to uniform regulations in the Act is included also in section 3(1) (definition of "archaeological resource"), section 4(a) (permit application requirements), section 4(b) (standards for permit application evaluation), section 4(d) (permit terms and conditions), and section 10(b) (agency-specific regulations consistent with uniform regulations).

Certain provisions, such as criminal prohibitions and criminal penalties, are outside the scope of this rulemaking. In order to be fully informed about the nature and extent of archaeological resource protection under the Archaeological Resources Protection Act of 1979, it is necessary to consult the Act as well as these regulations.

These regulations are designed to provide Federal land managers the ability to fully exercise their authority under the Act. However, because a variety of land management conditions exists among Federal agencies, supplemental detailed regulations may be promulgated under the authority of section 10(b) of the Act.

Public hearings were held during March and April 1980, in Denver, Colorado; Phoenix, Arizona; Portland, Oregon; and Knoxville, Tennessee, following publication of a notice of public hearings on March 19, 1980 (45 FR 17622). These hearings were held to provide an opportunity for early public input into the rulemaking process and to initiate an early dialogue among various groups interested in the use and/or protection of archaeological resources. Proposed uniform rules were published.
Changes in Response to Public Comments

§ 1215.1 Purpose (Renumbered § 1-1).

This section was expanded and reworded to make clearer the extent to which these regulations apply. Based on a number of general comments which show misunderstanding of the scope and effect of the proposed regulations, paragraph (a) was expanded to state explicitly that these regulations enable Federal land managers to protect cultural resources through four mechanisms: permits, civil penalties, preservation of collections and data, and confidentiality of archaeological resource information. Also, specific reference to the American Indian Religious Freedom Act was incorporated in keeping with section 10(a) of the Act.

Several comments suggested greater specificity in paragraph (b). Wording was changed slightly to state more directly that no new restrictions on authorized uses of the public lands are created by these regulations. Comments of representatives of industries which have ongoing interests in the use of public lands and resources concerned that land-use applicants would be required to apply for permits under these regulations in addition to applications for use entitlements under other legal authorities. These comments were acknowledged by adding a paragraph (b)(1) to § 5. "Permit requirements and exceptions," rather than by further expansion of the purpose statement. Permits may be required for archaeological consultants to land-use applicants, but not for the land-use applicants themselves. This does not represent any change from similar requirements applicable under other laws and regulations, primarily the American Antiquities Act of 1906 and 43 CFR Part 3.

§ 1215.2 Authorities (Renumbered § 2).

Several comments offered additional legal authorities to be added to this section. One comment pointed out that related authorities are listed at the head of the regulations and need not be listed again. Since the authority for promulgating these regulations is confined to the Archaeological Resources Protection Act of 1979, the section was shortened to follow this last comment. The two remaining paragraphs were reworded slightly to clarify the relationship of these and subsequent regulations to the provisions of section 10 of the Act; paragraph (b) is retained for informational purposes, so that the public may be informed that authorized agency regulations may add specificity to the general provisions of these uniform regulations.

§ 1215.3 Definition (Renumbered § 3).

This section drew a heavier body of comment than any other section in the proposed regulations, with the majority of comments addressing the definition of "archaeological resource" (proposed § 1215.3(a)). This definition is central not only to the remainder of these regulations, but also to the enforcement of criminal provisions of the Act.

Section 3(a) retains the fundamental features of the definition of "archaeological resource" from the proposed regulations, but it has been restructured in important ways, making it a more precise tool for eliminating ambiguity about whether or not an item in question is an archaeological resource, and making it more clear that certain items excluded by the Act fall outside the scope of the definition.

The key conditioning provisions for determining what is an archaeological resource, taken from the statutory definition in section 3(1) of the Act, are stated in the base definition in § 3(a) of the regulations: in order to be considered archaeological resources under these regulations, items must be material remains of human life or activities, at least 100 years of age, and of archaeological interest. Subdefinitions, defining "archaeological interest" and "material remains," provide the standards for applying the base definition. Where classes of material remains and illustrative examples were included as part of the definition of "material remains" in the proposed rules, they are now assigned to a separate paragraph and are specified to be of archaeological interest, and therefore archaeological resources, unless conditions of ensuing paragraph (a)(4) or (a)(5) apply. This definite status responds to comments about residual uncertainties in the proposed definition. Several illustrative examples were added to material remains classes in response to comments.

What is not an "archaeological resource" is included in a separate paragraph (a)(4), drawing on sections...
3(1) and 12(b) of the Act and responding to comments that certain excluded items had been listed, apparently counter to direction in the Act. Because of the way the definition was structured in the proposed rules, inclusion was appropriate since those items might be "archaeological resources" under certain circumstances. In the revised structure, paleontological remains, coins, bullets, and unworked rocks and minerals are definitely stated not to be "archaeological resources" themselves, unless they are located in immediate association with archaeological resources.

Many commentors expressed concern that the proposed definition would not allow dislocated material remains, whether archaeological or paleontological interest, to be collected by hobbyists. This concern was directed primarily to items eroded from archaeological sites along the shores of artificial lakes and redeposited sufficiently out of context as to remove their information potential. Lakes specifically mentioned were those resulting from projects of the Army Corps of Engineers and the Tennessee Valley Authority. Commentors pointed out that collection of these remains may contribute more to their preservation than allowing them to be further dislocated due to human-caused or natural disturbance. In recognition of the fact that material remains can, in certain circumstances, lose their archaeological interest and that their collection by the public under these circumstances might not be adverse to the purposes of the Act, a new paragraph (a)(5) was added to the definition of "archaeological resource." This new provision is based on the premise that if the circumstances clearly warrant a determination that certain material remains in certain areas have lost archaeological interest because of dislocation or other causes, the protected status of the remains should be removed and the public so informed. In the absence of such a determination, the presumption of archaeological interest would be retained in order to protect the remains. The final regulations provide that Federal land managers may determine that certain material remains, in specified areas under their jurisdiction, and under specified circumstances, are not of archaeological interest. Any such determination would have to be documented and made public.

Under sections 6 and 7 of the Act, criminal and civil penalties are not to be applicable to removal of arrowheads located on the surface of the ground. "Arrowhead" was defined in a technical manner in § 1215.3(b) of the proposed regulations, generating many comments. Many professional archaeologists commented that distinctions between arrowheads and other tools and weapon projectiles of similar form would prove difficult if not impossible, regardless of how a technical definition might be written. One commentor provided a substantial body of documentation from the published literature which demonstrates the difficulty of relying on shape and size criteria for differentiating "arrowheads" from dart points, spear points, hafted knives, drills, and other tools. Several commentors recommended that a lay definition be used. In light of the fact it is prohibited, but not used the lay term "arrowhead" rather than alternative technical terms that might have been used, and that a stated congressional intent of the non-penalty provisions is to protect unwary recreationists from the heavy fines and other punishment that might be levied under the Act, it was determined that a lay definition for a lay term is appropriate. Such a definition was included as § 3(3)(b).

Neither the Act nor these regulations exclude arrowheads from the definition of archaeological resources. Arrowheads over 100 years of age and of archaeological interest are archaeological resources under section 3(1) of the Act and § 3(3)(i) of these regulations. Their removal from public lands of Indian lands without a permit is prohibited, but is not punishable under the Act or these regulations. However, regulations under other authority which penalize their removal remain effective. Contrary to opinions frequently expressed in the comments and elsewhere, the Act does not legalize the collection of arrowheads from public lands or Indian lands.

Several commentors suggested that the definition of "Federal land manager," paragraph (c) in both proposed and final regulations, should show that a secretary of a department or other agency head may delegate management authority to other persons. A clause to this effect was added to the definition.

The "public lands" definition, paragraph (d) in both versions, received several comments with regard to the effect of "fee title" specification. Some commentors questioned whether the language would exclude certain lands in the public domain administered by the Bureau of Land Management in the Department of the Interior. All Bureau of Land Management lands, including those for which no title document as such exists, are covered in the fee-title concept as used in the Act. In response to comments, the definition was clarified by addition of the words "except Indian lands" at the end, since the fee-title provisions could be interpreted in a technical way to include certain Indian lands.

The definition of "Indian tribe," paragraph (f) in both versions, was expanded to include Alaska Native villages or tribes recognized as eligible for services provided by the Bureau of Indian Affairs. Related discussion touching on the definition of "Indian tribe" is found in the discussion of changes to § 1215.6 (new § 1215.7).

Several comments questioned the lack of mention of several trust territories and the Trust Territory of the Pacific Islands in the definition of "State" in paragraph (h) of both versions. The statutory language was retained unchanged since the requested changes are beyond the reach of rulemaking.

A number of comments asked that definitions be provided for certain terms, such as "bullet," "harm," "destruction," and others. The decision was to allow undefined terms to rest on common meaning and dictionary definitions. The extent of the meaning of "excavate" in these regulations was clarified in § 5(b)(1) in response to one such comment.

§ 1215.4 Excavation or removal of Archaeological Resources (Renumbered § 5—Retitled "Permit Requirements and Exceptions").

In response to one comment on clarity of purpose, the title of this section was changed. The reason for its movement in the order of sections is explained below, under discussion of proposed rule § 1215.14 (new § 1215.4).

This section also drew a substantial body of comment, most of it aimed at clarifying relationships between this section and other sections of the regulations.

Paragraph (a) in the proposed rules stated the permit requirement in passive construction, inadvertently departing from clear representation of statutory provisions that any person may apply for a permit, and that the Federal land manager may issue a permit if certain conditions are met. Rewording of the paragraph and reference to conditions guiding the Federal land manager's decision corrected this departure. One commentor noted that the word "wishing" was inappropriate, and the word "proposing" was substituted. Linkage to prohibitions, now in § 1215.4, was incorporated by adding a restraint
against beginning the proposed work before a permit has been issued.

The exceptions to the permit requirement were the subject of many comments. A new paragraph (b)(1) was added in response to concerns, on the part of representatives of mining, forestry product, and other land-use interests, that the statement in the Purpose section, §1215.1(b) (new §1215.1(b)), did not fully exempt persons holding authorizations to use public lands or resources from having also to apply for and receive a permit under these regulations. The new paragraph (b)(1) states that land use authorized under permits, leases, licenses, or entitlements does not also require a permit under these regulations. To answer concerns expressed in several comments, it states that authorized earth-moving excavation does not constitute "excavation and/or removal" as used in these regulations. It concludes by pointing out that this exception does not exempt the Federal land manager from responsibilities under other authorities, and that excavation and/or removal pursuant to those authorities are subject to permit requirements of these regulations.

The relationship of the Act and these regulations, other archaeological preservation authorities, and uses of public lands and resources, requires some explanation. As part of the decisionmaking process prior to authorizing the use of public lands or resources, Federal land managers are to take into account the potential effects of the authorization on significant archaeological and historic properties, under provisions of section 106 of the National Historic Preservation Act. Other statutes, such as the National Environmental Policy Act, similarly may require pre-authorization review of potential environmental effects. In some cases, the Federal land manager may request a land-use applicant to retain the professional services of a qualified consulting archaeologist, historian, or other specialist in order to gather resource inventory data pertaining to the area where the proposed land use would occur. Depending on findings, the Federal land manager may also request that the land-use applicant implement measures to mitigate effects of the proposed land use. This might include the recovery of data through the scientific excavation of archaeological resources.

Consultants employed by the land-use applicant (or authorized land user) to perform inventory or mitigation tasks are required to possess a permit to do this work. This requirement is not new.

Until the passage of the Act, such permits were issued under the authority of the American Antiquities Act of 1906 and uniform regulations at 43 CFR Part 3. Permit issuance is now being shifted to the Archaeological Resources Protection Act of 1979 and these regulations as provided in section 4(h) of the Act. As before, qualified persons conducting archaeological work on public lands and Indian lands are required to possess a permit.

Upon satisfaction of environmental review and other pertinent requirements, the Federal land manager may authorize the proposed land use, incorporating any necessary restrictions and stipulations in the authorization instrument. At that point, archaeological resource consideration will normally have been completed, and any further provisions, such as what action to take in the event of discovery of a buried archaeological resource, will be stipulated. At no time is the land-use applicant (or authorized land user), whose purpose is other than the excavation or removal of archaeological resources, required to hold a permit issued under these regulations.

The original paragraph (b)(1), pertaining to an Indian tribe or member thereof of excavating or removing any archaeological resource on Indian lands, was moved to become §1215.5(b)(3). One change was made in this paragraph. For the proposed rule, the statutory phrase "Indian lands of such Indian tribe" was interpreted to include both tribal lands and allotted lands of tribal members. Therefore, the words "or members of such tribe" were added. However, due to the complexity of this issue, it was decided that any clarification of the applicability of the regulation to allotted lands of tribal members should be addressed in Department of the Interior implementing regulations pursuant to section 10(b) of the Act. Accordingly, the final version adheres to the language of section 4(g)(1) of the Act. Paragraph (b)(2), excluding from permit requirements the private collection of any rock, coin, bullet, or mineral which is not an archaeological resource, was reworded slightly for clarity. Determinations of whether or not a rock, coin, bullet, or mineral is an archaeological resource depends on §1215.3(a)(4) and other provisions of the definition of "archaeological resource."

Paragraphs (b)(3) and (b)(5) of the proposed rules are now paragraphs (b)(4) and (b)(5); they are slightly reworded, but are unchanged in substance.

Several comments were received on paragraph (b)(4) of the proposed rules, regarding the permit status of employees and agents of the Federal government. The provision in the proposed rules had two intents. The first was to prevent putting Federal land managers in the inappropriate position of being required to issue permits to their own employees, hired under the selection constraints of applicable personnel regulations, before allowing them to perform official duties connected with the Federal land manager's archaeological resource management responsibilities. The second intent was to avoid requiring the Federal land manager to duplicate the assessment of qualifications and the definition of work requirements for persons carrying out the Federal land manager's archaeological resource management responsibilities under a contract or similar instrument. The comments did not negate the desirability of these features, but they did point out that the Act provides no exception for employees and agents to the permit requirement and notification provisions. This is acknowledged to be the case. Persons carrying out official agency duties under the Federal land manager's direction cannot be excepted from the permit requirement. Rather, they are not required to apply for a permit, because their status represents an alternative kind of permit, subject to the same standards as permits issued under this part. This is made more explicit in the revised regulations. The former paragraph under exceptions has been elevated to a separate paragraph (c). Because use of the phrase "employees and agents" might inadvertently restrict the classes of persons who could be called on to perform the Federal land manager's duties, the phrase has been changed to "persons." "Official duties" was tightened to "official agency duties under the Federal land manager's direction." And a proviso was added that prior to authorizing a person to perform official agency duties, the Federal land manager shall document compliance with provisions of those sections of the regulations pertaining to professional qualifications appropriate to the work to be conducted, terms and conditions under which authorized work is to be performed, and notification of Indian tribes when official duties might affect an Indian cultural or religious site, as determined by the Federal land manager.

Paragraph (d), in both the proposed and final regulations, provides for the issuance of a permit in response to a request from the Governor of any State. One commenter asked if it is intended
that a Governor may request a permit, which the Federal land manager would be obligated to issue, for persons who would be found not qualified under normal application procedures. This question addresses the fact that qualifications are left to the Governor's determination under provision of section 4(j) of the Act. This possible outcome was clearly not the intent of the Congress, in light of other provisions within section 4(j) and in the broader context of a statute designed to protect archaeological resources. This provision is interpreted to apply to qualified persons acting on behalf of the State, such as a State Archaeologist, a member of the State Historic Preservation Officer's staff, or staff of a State educational institution such as a university or museum. Several other comments questioned whether permits requested by a Governor could be issued for Indian lands, and whether notification procedures with regard to Indian cultural or religious sites would apply. Permits for Indian lands may be issued in response to a Governor's request. However, such requests are subject to the consent provisions of section 4(g)(2) of the Act. Notification provisions of section 4(c) of the Act also apply. These provisions are incorporated in the regulations in §§ -8(a)(5) and -7 respectively. The proposed rules included information in § 1215.4(c) that permits other than those required in these regulations might be needed. Several comments addressing this paragraph indicated that more confusion than information was imparted. The proposed paragraph (c) was included to insure public awareness that there are other general and specific authorities answered to by various Federal land managers which might have prohibitions or permit requirements for certain activities or in regard to material items which do not meet the tests for "archaeological resource" under the Act or these regulations. The confusion was compounded by mention that special use permits might be required for non-collecting or non-disturbing activities, which was intended as an example, but which was interpreted in a number of different ways by commentors. The new § -5(e) is a more straightforward expression of caution to the public to consider consulting with the Federal land manager before assuming that no permit is needed. The terminology which contributed to this confusion has been dropped.

§ 1215.5 Application for Permits (Renumbered § -6, Retitled "Application for Permits and Information Collection").

This section received relatively little comment, and stands as proposed with only minor rewording. Several of the comments suggested adding specific provisions which are adequately covered in other sections of the regulations. Some recommended useful policy provisions which were considered more appropriate to agency-specific regulations under section 10(b) of the Act than to these uniform regulations. A few comments ran counter to provisions of the Act and were rejected. One comment recommended that "copies of" be inserted ahead of "records, data, photographs, and other documents," and this was done.

§ 1215.6 Consideration of Indian Tribal Religious and Cultural Concerns (Renumbered § -7, Retitled "Notification to Indian Tribes of Possible Harm to, or Destruction of, Sites on Public Lands Having Religious or Cultural Importance").

This section received the second largest number of comments, and involved more of the task force's review and discussion time than any other section. Several of the proposed provisions proved very controversial, and while commentors' opinions were usually cleanly divided, evaluation was made more difficult by the frequent recognition that both sides in polar arguments had equal strength and validity. Upon review it was concluded that the proposed section had suffered from overspecification, and that the most satisfactory solution of the consequent problems is to return to language more nearly tracking the Act, leaving the closer specification to agency regulations under section 10(b) of the Act.

Some general discussion of the Act's provisions is necessary before explaining the changes that were made in the final regulations. Section 4(c) of the Act provides that:

If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9.

Section 10(a) of the Act, the statutory basis for these regulations, also specifies that "Such rules and regulations may be promulgated only after consideration of the provisions the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996)," a charge acknowledged in § -1(a) of these regulations. The American Indian Religious Freedom Act (AIRFA) established a Federal policy to protect and preserve for American Indians, Eskimos, Aleut and Native Hawaiians, their right of freedom to believe, express, and exercise their traditional religions. There are fundamental differences between traditional tribal religions and the more common religions of the larger American society. These differences are described in the report submitted by the President to the Congress pursuant to section 2 of AIRFA. One of the most important characteristics of traditional tribal religions is reverence for the natural world, upon which traditional tribal cultures depend. Specific places may have special religious significance for reasons such as the presence of shrines, cemeteries, vision quest sites, or plants and animals that have religious significance. In enacting AIRFA, the Congress recognized that infringements of religious freedom for traditional Native Americans have resulted in part from lack of knowledge and from the insensitive and inflexible enforcement of Federal policies and regulations. Section 4(c) of the Act and the reference to AIRFA are interpreted to seek to preclude lack of knowledge and insensitive policies and regulations with respect to issuance of permits under the Act.

Section -7 of these regulations establishes a substantially revised process by which Federal land managers will provide the required notification and consider tribal religious and cultural concerns which may be affected by the issuance of permits under these regulations. In carrying out this process Federal land managers may meet with tribal representatives to discuss tribal interests. Opportunities for tribal representatives to present their views orally will generally result in better communication between tribes and Federal land managers than will exclusive reliance on written communication. Any mitigation or avoidance measures which are adopted as a result of such consultation will be incorporated into terms and conditions of permits.

A number of comments addressed the provisions in the proposed paragraph (a)(1) for providing notice to Indian tribes having a reservation within 200 miles of the proposed permit area. Suggesting alternatively that the distance was too great, not great
enough, or irrelevant. The intent of the 200-mile radius was to improve the probability that affected tribes would receive notice. However, as comments pointed out, the provision would have been burdensome for Federal land managers to administer, and in some parts of the country it would have resulted in tribes routinely receiving notice for areas in which they have no particular interest, creating a burden also for them. As one commentor noted, in light of the removal of many Indian tribes to areas distant from their aboriginal territories, it might also have led inadvertently to failure to notify those tribes which have interests but presently reside more than 200 miles away, notwithstanding proposed paragraph (a)(2), which would have caused other Indian tribes known or believed to have interests to be notified.

The final regulations do not retain the 200-mile provision. Instead, paragraph (b)(1) requires the Federal land manager to identify those tribes which have aboriginal or historic ties to particular units of Federal land and to initiate communication with those tribes to determine the location and nature of sites of religious or cultural importance on those lands. Once such information is compiled, if an application for a permit is received for an area which a tribe has identified as important, and the Federal land manager determines that activities proposed in the application might affect religious or cultural sites, that tribe could receive notice of the application.

Several commentors, including some Indian tribes, expressed support for the development of a national inventory of tribal religious and cultural sites on public lands. Paragraph (a)(5) of the proposed rules provided that any such central listing, which may be established by the Secretary of the Interior under the Act or under other authority, would be consulted for notification purposes. However, it was concluded that these uniform regulations are not the appropriate place to stimulate policy options on the part of any single agency. Moreover, reference to an as yet undeveloped program proved confusing. The provision was therefore dropped from the final regulation.

Several commentors pointed out that there are some cases of conflicts between archaeological interests and Indian tribal religious or cultural interests which are irreconcilable. Particular concern was expressed regarding the treatment of Native American graves, grave offerings, cemeteries, and ceremonial sites, since practices surrounding disposal of the dead are an integral part of Native American religion. A number of commentors recommended that conflicts between the conduct of archaeology and Native American religious concerns could be reduced by removing graves, human skeletal remains, and related items from the definition of "archaeological resource." This recommendation was rejected for two reasons. First, the Congress explicitly included graves and human skeletal remains in the statutory definition of "archaeological resource," in section 3(1) of the Act. Second, listing items in the definition of "archaeological resource" in these regulations is not done for the purpose of limiting what archaeologists may find to be of interest or the discipline of archaeology may choose as its subject matter. Rather, the definition supplies the basis for enforcing the penalty provisions of the Act. If graves and human skeletal remains were excluded from coverage under the Act, there would be no penalties to deter their unpermitted disturbance. Because of the notification requirement of § 7 and its relationship to terms and conditions under § 9(c) of these regulations, tribal religious and cultural concerns relative to graves and human remains can have an important role in limiting permitted work to that which is not in conflict with religious beliefs or cultural practices.

Several commentors suggested that the Federal land manager should be required to exclude any site of tribal religious or cultural importance from the area embraced by a permit, on the basis of guarantees of religious freedom in the First Amendment and the American Religious Freedom Act. This recommendation is not adopted, since Federal land managers are bound by penalties under the Act regardless of their unpermitted disturbance. Because of the wording of these regulations, and since the application of constitutional standards to specific cases depends on specific fact situations. These regulations set forth a mechanism for Federal land managers to make contact with Indian tribes, notifying them of possible conflicts arising from permit applications and responding to requests for consultation, and to incorporate in terms and conditions of the permit any mitigation or avoidance measures adopted as a result of consultation.

Several commentors reflected concern about the confidentiality of information regarding the location of tribal religious and cultural sites. Desecration of sites has occurred in the past, and many Indians view disclosing the location of a site as inviting desecration. In some instances, disclosing the location of a site is prohibited by tribal religious teachings. Under provisions of the Act and these regulations, Indian tribes may find themselves in the uncomfortable position of having to act contrary to their preferences or beliefs by confiding locational information to the Federal land manager, aware that the Federal land manager's legal authority to withhold information from the public may be limited, or to remain silent in the expectation of harm or destruction from activity authorized under a permit. The Federal land manager is bound by the Freedom of Information Act, and the agency is required to disclose agency records formally requested, unless the information is subject to an exemption. Two exemptions may apply to some Indian religious or cultural sites. If such sites are also archaeological resources, or coincide in location with archaeological resources, the Federal land manager may hold their location and nature confidential under section 9 of the Act (and § 33 of the regulations). If they are included in or eligible for inclusion in the National Register of Historic Places, the Federal land manager may withhold information under section 304 of the National Historic Preservation Act. But if neither of these exemptions applies, the Federal land manager may be required to disclose such information in response to a Freedom of Information Act request if it is part of the agency's records. Indian tribes must decide for themselves whether and how to participate in Federal land managers' attempts to determine whether lands under their jurisdiction contain sites of religious or cultural concern to Indian tribes.

Notification of Indian tribes depends to some degree on the definition of "Indian tribe" in the Act and the regulations. Several commentors disagreed with the proposed definition, which used Federal recognition as a determining criterion, because the Act did not refer to Federal recognition. The Act defines "Indian tribe," in part, as "any Indian tribe, band, nation, or other organized group or community." This definition leaves uncertainty as to which social groups of American Indian heritage a Federal land manager might determine to constitute an Indian tribe for purposes of notification. In general, "Indian tribe" as used by the Federal government is a term of art which implies a government-to-government relationship. For groups of Indians which have maintained tribal or other identity, but which are not federally recognized as Indian tribes, a process has been established by the Bureau of Indian Affairs by which they may attain
acknowledgment of tribal status. The definition of "Indian tribe" was expanded slightly, to include also Native Alaska villages or tribes eligible to receive services of the Bureau of Indian Affairs, but was otherwise not changed. The response to concerns that are recognized groups would not be included in notifications was to require the Federal land manager to identify and communicate with federally recognized tribes which have aboriginal or historic ties to involved Federal lands, and also to encourage the Federal land manager to identify and communicate with other groups with similar ties, even though they do not have recognition status. Further, unrecognized groups may identify themselves to and initiate communication with the Federal land manager.

Several commentors addressed a related issue, whether tribal governments are always capable of representing the interests of tribal members who practice traditional tribal religions. Fractional divisions may exist among some Indian tribes, and some practitioners of traditional religions may not recognize the legitimacy of tribal governments or may not view their tribal governments as being concerned for traditional religious interests. Notwithstanding these possibilities, the regulations must reflect the requirement of section 4(c) of the Act for the Federal land manager to provide notice to affected tribes. The most practical way for initial contact of this kind is through the government-to-government relationship discussed above, and it is appropriate that notice should be provided to the chief executive officer of the tribal governing body. The issue of adequate representation of religious views is a matter best addressed within the tribes themselves. The final regulations include language in § 1215.7(a)(1) encouraging Indian tribes to designate a tribal official who will be the focal point for any notification and discussion, and this may be a person well versed in the traditional tribal religion.

A number of comments addressed various parts of the Act and the proposed regulations which might be applied differently on Indian lands than they would be on public lands. For example, one commentor suggested that Indian tribes might be delegated the permitting role of the Federal land manager for archaeological work on Indian reservations. Another questioned the implications and applicability of the savings provisions in section 12 of the Act to Indian lands, and another noted that the Indian landowner consent provisions might be difficult to implement where a permit application involves allotted lands in which numerous persons hold fractional interests. Since these and similar Indian-related issues in need of clarification fall within the implementation responsibilities of the Secretary of the Interior, rather than applying to all Federal land managers, they would best be treated in the regulations to be prepared by the Secretary of the Interior under sections 5 and 10(b) of the Act.

Finally, several commentors suggested that the proposed 45-day period which tribes were to be allowed for responding to notices is too long and would unnecessarily delay issuance of permits. One tribe commented that 45 days is too short a period. In the final regulations the time period is revised to 30 days, which is considered to be a reasonable time period that will not cause unnecessary delay, and will give Indian tribes adequate opportunity to respond that they do have concerns. The specified time period does not require that the Federal land manager issue a permit 30 days after giving notice to an Indian tribe, whether or not concerns are raised, but rather requires that the Federal land manager allow 30 days for Indian tribes to respond. Any further consultation and consideration may occupy additional time without regard to the 30-day response period.

§ 1215.7 Issuance of Permits
(Renumbered § —7.(8))

This section also drew a substantial volume of comments, many of them from archaeologists and others with professional interests in permit issuance under the Act. The section establishes the standards under which Federal land managers will exercise their discretion in determining whether or not to issue permits. It includes provisions for determining applicants' qualifications and the appropriateness of work proposed, and for insuring that collections and records will be cared for properly. The review of permit applications which overlap jurisdictional boundaries will be coordinated among the Federal land managers involved.

Paragraph (a) was expanded to include reference to the duration of permits. This change is addressed under discussion of proposed § 1215.8. Paragraph (a)(1) was reworded slightly in response to one comment, changing "theoretical and methodological design" to "archaeological theory and methods," because the intent of the original phrasing was not clear. The revised wording is intended to incorporate all pertinent aspects of the art and science of archaeology. One commenter recommended that a paragraph be added, among minimum qualifications, to specify managerial capabilities not necessarily demonstrated through the proposed provisions. This suggestion was incorporated essentially as submitted, as paragraph (a)(1)(ii).

Several commentors addressed paragraph (a)(1)(i) of the proposed rules, which requires, alternatively, a graduate degree in anthropology or archaeology, or equivalent training and experience. A number of commentors took the viewpoint that historians should be specified as eligible to receive permits to conduct historical archaeological work. It is recognized that not all qualified persons practicing archaeology in the United States possess graduate degrees in anthropology or archaeology, and the provision was intentionally left open for persons who have attained qualifications through training and experience not leading to a graduate degree in anthropology or archaeology. Persons in this category may be historians, or they may represent any of a number of other educational backgrounds. The original provision was left unchanged. It should be noted that not all persons holding graduate degrees in anthropology or archaeology would meet the minimum qualifications for a permit under these regulations.

One comment suggested that a single authority in each State, such as the State Archaeologist, be established as the official who determines that individuals meet qualification requirements. Under section 4 of the Act, the Federal land manager has the responsibility for determining an applicant's qualifications, pursuant to uniform regulations. It would be an inappropriate delegation of authority for any Federal land manager to rely fully on an outside source for such judgments, but it is possible that such consultation could aid the Federal land manager in reaching decisions. The way that the Federal land manager carries out the responsibility to determine qualifications is open in the Act, and it is left open in these regulations. Paragraph (a)(2), addressing the public interest purpose of proposed work, has been expanded to clarify that the public interest may be met under either of two general categories, scientific or scholarly research such as might be conducted under a research grant, or preservation or archaeological data such as might be required to mitigate the effects of a competing land use. Several comments expressed concern about the
limits of the "management plan" in paragraph (a)(3). One commentor pointed out that while "management plan" is apparently intended in a general sense, the phrase has different specific meanings among different federal agencies. The provision was expanded to make it clear that the phrase is not intended to apply in any narrow sense that would hamper the Federal land manager from following existing management commitments. A new paragraph (a)(4) provides that compliance with historic preservation law satisfies the requirements of paragraphs (a)(2) and (a)(3).

It should be noted that the language in paragraph (a)(4) differs somewhat from the language of the Act in section 4(g)(2), regarding Indian landowner consent. The wording used was suggested by the Bureau of Indian Affairs and the Office of the Solicitor, Department of the Interior, and appeared in the proposed regulatory authority of an Indian tribal statutory language is that allotted Indian land is, in most instances, subject to the regulatory authority of an Indian tribal government. In order to protect the interests of both Indian landowners and tribal governments, these regulations provide clear guidance that the consent of both the Indian landowner(s) and the tribal government having jurisdiction over such allotted lands will be required. In many cases in which there is tribal government jurisdiction over specific allotted lands, only the consent of the Indian landowner(s) will be required. Further clarification of this issue will be provided in regulations issued by the Secretary of the Interior pursuant to section 10(b) of the Act.

A few comments were received on proposed paragraph (a)(6), which required certification that materials and records would be turned over to the repository not later than the date of submission of the final report to the Federal land manager. Several commentors suggested that a period of 90 days be allowed, which was done in the new paragraph (a)(7). One recommended that the regulations recognize that not all specialized samples should be kept at the same repository, and that some samples are destroyed or altered during analysis (such as pollen, dendrochronology, radiocarbon, and thermoluminescence samples). The validity of this recommendation is acknowledged, and the new paragraph (a)(6) has been changed slightly to allow that more than one repository might be proposed, substituting "any" for "the." This ties indirectly with a new provision in §1215.13(d), mentioned below under discussion of proposed §1215.13. Records accompanying the samples and other materials can satisfactorily account for destroyed or altered samples. Also, there is nothing in these regulations requiring the Federal land manager and permittees from reaching agreement on special exceptions to the general provisions regarding preservation of materials and data.

Several commentors pointed out inappropriate differences between proposed paragraphs (a)(6)(i) and (ii). The differences were due to a proofreading oversight and have been corrected in the new paragraphs (a)(7)(i) and (ii).

Paragraph (b) was not clear to several commentors. The intent of the provision is to ensure that when permits would be required from more than one Federal land manager, the resulting permits would not be unnecessarily dissimilar. As a hypothetical example, an archaeologist might propose to carry out settlement and subsistence research by conducting survey and test excavations throughout the watershed area of a small tributary to a major river in the western United States, wherein the lower elevations are managed by one agency, and the higher ground is managed by another. The applicant would submit applications for two permits, making each agency aware of the other's involvement. In accordance with the reworded provision of paragraph (b), the Federal land managers involved would be required to coordinate the review and evaluation of the applications and the issuance of the permits. Because of the coordination, the terms and conditions of the permits should be similar or identical. While it is not provided for in these regulations, it might be within the discretionary latitude of the Federal land managers to agree to combine two (or more) permits which might be issued under such circumstances into a single permit issued jointly.

Several commentors suggested that the time between receipt of an application and a decision should be governed by a 30- or 60-day decision requirement placed on the Federal land manager. No time limits were imposed in these uniform regulations, because of the need to accommodate internal management requirements which vary from agency to agency. In addition, it is necessary to allow adequate time for Federal land managers to consider Indian tribal concerns pursuant to §10—.7. When applicable, however, timeliness of action in response to permit applications is highly important, and Federal land managers should ensure that review and evaluation time are held to the minimum needed.

§1215.8 Time Limits of Permits—Deleted.

This section proposed that permits could be issued for up to a 3-year period, could be extended for up to 4 months, could be renewed, and would be reviewed annually if issued for a period greater than 1 year. Because specific time limits are most appropriately determined on a case by case basis, the maximum limit was changed to "a specified period of time appropriate to the work to be conducted" and inserted in §10—(a). An extension provision was included as §10—(f), and an annual review provision as §10—(g). There is no limit on the number of times a permit can be extended, and thus there is no provision for renewal.

§1215.9 Terms and Conditions of Permits (Reenumered §10—).

This section was the subject of relatively few comments, of which nearly half pertained to accounting for Indian concerns. Paragraph (c) dealt with terms and conditions requested by Indian tribes or Indian landowners for work on Indian lands. In response to comments, the paragraph was expanded to apply also to public lands, tying in with the consultation process under §10—.7.

One comment recommended insertion of "and required" in paragraph (a)(1), which had done so. A suggestion that the type of security referenced in paragraph (d) should be specified. The permissive wording of paragraph (d), which would have allowed the Federal land manager to require security, was not drawn from provisions of the Act. Also, circumstances which might necessitate the posting of bond or other security would be rare. Although the provision was deleted from the final regulations, its deletion does not prevent Federal land managers from requiring security.

One commentor suggested new language to specify that individuals named in a permit would not be released from responsibility under a permit in the event of reassignment or separation until all outstanding obligations had been satisfied. A new paragraph (e) was inserted in response to this suggestion, with one important change. In some instances the individuals named in a permit, who are responsible for conducting the work and/or carrying out the permit's terms and conditions, are working on behalf of an institutional or corporate permittee. In such a case, it is the permittee, not named individuals, that is responsible to
 Paragraph (e) requires that the permittee, rather than named individuals, not be released from terms and conditions until obligations have been satisfied, whether or not the permit remains in force. Rules of individuals named in a permit are integral parts of the conditions of a permit, and any change in their involvement in the work authorized, without the Federal land manager's prior approval, might warrant suspension or revocation of the permit.

§ 1215.10 Suspension, Revocation and Termination of Permits (Renumbered § 10; retitled "Suspension and revocation of permits").

Few comments were offered on this section. The section was restructured to clarify the "program purposes" provision in the original version, and to adhere more closely to the statutory language in section 4(i) of the Act.

§ 1215.11 Compliance With Regulations of the Advisory Council on Historic Preservation (36 CFR Part 800) (Renumbered § 12; Retitled "Relationship to Section 106 of the National Historic Preservation Act").

The order of this section and the section on appeals was reversed, to move the latter into a logically more appropriate proximity to the sections addressed. This section was retitled, since it is not within the scope of these regulations to require compliance with any statute other than the Act or with regulations other than pertaining to the Act.

Section 4(i) of the Act provides: "Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 106 of the Act of October 15, 1966." This simple statement has occasioned wide misunderstanding and overextension. Some commentors believed that issuance of a permit under this part would eliminate the requirement for section 106 compliance with respect to all land uses associated with the permit. Others felt that eliminating section 106 compliance in any way would be inappropriate. Some explanation is in order.

Permits under this part will be issued under essentially two sets of circumstances. The first is where the applicant proposes to conduct archaeological investigations for purely academic or research purposes. Under section 4(i) of the Act, issuance of a permit for this purpose will not require section 106 compliance. Since there is nothing in the Act or its legislative history which indicates a different intent, it is beyond the scope of this rulemaking to change the plain meaning of section 4(i).

The second set of circumstances under which permits may be issued pursuant to this part relates to archaeological work required by the Federal land manager under other resources protection statutes (see related discussion under proposed § 1215.14, below). On occasion, archaeological investigations may be required as part of the section 106 compliance process carried out by the Federal land manager prior to authorizing a land-use request. Such investigations will require a permit under this part. Issuance of the permit itself does not and should not require duplication of section 106 compliance procedures. However, the mere fact that a permit will be required as part of the process does not affect the applicability of section 106 to the Federal land manager's proposed authorization of the land use.

As a hypothetical example, utility company might apply for the grant of a right-of-way across public lands to construct an electrical power distribution line. Lacking availability of archaeological staff to respond in a timely manner, the Federal land manager might request the company to provide information about the presence or absence and significance of archaeological resources within the area of the proposed construction project. The company would then retain an archaeological consultant, who would apply to the Federal land manager for a permit, under the Act and these regulations, to conduct archaeological survey and test excavations in the project area. If the consultant met qualifications, the Federal land manager would issue a permit without considering this action, in and of itself, to be subject to section 106 compliance procedures. The consultant would conduct the permitted work and submit a report to the company, which would then submit the report to the Federal land manager as requested. If the report were to show that archaeological resources are present in the proposed project area, the Federal land manager would consider the applicability of section 106 before reaching a decision to authorize the right-of-way. The issuance of a permit under the Act and these regulations would be an action substantially independent from the larger requirement of section 106 compliance with regard to Federal authorization of the proposed right-of-way.

Alternatively, had the Federal land manager already possessed sufficient information, so that no request to the company would have been necessary, and had that information shown that an archaeological property, eligible for the National Register of Historic Places, would be intersected by the proposed right-of-way, there would be no question about the need to comply with section 106. Whether or not a permit is issued under the Act and these regulations, the Federal land manager has responsibility to determine the effects of a proposed undertaking on eligible or listed National Register properties.

§ 1215.12 Appeals Relating to Permits (Renumbered § 11).

Very few comments addressed this section, which was revised slightly for clarity. Since many agencies already have appeal procedures, no attempt was made to establish standard appeal procedures in these uniform regulations.

§ 1215.13 Custody of Archaeological Resources (Renumbered § 13).

Among the relatively few comments on this section several pertained to tightening or loosening the ownership provisions. Paragraphs (a) and (b) have an information function; ownership is not subject to regulation under the Act.

A new paragraph (d) was added to give Federal land managers the latitude to provide for exchange of materials among appropriate repositories until such time as the Secretary of the Interior may promulgate the regulations provided for in section 5 of the Act. This lies in with provisions mentioned above, under discussion of proposed § 1215.7, for allowing materials to be housed in more than one repository.

One commentor, representing a State museum, saw a need to protect reputable repositories from committing a technical violation of section 6 of the Act, through "receiving" archaeological resources which might have been removed illegally from public lands or Indian lands. Under the Act, receiving archaeological resources, removed from public lands or Indian lands in violation of the permit requirement in the Act or these regulations, is itself a violation. However, a university, museum, or other institution should be free to receive such resources, in the same sense of taking temporary custody on behalf of a Federal land manager or Indian tribe, so long as the appropriate Federal land manager or Indian tribe is given prompt notification. Such notification would be evidence of a lack of intent to violate the Act, thereby eliminating an essential element of a criminal violation. And although intent need not be established
for imposing civil penalties. Federal land managers would not be expected to seek civil penalties under such circumstances. Nevertheless, no provision has been added to extend the requested protection to museums. First, the regulations do not apply to criminal prosecutions; and second, with respect to civil penalties, it was deemed unwise to waive civil penalties by regulation for all persons who might return archaeological resources illegally removed or excavated from public lands or Indian lands, and unfair to waive penalties for certain institutions only. Such matters are left to discretion, to be handled on a case-by-case basis.

§ 1215.14 Prohibited Acts (Renumbered §-4).

In the proposed rules, this section included all prohibitions from section 6 of the Act. The final regulations include only those prohibitions relating to permit requirements or for which civil penalties are provided in those regulations. The application of civil penalties to persons engaged in trafficking in archaeological resources in interstate or foreign commerce in violation of State or local law is not practical or appropriate due to the manner in which civil penalties must be assessed. Consequently, the prohibition against such trafficking, proposed paragraph (c), was deleted. The section as moved to occupy a new place ahead of the permit sections, since its prohibitions are the basis for the permit sections.

§ 1215.15 Criminal Penalties—Delet ed.

Because criminal prosecution will be pursued independently from these regulations, the criminal penalties section was dropped. The Act should be consulted for information on criminal penalties which the courts may impose.

§ 1215.16 Determination of Archaeological or Commercial Value and Cost of Restoration and Repair (Renumbered §—14).

Under both the criminal penalty and civil penalty sections of the Act, sections 6 and 7, penalty amounts are to be established in reference to two factors, the archaeological and commercial value of the archaeological resources involved in the violation and costs of restoration and repair. Several commenters were critical of the idea of using commercial value, since the importance of fair market value in the assessment of penalty amounts tends to lend a false legitimacy to the marketing of archaeological resources, and might promote illicit trade. However, through the use of commercial value to set penalty amounts, persons who traffic in archaeological resources will find that their own price schedules are being used against them. In the long run, high prices translated into fines may be instrumental in discouraging illegal excavation, removal, and commerce. It is also important to have more than one measure for settling penalty amounts. Archaeological resources with very high dollar value might be removed under some circumstances without doing a great deal of damage to archaeological value, while conversely, extreme amounts of damage might be done to archaeological value for the sake of removing items which have very little market value. Archaeological value and commercial value as used in the Act and these regulations are enforcement tools; they are independent from concepts about the intrinsic worth of archaeological resources, whether those be based on scientific detachment, awe, aesthetics, or profit motive.

One commenter suggested application of cost-benefit analysis to costs of restoration and repair. This suggestion is inappropriate to determining a penalty amount. Such analysis might be used for management purposes, to help reach a decision about whether or not to proceed with restoration and repair, but to apply it to penalties could result in the least fine for the most destructive violation.

One comment proposed including the costs of reinterment of human remains according to tribal customs as part of the cost of restoration and repair. This proposal was incorporated in paragraph [c][7].

§ 1215.17 Assessment of Civil Penalties (Renumbered §—15).

Several changes were made to this section in response to comments and for purposes of clarification and simplification.

The proposed regulations provided for three notices, a “notice of violation” (§ 1215.17(b)), a “notice of assessment” (§ 1215.17(c)), and a “notice of penalty” (§ 1215.17(g)). The first two, the notice of violation and notice of assessment, were to have been served either separately or concurrently. The purpose for proposing these two distinct notices was twofold. First, the notice of violation was viewed as an educational tool. The proposed regulations called for its issuance in “minor” offenses where the Federal land manager had already determined not to assess a civil penalty. Comments focusing on the “minor” offenses led to the recognition that issuance of a notice of violation under the civil penalty provisions, with no intention to follow through with civil penalty proceedings, was inappropriate. If it is appropriate to use the civil penalty provisions in a non-punitive way, the proper procedure is to remit (i.e., cancel) or mitigate (i.e., lessen) the penalty assessed, as provided in the Act. References to remitting the penalty have therefore been inserted along with references to mitigation, and notices of violation in these final regulations are to be used only to initiate civil penalty proceedings.

The second purpose to be served by the two notices was to provide the Federal land manager a vehicle for serving a notice of violation before determination of the damages associated with the violation. However, the option of serving a notice of violation can be preserved by providing for a delayed notice of the proposed penalty amount, if necessary, without reference to a separate notice. Accordingly, the former notice of violation and notice of assessment have been combined into one notice, a “notice of violation,” with an optional provision for a deferred notice of a proposed penalty amount. The former notice of penalty has been redesignated as the “notice of assessment.”

The regulations were also restructured to de-emphasize the importance of the maximum penalty amount allowable. Using this amount to establish the initial proposed penalty amount in every violation was viewed as too inflexible and potentially too onerous on persons served with a notice of violation. The Federal land manager is therefore no longer required to determine the maximum penalty amount allowable for each violation, although care must be taken that no penalty assessed exceeds the statutory maximum.

§ 1215.18 Civil Penalty Amounts (Renumbered §—16).

In keeping with the decision to place less emphasis on the maximum penalty amount, the requirement to determine the amount was removed from this section. The maximum penalty amount is simply stated in paragraph (a), and paragraph (b) was relabeled “Determination of penalty amount, mitigation, and remission.”

Among the several comments addressed to this section, a few suggested that there be no mitigation or remission of penalty amounts without the consent of the affected Indian tribe, where the violation occurred on Indian lands or affected a tribal religious or cultural site on public lands. This suggestion was not accepted because the Act charges the Federal land manager with determining civil penalty amounts. However, the final regulations...
include new paragraphs (b)(2) and (b)(3) which provide for consultation with affected Indian tribes before making a decision to mitigate or remit a penalty. In order to enable the Federal land manager to achieve a more just result.

One comment recommended that tribal religious or cultural values which can be quantified by the affected Indian tribe should be considered in setting penalty amounts. This recommendation was not incorporated in the regulations, since it is but one potential example of "other factors" the Federal land manager is directed to take into account under Section 7(a)(2) of the Act. It should be noted that there may be opportunity for an Indian tribe to make damages known through provisions in (§ —16(b)(2) and (3) of these regulations.

One commentor suggested that a uniform fixed schedule of fines should be established to apply to most civil violations, not just minor offenses. Fines and applicability criteria would be based on broad and easily determined categories of damage. This would simplify the task of the Federal land manager, and would place the burden on the violator to demonstrate that the statutory limits of "fair market value of resources destroyed or not recovered" and "costs of restoration and repair" are less than the proposed penalty. While this suggestion has merit, establishment of fixed penalty amounts in accordance with the statutory criteria could be best accomplished by agency regulations issued pursuant to section 10(b) of the Act or by other administrative action, after some experience in assessing civil penalties under the Act has been acquired.

A new criterion, § —16(b)(1)(vi), was added to allow reducing a proposed penalty determined to be excessive under the circumstances.

§ 1215.19 Forfeiture and Rewards (Renumbered § —17: Retitled "Other Penalties and Rewards").

There were several comments offering suggestions for clarifying forfeiture provisions. These are statutory provisions, and were included for information only. In order to allow the public to be aware that other penalties besides those detailed in these regulations might apply, the revised section includes reference to the sections of the Act pertaining to criminal prohibitions, criminal penalties, and forfeiture provisions. Forfeiture regulations may be issued by individual agencies pursuant to section 10(b) of the Act.

The rewards provisions remain essentially the same, with the addition of a provision that persons who provide information in connection with having a civil penalty amount mitigated under (§ —17(b)(3)(iii) shall not be eligible to receive a reward.

§ 1215.20 Confidentiality of Archaeological Resource Information (Renumbered § —18).

This section closely follows the wording of section 9 of the Act. Several comments suggested changes which would have departed from statutory provisions. One commentor recommended that the wording be restated in a positive form, so as to encourage dissemination of knowledge, increase public appreciation, and promote a public conservation ethic. This is a very worthwhile suggestion, but it pertains more to the charge of the Secretary of the Interior under section 11 of the Act than to the protection of sensitive information. With some minor corrections, the section remains essentially as proposed.

§ 1215.21 (Reserved)—Deleted.

§ 1215.22 Report (Renumbered § —19).

This section was left exactly as proposed. There were no comments.

§ 1215.23 Interpretive Rulings—Deleted.

The proposed section stated: "Each Federal land manager may publish from time to time, as an appendix to this part, statements of policy and legal opinions relating to the interpretation, enforcement, and implementation of the Act and this part." The section was deleted, since individual agency statements of policy or legal interpretation would not be binding on other agencies, and therefore should not be codified with these uniform regulations (see 44 U.S.C. 1510).

The Issue of Metal Detector Use

At the public hearings in March and April 1980 and during the commenting period, concern was expressed that the use of metal detectors and associated collector-hobbyist activities on public lands and Indian lands could be a major enforcement target of the Act and the regulations. Nothing in the Act or in these regulations addresses the use of metal detectors on public lands or Indian lands. In considering the legislation, Senator Dale Bumpers stated in the Congressional Record, "This legislation does not affect the use of metal detectors on public lands. If it is legal to use metal detectors currently, this act does not diminish that use. If it is illegal to use metal detectors, as in national parks, this act does not allow such use" (125 CR S14722, October 17, 1979). The same is true of these regulations. However, while the use of metal detectors is neither authorized nor prohibited by the Act and these regulations, unauthorized excavation of archaeological resources discovered while using metal detectors is prohibited on public lands and Indian lands. Also, it is important for users of metal detectors and others to be aware that there are other land management regulations and land use restrictions which govern activities on public lands and Indian lands.

Hobby collecting in various forms is engaged in by a large number of responsible persons, and such hobbyists are encouraged to work together with Federal land managers to deter resource destruction. To protect themselves from unintentionally violating any law or regulations, persons wanting to use public lands and Indian lands should obtain information regarding permissible activities from the Federal land manager's local representative. To the small percentage of collectors, treasure hunters, and metal detector users who destroy archaeological resources in violation of prohibitions, the Act and these regulations prescribe heavy criminal and civil penalties.

Authorship

These uniform rules were prepared by an interagency rulemaking task force composed of representatives of the Department of the Interior (Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, National Park Service, Office of the Solicitor); Department of Agriculture (Forest Service, Office of the Secretary); Department of Defense (Departments of Army, Navy, Air Force); and the Tennessee Valley Authority.

Compliance With Other Authorities

Environmental Effects

The Secretary of the Interior has prepared an Environmental Assessment on this rulemaking and has made a Finding of No Significant Impact pursuant to regulations of the Council on Environmental Quality implementing the National Environmental Policy Act (42 U.S.C. 4332). Copies of the Environmental Assessment and Finding of No Significant Impact are available for public review in the National Park Service's Washington Office.

Economic Impact

The Secretary of the Interior has determined that this rulemaking is not a "major rule" within the meaning of Executive Order 12291 (46 FR 13193,
February 17, 1981), and would not have a "significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act (5 W.S.C. 601 et seq.). These determinations are based on findings that the rulemaking is primarily directed toward the management of Federal resources, with negligible or no impact on the general public, and with cumulative economic impact of less than $100,000,000 per year.

Information Collection

The Office of Management and Budget has given approval for the information collection requirements in section—.6 of these regulations (Application for permits and information collection") pursuant to the Paperwork Reduction Act (44 U.S.C. 3507). The clearance number is 1024-0037.

Regulations Promulgation

The Departments of the Interior, Agriculture, and Defense and the Tennessee Valley Authority are promulgating identical regulations on protection of archaeological resources and are codifying these regulations in their respective titles of the Code of Federal Regulations. Since the regulations are identical, the text of the regulations is set out only once at the end of this document. The part heading, table of contents, and authority citation for the regulations as they will appear in each CFR title precede the text of the regulations.

Approval

These regulations have been approved by the Secretary of Agriculture, the Secretary of Defense, the Secretary of Interior, and the Chairman of the Board of the Tennessee Valley Authority.

Department of the Interior (43 CFR Part 7)

List of Subjects in 43 CFR Part 7

Historic preservation, Monuments and memorials, Antiquities, Archaeology.

Title 43 of the Code of Federal Regulations is amended by adding Part 7 to read as follows:

PART 7—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

Sec.

7.1 Purpose.

7.2 Authority.

7.3 Definitions.

7.4 Prohibited acts.

7.5 Permit requirements and exceptions.

7.6 Application for permits, and Information Collection.

7.7 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.

7.8 Issuance of permits.

7.9 Terms and conditions of permits.

7.10 Suspension and revocation of permits.

7.11 Appeals relating to permits.

7.12 Relationship to section 106 of the National Historic Preservation Act.

7.13 Custody of archaeological resources.

7.14 Determination of archaeological or commercial value and cost of restoration and repair.

7.15 Assessment of civil penalties.

7.16 Civil penalty amounts.

7.17 Other penalties and rewards.

7.18 Confidentiality of archaeological resource information.

7.19 Report.


(OMB Control No.: 1024-0037)

Dated: October 24, 1983.

Douglas W. MacClery,
Deputy Assistant Secretary for Natural Resources and Environment.

Department of Defense (32 CFR Part 229)

List of Subjects in 32 CFR Part 229

Historic preservation, Monuments and memorials, Antiquities, Archaeology.

Title 32 of the Code of Federal Regulations is amended by adding Part 229 to read as follows:

PART 229—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

Sec.

229.1 Purpose.

229.2 Authority.

229.3 Definitions.

229.4 Prohibited acts.

229.5 Permit requirements and exceptions.

229.6 Application for permits.

229.7 Confidentiality of archaeological resource information.

229.8 Issuance of permits.

229.9 Terms and conditions of permits.

229.10 Suspension and revocation of permits.

229.11 Appeals relating to permits.

229.12 Relationship to section 106 of the National Historic Preservation Act.

229.13 Custody of archaeological resources.

229.14 Determination of archaeological or commercial value and cost of restoration and repair.

229.15 Assessment of civil penalties.

229.16 Civil penalty amounts.

229.17 Other penalties and rewards.

229.18 Confidentiality of archaeological resource information.

229.19 Report.

PART 1312—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

Sec.
1312.1 Purpose.
1312.2 Authority.
1312.3 Definitions.
1312.4 Prohibited acts.
1312.5 Permit requirements and exceptions.
1312.6 Application for permits, and Information Collection.
1312.7 Notification of Indian tribes of
1312.8 Issuance of permits.
1312.9 Terms and conditions of permits.
1312.10 Suspension and revocation of
1312.11 Appeals relating to permits.
1312.12 Relationship to section 106 of the
1312.13 Cost of archaeological resources.
1312.14 Determination of archaeological or commercial value and cost of restoration and repair.
1312.15 Assessment of civil penalties.
1312.16 Civil penalty amounts.
1312.17 Other penalties and rewards.
1312.18 Confidentiality of archaeological resource information.
1312.19 Report.


OMB Control No.: 1024-0037


C. H. Dean, Jr.
Chairman.

§—1 Purpose.

(a) The regulations in this part implement provisions of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470a-11) by establishing the uniform definitions, standards, and procedures to be followed by all Federal land managers in providing protection for archaeological resources, located on public lands and Indian lands of the United States. These regulations enable Federal land managers to protect archaeological resources, taking into consideration provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996), through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and date, and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the archaeological resources.

(b) The regulations in this part do not impose any new restrictions on activities permitted under other laws, authorities, and regulations relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.

§—2 Authority.

(a) The regulations in this part are promulgated pursuant to section 10(a) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470i), which requires that the Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority jointly develop uniform rules and regulations for carrying out the purposes of the Act.

(b) In addition to the regulations in this part, section 10(b) of the Act (16 U.S.C. 470i) provides that each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations in this part, as may be necessary for carrying out the purposes of the Act.

§—3 Definitions.

As used for purposes of this part:

(a) "Archaeological resource" means any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.

(1) "Archaeological interest" means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

(2) "Material remains" means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated.

(3) The following classes of material remains [and illustrative examples], if they are at least 100 years of age, are of archaeological interest and shall be considered archaeological resources unless determined otherwise pursuant to paragraph (a)(4) or (a)(5) of this section:

(i) Surface or subsurface structures, shelters, facilities, or features (including but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, middens);

(ii) Surface or subsurface artifact concentrations or scatters;

(iii) Whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments (including, but not limited to, pottery and other ceramics, cordage, basketry and other weaving, bottles and other glassware, bone, ivory, shell, metal, wood, hide, feathers, pigments, and flaked, ground, or pecked stone);

(iv) By-products, waste products, or debris resulting from manufacture or use of human-made or natural materials;

(v) Organic waste (including, but not limited to, vegetable and animal remains, coprolites);

(vi) Human remains (including, but not limited to, bone, teeth, mummiified flesh, burials, cremations);

(vii) Rock carvings, rock paintings, intaglios and other works of artistic or symbolic representation;

(viii) Rockshelters and caves or portions thereof containing any of the above material remains;

(ix) All portions of shipwrecks (including, but not limited to, armaments, apparel, tackle, cargo);

(x) Any portion or piece of any of the foregoing.

(4) The following material remains shall not be considered of archaeological interest, and shall not be considered to be archaeological resources for purposes of the Act and this part, unless found in a direct physical relationship with archaeological resources as defined in this section:

(i) Paleontological remains;

(ii) Coins, bullets, and unworked minerals and rocks.

(5) The Federal land manager may determine that certain material remains, in specified areas under the Federal land manager’s jurisdiction, and under specified circumstances, are not or are
no longer of archaeological interest and are not to be considered archaeological resources under this part. Any determination made pursuant to this subparagraph shall be documented. Such determination shall in no way affect the Federal land manager's obligations under other applicable laws or regulations.

(b) "Arrowhead" means any projectile point which appears to have been designed for use with an arrow.

(c) "Federal land manager" means:

(1) With respect to any public lands, the secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands, including persons to whom such management authority has been officially delegated;

(2) In the case of Indian lands, or any public lands with respect to which no department, agency or instrumentality has primary management authority, such term means the Secretary of the Interior;

(3) The Secretary of the Interior, when the head of any other agency or instrumentality has, pursuant to section 3(2) of the Act and with the consent of the Secretary of the Interior, delegated the responsibilities (in whole or in part) in this part.

(d) "Public lands" means:

(1) Lands which are owned and administered by the United States as part of the national park system, the national wildlife refuge system, or the national forest system; and

(2) All other lands the fee title to which is held by the United States, except lands on the Outer Continental Shelf, lands under the jurisdiction of the Smithsonian Institution, and Indian lands.

(e) "Indian lands" means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian tribe or Indian individual.

(f) "Indian tribe" as defined in the Act means any Indian tribe, band, nation, or other organized group or community, including any Alaska village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688). In order to clarify this statutory definition for purposes of this part, "Indian tribe" means:

(1) Any tribal entity which is included in the annual list of recognized tribes published in the Federal Register by the Secretary of the Interior pursuant to 25 CFR Part 54;

(2) Any other tribal entity acknowledged by the Secretary of the Interior pursuant to 25 CFR Part 54 since the most recent publication of the annual list; and

(3) Any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and any Alaska Native village or tribe which is recognized by the Secretary of the Interior as eligible for services provided by the Bureau of Indian Affairs.

(g) "Person" means an individual, corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the United States, or of any Indian tribe, or of any State or political subdivision thereof.

(h) "State" means any of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(i) "Act" means the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-17.).

§ 4.4 Prohibited acts.

(a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under § 4.8 or exempted by § 4.5(b) of this part.

(b) No person may sell, purchase, exchange, transport, or receive any archaeological resource, if such resource was excavated or removed in violation of:

(1) The prohibitions contained in paragraph (a) of this section; or

(2) Any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

§ 4.5 Permit requirements and exceptions.

(a) Any person proposing to excavate and/or remove archaeological resources from public lands or Indian lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Federal land manager for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Federal land manager may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in § 4.8(e) of this part.

(b) Exceptions:

(1) No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Federal land manager's responsibility to comply with other authorities which protect archaeological resources prior to approving permits, leases, licenses, or entitlements for use; any excavation and/or removal of archaeological resources required for compliance with those authorities shall be conducted in accordance with the permit requirements of this part.

(2) No permit shall be required under this part for any person collecting for private purposes any rock, coin, bullet, or mineral which is not an archaeological resource as defined in this part, provided that such collecting does not result in disturbance of any archaeological resource.

(3) No permit shall be required under this part or under section 3 of the Act of June 8, 1906 (16 U.S.C. 432), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal or archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this part.

(4) No permit shall be required under this part for any person to carry out any archaeological activity authorized by a permit issued under section 3 of the Act of June 8, 1906 (16 U.S.C. 432), before the enactment of the Archaeological Resources Protection Act of 1979. Such permit shall remain in effect according to its terms and conditions until expiration.

(5) No permit shall be required under section 3 of the Act of June 8, 1906 (16 U.S.C. 432) for any archaeological work for which a permit is issued under this part.

(c) Persons carrying out official agency duties under the Federal land manager's direction, associated with the management of the permit resources, need not follow the permit application procedures of § 4.6. However, the Federal land manager shall insure that provisions of § 4.8 and
§—9 have been met by other documented means, and that any official duties which might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Federal land manager, have been the subject of consideration under §—7.

(d) Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Federal land manager shall issue a permit, subject to the provisions of §—5(b)(5), §—7, §—8(a)(3), (4), (5), (6), and (7), §—9, §—10, §—12, and §—13(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Federal land manager.

(e) Under other statutory, regulatory, or administrative authorities governing the use of public lands and Indian lands, authorizations may be required for activities which do not require a permit under this part. Any person wishing to conduct on public lands or Indian lands any activities related to but believed to fall outside the scope of this part should consult with the Federal land manager, for the purpose of determining whether any authorization is required, prior to beginning such activities.

§—6 Application for permits and information collection.

(a) Any person may apply to the appropriate Federal land manager for a permit to excavate and/or remove archaeological resources from public lands or Indian lands and to carry out activities associated with such excavation and/or removal.

(b) Each application for a permit shall include:

(1) The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed time of performance, locational maps, and proposed outlet for public written dissemination of the results.

(2) The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in §—8(a).

(3) The name and address of the individual(s), if different from the individual(s) named in paragraph (b)(2) of this section, proposed to be responsible for carrying out the terms and conditions of the permit.

(4) Evidence of the applicant's ability to initiate, conduct, and complete the proposed work, including evidence of logistical support and laboratory facilities.

(5) Where the application is for the excavation and/or removal of archaeological resources on public lands, the names of the university, museum, or other scientific or educational institution in which the applicant proposes to store copies of data, records, photographs, and other documents derived from the proposed work. Applicants shall submit written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility for the records, data, photographs, and other documents and to safeguard and preserve these materials as property of the United States.

(6) Where the application is for the excavation and/or removal of archaeological resources on Indian lands, the name of the university, museum, or other scientific or educational institution in which the applicant proposes to store copies of records, data, photographs, and other documents derived from the proposed work, and all collections in the event the Indian owners do not wish to take custody or otherwise dispose of the archaeological resources. Applicants shall submit written certification, signed by an authorized official of the institution, or willingness to assume curatorial responsibility for the collections, if applicable, and/or the records, data, photographs, and other documents derived from the proposed work.

(c) The Federal land manager may require additional information, pertinent to land management responsibilities, to be included in the application for permit and shall so inform the applicant.

(d) Paperwork Reduction Act. The information collection requirement contained in §—6 of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB clearance number 1024-0037. The purpose of the information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist Federal land managers in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

§—7 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.

(a) If the issuance of a permit under this part may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands, as determined by the Federal land manager, at least 30 days before issuing such a permit the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 of the Act.

(1) Notice by the Federal land manager to any Indian tribe shall be sent to the chief executive officer or other designated official of the tribe.

Indian tribes are encouraged to designate a tribal official to be the focal point for any notification and discussion between the tribe and the Federal land manager.

(2) The Federal land manager may provide notice to any other Native American group that is known by the Federal land manager to consider sites potentially affected as being of religious or cultural importance.

(3) Upon request during the 30-day period, the Federal land manager may meet with official representatives of any Indian tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under §—9.

(4) When the Federal land manager determines that a permit applied for under this part must be issued immediately because of an imminent threat of loss or destruction of an archaeological resource, the Federal land manager shall so notify the appropriate tribe.

(b) [In order to identify sites of religious or cultural importance, the Federal land manager shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Federal land manager's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on
(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data.

(3) The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned;

(4) Where the proposed work consists of archaeological survey and/or data recovery undertaken in accordance with other approved uses of the public lands or Indian lands, and the proposed work has been agreed to in writing by the Federal land manager pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f), paragraphs (a)(2) and (a)(3) shall be deemed satisfied by the prior approval.

(5) Written consent has been obtained, for work proposed on Indian lands, from the Indian landowner and the Indian tribe having jurisdiction over such lands;

(6) Evidence is submitted to the Federal land manager that any university, museum, or other scientific or educational institution proposed in the application as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records; and

(7) The applicant has certified that, not later than 90 days after the date the final report is submitted to the Federal land manager, the following will be delivered to the appropriate official of the approved university, museum, or other scientific or educational institution, which shall be named in the permit:

(i) All artifacts, samples, collections, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit where the permit is for the excavation and/or removal of archaeological resources from public lands.

(ii) All artifacts, samples and collections resulting from work conducted under the requested permit for which the custody or disposition is not undertaken by the Indian owners, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit, where the permit is for the excavation and/or removal of archaeological resources from Indian lands.

§ 9.9 Terms and conditions of permit:

(a) In all permits issued, the Federal land manager shall specify:

(1) The nature and extent of work allowed and required under the permit including the time, duration, scope, location, and purpose of the work;

(2) The name of the individual(s) responsible for conducting the work and, if different, the name of the individual(s) responsible for carrying out the terms and conditions of the permit;

(3) The name of any university, museum, or other scientific or educational institutions in which any collected materials and data shall be deposited; and

(4) Reporting requirements.

(b) The Federal land manager may specify such terms and conditions as deemed necessary, consistent with this part, to protect public safety and other values and/or resources, to secure work areas, to safeguard other legitimate land uses, and to limit activities incidental to work authorized under a permit.

(c) The Federal land manager shall include in permits issued for archaeological work on Indian lands such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands, and for archaeological work on public lands shall include such terms and conditions as may have been developed pursuant to § 9.7.

(d) Initiation of work or other activities under the authority of a permit signifies the permittee’s acceptance of the terms and conditions of the permit.

(e) The permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired.

(f) The permittee may request that the Federal land manager extend or modify a permit.

(g) The permittee’s performance under any permit issued for a period greater than 1 year shall be subject to review by the Federal land manager, at least annually.

§ 9.10 Suspension and revocation of permits:

(a) Suspension or revocation for cause. (1) The Federal land manager may suspend a permit issued pursuant to this part upon determining that the
permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or §—.4. The Federal land manager shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

(2) The Federal land manager may revoke a permit upon assessment of a civil penalty under §—.15 upon the permittee's conviction under section 6 of the Act, or upon determining that the permittee has failed after notice under this section to correct the situation which led to suspension of the permit.

(b) Suspension or revocation for management purposes. The Federal land manager may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit would be in conflict with management requirements in effect when the permit was issued. The Federal land manager shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

§—.14 Determination of archaeological or commercial value and cost of restoration and repair.

(a) Archaeological value. For purposes of this part, the archaeological value of any archaeological resource involved in violation of the prohibitions in §—.4 of this part or conditions of a permit issued pursuant to this section shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. Those costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) Commercial value. For purposes of this part, the commercial value of any archaeological resource involved in violation of the prohibitions in §—.4 of this part or conditions of a permit issued pursuant to this section shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) Cost of restoration and repair. For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this section, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

1. Reconstruction of the archaeological resource;
2. Stabilization of the archaeological resource;
3. Ground contour reconstruction and surface stabilization;
4. Research necessary to carry out reconstruction or stabilization;
5. Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;
6. Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;
7. Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager.

(b) Notice of violation. The Federal land manager shall serve a notice of violation upon any person believed to be subject to a civil penalty, either in person or by registered or certified mail (return receipt requested). The Federal land manager shall include in the notice:

1. A concise statement of the facts believed to show a violation;
2. A specific reference to the provision[s] of this part or to a permit issued pursuant to this part allegedly violated;
3. The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;
4. Notification of the right to file a petition for relief pursuant to paragraph (d) of this section, or to await the Federal land manager's notice of assessment, and to request a hearing in accordance with paragraph (g) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.
5. The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount).
The Federal land manager; in accordance with paragraph (d) of this section; may:

(1) Seek informal discussions with the Federal land manager;
(2) File a petition for relief in accordance with paragraph (d) of this section;
(3) Take no action and await the Federal land manager's notice of assessment;
(4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.

(d) Petition for relief: The person served with a notice of violation may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the Federal land manager within 45 calendar days of the date of service of the notice of violation or of a proposed penalty amount, if later. The petition shall be in writing and signed by the person served with the notice of violation. If the person is a corporation, the petition must be signed by an officer authorized to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.

(e) Assessment of penalty. (1) The Federal land manager shall assess a civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later. The Federal land manager shall take into consideration all available information, including information provided pursuant to paragraphs (c) and (d) of this section or furnished upon further request by the Federal land manager.
(2) The Federal land manager shall determine a penalty amount in accordance with §16-16.

(f) Notice of assessment. The Federal land manager shall notify the person served with a notice of violation of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The Federal land manager shall include in the notice of assessment:

(1) The facts and conclusions from which it was determined that a violation did occur;
(2) The basis in §16-16 for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and
(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(g) Hearings. (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing a copy of the notice of assessment, and shall deliver the request as specified in the notice of assessment, personally or by registered or certified mail (return receipt requested).
(2) Failure to deliver a written request for a hearing within 45 days of the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.
(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. §554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this section, and shall not be limited by the amount assessed by the Federal land manager under paragraph (f) of this section or any offer of mitigation or remission made by the Federal land manager.

(h) Final administrative decision. (1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;
(2) Where the person served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision;
(3) Where the person served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(i) Payment of penalty. (1) The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a United States District Court as provided in section 7(b)(1) of the Act.
(2) Upon failure to pay the penalty, the Federal land manager may request the Attorney General to institute a civil action to collect the penalty in a United States District Court for any district in which the person assessed a civil penalty is found. Where the Federal land manager is not represented by the Attorney General, a civil action may be initiated directly by the Federal land manager.

(j) Other remedies not waived. Assessment of a penalty under this section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

§16-16 Civil penalty amounts.

(a) Maximum amount of penalty. (1) Where the person being assessed a civil penalty has not committed the act or omission constituting a violation of any prohibition in §5.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged or not recovered.
(2) Where the person being assessed a civil penalty has committed any previous violation of any prohibition in §5.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus the commercial value of archaeological resources destroyed or not recovered.

(b) Determination of penalty amount, mitigation, and remission. The Federal land manager may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty.

(i) Agreement by the person being assessed a civil penalty to return to the Federal land manager any archaeological resources removed from public lands or Indian lands;
(ii) Agreement by the person being assessed a civil penalty to assist the Federal land manager in activity to preserve, restore, or otherwise contribute to the protection and study of
archaeological resources on public lands or Indian lands;

(iii) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this part;

(iv) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulations in this part;

(v) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances;

(vii) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

(2) When the penalty is for a violation on Indian lands, the Federal land manager shall consult with and consider the interests of the Indian landowner and the Indian tribe having jurisdiction over the Indian lands prior to proposing to mitigate or remit the penalty.

(3) When the penalty is for a violation which may have had an effect on a known Indian tribal religious or cultural site on public lands, the Federal land manager should consult with and consider the interests of the affected tribe(s) prior to proposing to mitigate or remit the penalty.

§ .17 Other penalties and rewards.

(a) Section 6 of the Act contains criminal prohibitions and provisions for criminal penalties. Section 8(b) of the Act provides that archaeological resources, vehicles, or equipment involved in a violation may be subject to forfeiture.

(b) Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Federal land manager may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State, or local government who furnish information or render service in the performance of their official duties, and persons who have provided information under .10(b)(1)(i) shall not be certified eligible to receive payment of rewards.

(c) In cases involving Indian lands, all civil penalty monies and any item forfeited under the provisions of this section shall be transferred to the appropriate Indian or Indian tribe.

§ .18 Confidentiality or archaeological resource information.

(a) The Federal land manager shall not make available to the public, under subchapter II of chapter 5 of title 5 of the United States Code or any other provision of law, information concerning the nature and location of any archaeological resource, with the following exceptions:

(1) The Federal land manager may make information available, provided that the disclosure will further the purposes of the Act and this part, or the Act of June 27, 1960, as amended (16 U.S.C. 469-469c), without risking harm to the archaeological resource or to the site in which it is located.

(2) The Federal land manager shall make information available, when the Governor of any State has submitted to the Federal land manager a written request for information concerning the archaeological resources within the requesting Governor's State, provided that the request includes:

(i) The specific archaeological resource or area about which information is sought;

(ii) The purpose for which the information is sought; and

(iii) The Governor's written commitment to adequately protect the confidentiality of the information.

§ .19 Report.

Each Federal land manager, when requested by the Secretary of the Interior, shall submit such information as is necessary to enable the Secretary to comply with section 13 of the Act.
On February 1, 1979, Congressman Morris Udall introduced into the House of Representatives a bill to preserve and protect the nation's archaeological resources. Udall spoke with a sense of urgency as he outlined the proposed legislation: "recent court rulings... have held the existing law protecting archaeological artifacts is unconstitutionally vague." More important, Udall said that the present law, even if it were held to be constitutional, was inadequate to protect the nation's cultural resources in an age of high demand and high prices for ancient Indian artifacts.

"Yet this need not be the case," Udall concluded. "If we move now, we can pass this tough, new law and save this important part of our past. To do otherwise would amount to surrender to a pack of vandals of history—and we shall all be the losers."

Nine months later, President Carter signed into law the Archaeological Resources Protection Act of 1979. But the story of this landmark legislation did not begin when Udall introduced the bill. Archeologists and prosecutors had been at work on it for several years, many of those years dominated by frustration and failure. The introduction of the bill into the House and Senate was the culmination of many false starts and wrong directions—of learning details of the political process that the textbooks leave out. This is the story of how it came to pass.

As the nineteenth century came to a close, public interest in the history and art of the Indians of the Southwest led to a passion for collecting artifacts of the ancient people who lived at Mesa Verde and Chaco Canyon, in the deserts of Arizona and the canyons of Utah. The great museums of the East competed for the artifacts of lost civilizations which they hauled back on the recently completed railroads, and private collectors bid up the prices of ancient pottery and artifacts. The vast unclaimed public lands of the desert Southwest were finally being settled, and many of the great monuments were being threatened. All of this stirred the fears of the budding archeological community of the Southwest and its leader, Edgar Lee Hewett of Santa Fe.

Hewett attacked the problem with characteristic vigor and presented a draft bill to the American Anthropological Association and the Archaeological Institute of America in 1905. The next year Hewett’s draft was enacted by Congress and signed into law by President Theodore Roosevelt as part of a growing national awareness to preserve what was left of the nation’s vanishing heritage.

It came to be known as the Antiquities Act of 1906, and it reserved all antiquities on public lands to the people of the United States and made it illegal to remove them without a permit from the appropriate Secretary. Ironically, 68 years passed before the first successful prosecution for looting an Indian ruin took place.

However, a little-noticed provision of the law was to have a great impact on the history of American conservation and on the legislative history of the Archaeological Resources Protection Act as well. Section 2 of the Antiquities Act authorized the President to withdraw lands from the public domain and proclaim them national monuments. It was Hewett’s intention to have the most spectacular archeological sites in the Southwest preserved as national monuments, and the ruins at El Moro and Montezuma’s Castle were designated before 1906 came to a close. The great ruins at Chaco Canyon were preserved in early 1907.

But President Roosevelt saw in this provision an opportunity to do more than simply withdraw and protect archeological sites. On January 11, 1908, he proclaimed the Grand Canyon a national monument under the terms of Section 2, after Congress failed to
add it to the budding national-park system. Future presidents followed his example, and the Antiquities Act of 1906 became a primary tool for creating new national parks. In 1978, frustrated by Congress's inability to act on his proposal for protecting national-interest lands in Alaska, President Jimmy Carter used the Antiquities Act to designate 56 million acres as national monuments. Because of this action, subsequent efforts to enact legislation to protect archeological sites from looters became immensely complicated.

The first reported use of the criminal provisions of the Antiquities Act came in 1974 when Ben Diaz of Phoenix was arrested for illegally appropriating Apache religious objects from the San Carlos Reservation. But these objects were only a few years old, and Diaz appealed his conviction. The Ninth Circuit Court of Appeals agreed with Diaz and found the criminal provisions of the Antiquities Act unconstitutional because they failed to define adequately such terms as "object of antiquity," "ruin" and "monument." The court said, "one must be able to know with reasonable certainty, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he found them." The Diaz decision brought a shiver to the archeologists of the Southwest who were already pressing federal-land managing agencies to step up enforcement of the Antiquities Act. Prices for prehistoric Indian pottery from the Southwest were skyrocketing in the antiquities markets of the East and Europe. Professional looters armed with backhoes and front-end loaders were taking apart entire pueblo ruins in search of treasure; they left nothing behind. The problem was particularly serious in southwestern New Mexico and southeastern Arizona where prehistoric Mimbres and Four Mile pottery was bringing prices in the tens of thousands of dollars. Anasazi pottery from the Four Corners was also gaining in popularity and price.

In 1975 Charles and Mike Quarrell were apprehended by rangers while looting a Mimbres ruin in the Gila National Forest. New Mexico is not in the Ninth Circuit, so the ruling in the Diaz case did not apply, and Assistant U.S. Attorney Robert B. Collins decided to prosecute under the Antiquities Act. The Quarrells were found guilty and sentenced to 40 hours of community service and supervised probation of one year. Despite his victory, Collins and the concerned land-management officials learned that the sanctions provided by the Antiquities Act (a maximum $500 fine and/or 90 days in jail) were wholly inadequate for a crime that could well net tens of thousands of dollars. It was seen by the professional looters as only a small part of the cost of doing business. Furthermore, the Antiquities Act only made the persons actually doing the digging culpable for prosecution. In the Quarrells trial, a Mesa, Arizona, man, C. Frank Turley, testified as a character witness for the Quarrells. During cross-examination, Collins learned that Turley had hired the Quarrells to loot Mimbres sites, and he transported the goods back to Phoenix for sale in the big markets of Scottsdale and the East. If the organizers and dealers of the looting operations were immune from prosecution, Collins saw no way the law could be enforced adequately.

It was then that Collins began to discuss the need for new legislation with Dee Green, Southwest regional archeologist for the Forest Service, who had played a key role in the Quarrells prosecution. They quickly concluded that a new law was needed—one with greatly increased penalties and a focus on the organizers and dealers in stolen antiquities, not on the diggers who tended to be poor residents of the area trying to earn extra income. In fact, many of the diggers were illegal aliens trying to earn a few dollars for their families in Mexico. Meanwhile, the organizers and dealers were reaping huge profits with immunity from prosecution.

Collins and Green began to spread their views among the archeological community, but the success of the Quarrells prosecution tended to lull government officials and archeologists into a false sense of security. Instead of increasing a vigilance on public lands, the focus shifted to legislation to protect ruins on private lands. Stephen LeBlanc, president of The Mimbres Foundation, had learned firsthand what professional looters could do to a priceless resource. The roar of front-end loaders looting Mimbres pueblos echoed throughout the valley. Because they were operating on private lands, there was nothing anyone could do. LeBlanc persuaded the Society for American Archaeology to seek legislation to protect ruins on private lands. For the job, they hired a Santa Fe consultant, Mark Michel. Michel obtained the backing of New Mexico State Senator Ted Montoya, the youngest member of one of the state's most powerful political families. In early 1977, Michel and Montoya persuaded the New Mexico legislature to enact a law barring the looting of archeological sites on private land with the use of mechanical equipment. It was the first major antiquities-protection legislation adopted since 1906. For the effort Michel organized an effective public-relations campaign that began to sensitize the press to the problem of looting throughout the Southwest.

That same summer, the focus again shifted to federal lands and the Antiquities Act. On July 24, 1977, Scott Camazine, a Harvard medical student, was arrested while looting a prehistoric ruin on the Zuni Reservation of western New Mexico. At the trial Camazine argued that the Diaz decision made the Antiquities Act unconstitutional. After hearing the government's case, U.S. Magistrate David R. Gallagher ruled in favor of Camazine's motion and ruled the Antiquities Act unconstitutionally vague. Because of a legal technicality, the government could not appeal, and the Antiquities Act was now invalid in New Mexico as well as all of the western states composing the Ninth Circuit.

Gallagher's ruling made front-page news in New Mexico and brought strong editorial comment. The Santa Fe New Mexican in an editorial said, "New Mexico's archeological treasures are standing naked. . . . If a new law needs to be enacted, it should be done quickly. Archeological treasures in New Mexico, and the South-
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west need the protection."10 Indian leaders, government land managers, and archeologists joined in the public outrage. Assistant U.S. Attorney Collins tried to reassure the public by announcing to the media that he did not believe a magistrate like Gallagher had the authority to declare a law unconstitutional, and that he intended to continue to prosecute looters under the Antiquities Act. But Collins and Green had already decided that whatever happened to the Antiquities Act in the courts, it needed to be replaced. Their views were shared by a growing number of government officials and archeologists.

It was not long before Collins got the opportunity to test the law. In October 1977, forest rangers discovered Byron May and William Smyer looting a Mimbres site in the Gila National Forest. May and Smyer fled the scene but left behind incriminating evidence, including a photograph of May with a human skull on his head and leg bones in each hand. They were later apprehended with large quantities of prehistoric artifacts.11

This time, Collins decided to bypass magistrate court and to take the case directly to the U.S. District Court for New Mexico. As had the defendants in the Quarrells and Camazine cases, Smyer and May moved to dismiss the charges on the basis that the Antiquities Act was unconstitutionally vague. District Court Judge Howard Bratton ruled in favor of the Antiquities Act: "The words 'ruin' and 'monument' plainly require no guessing at their meaning, and the term 'objects of antiquity' is no less comprehensible." Smyer and May were convicted and sentenced to 90 days in jail, the stiffest penalty yet handed out in a looting case.12

Despite his victory, Collins was far from pleased. He knew Smyer and May would appeal to the Tenth Circuit Court of Appeals in Denver, and that court might well follow the lead of the Ninth Circuit in the Diaz decision. Even if they upheld the Antiquities Act, the Diaz ruling would stand and the law would be cloudered by different decisions in different judicial districts. As for Smyer and May, their 90-day jail term was small in comparison to the profits they and other looters were making throughout the Southwest.

Green and LeBlanc, heartened by the result of the Smyer and May trial and by the New Mexico looting law, began to press home their case for a new Antiquities Act. The Society for American Archeology had little experience in the political arena and few funds available for special projects. But the executive committee did support their proposal for a new act, and LeBlanc approached Michel about a new federal law. Michel who was working for the SAA lobbying for protection of sites on public lands, explained that lobbying in Washington was an expensive proposition and that they should raise the funds to hire a professional lobbyist in Washington. LeBlanc did not think that was possible, so Michel advised him to try and get the Department of the Interior to introduce new legislation and to lobby for it. Michel volunteered to talk to Interior Secretary Cecil Andrus and his staff, with whom Michel had worked closely as an aide to New Mexico Governor Jerry Apodaca when Andrus was Governor of Idaho.

In September 1977 Michel wrote a lengthy letter to Andrus outlining the problem and recommending corrective legislation. "Even if the Antiquities Act of 1906 were to be upheld," Michel wrote, "it is inadequate to deal with the problem. It needs to be replaced with a modern, tough new law." Michel outlined to the Secretary five issues that a new law should cover, including stiff penalties and an attack on the dealers and traffickers in looted artifacts.13

During a visit to Washington in November 1977, Michel spoke with Joe Nagel, a special assistant to Secretary Andrus, whom Michel knew from their days as assistants to the governors. Nagel said that Andrus would support legislation and made an appointment for Michel with the head of the Heritage Conservation and Recreation Service, the agency within Interior at that time with responsibility for cultural programs. Michel met with HCRS Director Christopher Deleporte and the manager of HCRS' antiquity program, Charles McKinney. He was told that Interior was far along in drafting new legislation and that it would be forthcoming in 1978. In a follow-up letter under the signature of Secretary Andrus, Interior described two initiatives that were underway. First, a definition of "object of antiquity" was to be published in the Federal Register to solve the definition problem of the Diaz decision. And second, "a comprehensive legislative-amendment package encompassing proposals to strengthen the statute itself..." was introduced. The amendments were to be transmitted to Congress "early in the next session (1978)."14

Although pleased with the reaction of Interior, Michel took home a feeling that neither Deleporte nor McKinney fully recognized the seriousness of the problem.

Before leaving Washington, Michel also met with Congressman Morris Udall of Arizona, chairman of the House Interior Committee, where any legislation would be heard. Michel briefed Udall and his staff on the severity of the problem and the forthcoming Interior Department legislation. Udall promised to support a strong bill. Upon his return to New Mexico, Michel reported to the SAA Interior's position that new legislation would be forthcoming shortly and advised them to work closely with the department.

For the next few months the officers of the SAA tried to come to terms with the problem of achieving a desired result in Washington. In the past, the organization had relied mainly on volunteer efforts to achieve its political goals. Although these efforts had been partially successful, they were on an ad hoc basis, and no structure existed for initiating legislation and shepherd it through Congress. Thus, for financial and organizational reasons, the SAA continued to rely on the Interior Department to initiate legislation and to lobby it through Congress. Nonetheless, the organization sought legal advice on its ability to formally lobby, and that advice was positive.15

By February 1978 Interior had not yet produced a bill to replace the Antiquities Act. But certain members of
the SAA did obtain a draft of legislation that was circulating in the department. They were not pleased. The draft bill made only minor changes in the 1906 Act. The maximum penalty remained at $500 and the scope of the law was not expanded to include trafficking in stolen artifacts. At best, the draft was a solution to the DIAZ problem, but it did not attempt to attack the major problem of organized looting. LeBlanc was outraged and took his case to colleagues at the SAA at their winter meeting in Houston. The executive committee decided to form an ad hoc public issues committee to keep watch on the pending legislation. They were particularly incensed that Interior had failed to consult with them on the nature and scope of the proposed legislation.

Upon his return, LeBlanc asked Michel to prepare a legal brief on the problem and the direction legislation should take. Michel retained a Santa Fe attorney, David Douglas, with whom he had collaborated on environmental legislation in the past. The resulting “memorandum of law” analyzed the entire problem of the protection of archeological sites and recommended that federal law limit itself to federal lands and interstate commerce. Both of these areas were unquestionably within the purview of Congress and would stand a court challenge. Douglas recommended a comprehensive new law to replace the 1906 Act. If Interior failed to act, he recommended that the SAA draft the new law without Interior’s participation.

Michel then communicated these views to Nagel and Andrus. In a strongly worded letter, Michel pointed out the deficiencies of the Interior draft and called for more comprehensive reforms. In addition, he expressed the view of the SAA Public Issues Committee that amending the 1906 act was not the appropriate approach. “We have serious reservations as to whether an amendment to the 1906 Act is the correct vehicle for change,” Michel wrote. He expressed the belief that an entirely new bill was needed.

By the middle of March the SAA Public Issues Committee could see no progress being made at Interior, and LeBlanc asked Michel to draft a bill. The intent was still to rely on Interior, but the members of the Public Issues Committee now felt it necessary to develop their own draft for discussion purposes. Michel again retained Douglas to assist him in drafting the bill, and they went to work. By the first of April the draft was complete. They entitled the bill “An Act To Preserve American Antiquities,” and it was later to become the core of the Archeological Resources Protection Act of 1979.

Unlike the Interior draft, it was a comprehensive reform bill that repealed the criminal sections of the 1906 Act and replaced them with an entirely new code. Looting was prohibited, as were selling, purchasing, bartering, trafficking in, transporting, or receiving looted artifacts from federal lands. Trafficking in interstate commerce was also banned if the violation of a state or local law was involved. A sliding scale of criminal penalties was included, ranging from a $500 fine and/or 90 days in jail for a first offense where the value of the artifacts was less than $2,500, to a felony of two years in prison and/or a $20,000 fine for a second offense. In addition, a system of civil penalties was included to cover damages and repair to the damage done to a site by looters, with the idea that a jury might not be willing to send a looter to jail but might be willing to extract a costly civil penalty.

The bill also contained a system of rewards to help recruit people to police the public lands. A new permitting structure for lawful excavations and the curation of recovered artifacts in museums was established, and a system of federal aid to the states for the protection of archeological sites was proposed. Thus, every major provision of the Archaeological Resources Protection Act of 1979 was included in the Michel-Douglas draft.

On April 4, 1978, the draft was forwarded to Interior and to Congressmen Udall along with a package of materials supporting the need for legislation. It was still the intention of the SAA Public Issues Committee to work through Interior, thus saving the cost of initiating action themselves. Michel asked Andrus to incorporate the SAA bill into an Interior bill.

On April 10, Interior finally published a proposed rule in the Federal Register to define “object of antiquity” and solve the DIAZ problem. But by then the SAA had committed itself to a comprehensive reform of the Antiquities Act of 1906.

On April 12 the situation in the Southwest took a dramatic turn for the worse. U.S. District Judge William P. Copple of Phoenix ruled that the government could not prosecute three Utah men (Thye and Kyle Jones and Robert Gevara) who were apprehended while looting a prehistoric site in the Tonto National Forest of Arizona. With the Antiquities Act invalid in Arizona, U.S. Attorney Michael D. Hawkins decided to prosecute the men under the theft-of-government-properties and depredation-of-government-properties statutes, both felonies. Copple ruled that those statutes were inappropriate and that the men should be charged under the 1906 Act. But the 1906 Act was ruled unconstitutional in Arizona, so the men could not be prosecuted at all. Copple was well aware of the implications. “This ruling leaves a hiatus which the Congress should correct by appropriate legislation,” he commented. Hawkins said the issue could only be settled by the U.S. Supreme Court.

The members of the Public Issues Committee of the SAA were alarmed at the prospects. A Supreme Court test could take years and still not solve the deficiencies of the 1906 Act. Interior was still dragging its feet on new legislation, but public pressure for action began to mount. The Arizona Republic, the state’s largest newspaper, gave the problem lots of attention. In an editorial the Republic commented, “Unless Congress acts with remarkable swiftness to pass a new law against the theft of Indian artifacts from federal land, a great archeological treasure will be lost forever.” But the SAA and Congressman Udall continued to wait for Interior’s long-promised bill, and the summer came and went with no action forthcoming. Michel had stayed in close
They all continued to wait. Finally in November, LeBlanc pressed the Public Issues Committee for some action, and they agreed to commit $10,000 to the project to get a new antiquities act. Michel was recruited to take on the task for a nominal fee and expenses, and LeBlanc offered to raise the necessary funds from private sources.

On November 27, Michel spoke with Nagel again. But this time Nagel advised Michel not to wait for Interior. Nagel said that HCRA was the biggest problem in the Department and that it was virtually impossible to get them to respond. He advised going directly to Congress with the bill Michel and Douglas had drafted in April, and he promised to keep HCRA out of the way and that Secretary Andrus would lend his support. Michel and Nagel had spent considerable effort fighting unresponsive federal bureaucracies while serving on the staffs of their respective governors, and they both realized it was now time for independent action.

The next week Michel traveled to Washington to get a bill introduced. He first met with Nagel and John Decosta of the Interior Department’s solicitor’s office. They urged Michel to move independently with Congress and promised full support. On December 6 Michel met with Udall and Sheehan and briefed the congressman on the situation. Udall said he would sponsor the bill, and would set forth some policy guidelines.

First, all references to the 1906 Act were to be deleted. Udall was engaged in a massive effort to protect public lands as parks, wildlife refuges, and wilderness in Alaska. President Carter had used the land-withdrawal section of the Antiquities Act to protect 56 million acres, a move that was being challenged in the courts and Congress. Udall feared that Alaska’s Senator Mike Gravel would seize upon any bill to amend the Antiquities Act to try to undo Carter’s action.

Second, Udall asked Michel to arrange for bipartisan support from the Southwest. He wanted the bill to be a local-interest measure. Third, Udall wanted quick action so that the momentum would not be lost. He instructed Sheehan to have the bill ready for introduction when the Congress reconvened in January. Michel suggested a press event in Tucson to announce the bill and to help gain political support for Udall. When the meeting finally broke up that afternoon, the Archaeological Resources Protection Act of 1979 had been born.

That evening Michel, Sheehan, and Loretta Neumann of the House Interior Committee went over the Michel-Douglas draft of the previous April, making changes suggested by Udall and others, and sent the bill to the legislative counsel for drafting. The next day Michel met with McKinney and others in HCRA and informed them that Udall was going to introduce the bill. They were visibly upset but offered to work with the SAA to get it approved.

Before leaving Washington, Michel got the conditional support of Arizona’s senators—Barry Goldwater and Dennis DeConcini. As a leader of the conservative Republicans, Goldwater’s support was crucial; the senator was an enthusiastic champion of Indian culture and would later play an important role in passage of the act. For the next six weeks, Michel and Sheehan worked through no less than four drafts of the legislation, incorporating modifications and polishing the language.

In December Collins and Green published an article in Science that provided a strong justification for an entirely new bill. "The penalties provided in the 1906 Act are inadequate to deter the looting of prehistoric ruins and commercial dealings in stolen prehistoric artifacts," they said. "The breadth of the act’s prohibitions should be expanded so as to stop, in some measure, the lucrative commercial dealings in illegally obtained artifacts." During Congress’s year-end recess, Michel traveled to Tucson to meet with Udall and professors Raymond Thompson and Emil Haury of the University of Arizona. Thompson was a member of the SAA Public Issues Committee, had been involved in planning the legislation, and was to become a key witness as the bill moved through Congress. Haury was the dean of Arizona archeology and his support of the bill was critical. Both scholars assured Udall of the great need for the bill and of their strong support.

On January 12 Michel and Collins met with Senator Pete Domenici of New Mexico in his Albuquerque office. Collins briefed Domenici on the status of the legal standing of the Antiquities Act and made a powerful case for the new legislation. Domenici asked if there would be opposition, and Michel assured him that it would be nominal. Domenici then agreed to be the chief sponsor in the Senate. As a Republican member of the Senate Energy and Natural Resource Committee, he was in a key position to boost the bill through the Senate. Professor Charles McGimsey of the University of Arkansas won the support of Senator Dale Bumpers, who chaired the appropriate subcommittee and who initially was skeptical of any bill with Domenici’s name on it.

The next week Michel traveled to Washington to finalize the draft with Sheehan, Neumann, and Pope Barrow of the legislative counsel. He also rounded up more cosponsors, including representatives Lujan and Runnels of New Mexico, Rudd and Rhodes of Arizona, Marriott of Utah and Seiberling of Ohio, a powerful member of the House Interior Committee. In the Senate, Goldwater of Arizona and Domenici confirmed their support; and Schmitt of New Mexico, Bumpers of Arkansas and Eagleton of Missouri joined as cosponsors.

All of Udall’s conditions had now been met. The bill was stripped of any reference to the Antiquities Act, and all but one of the members of Congress from New Mexico and Arizona were signed on as cosponsors—Republicans and Democrats alike.
On February 1, 1979, Udall introduced H.R. 1825 into the House of Representatives. On February 26 Domenici introduced the same bill into the Senate as S. 490. By now he was an enthusiastic supporter: "Theft of valuable artifacts from public lands in the Southwest has become a very serious problem.... Virtually thousands of dollars worth of prehistoric Indian artifacts have been taken...." The Senator added, "Put simply, they are irreplaceable. The men and women who crafted these artifacts are long gone. The age that shaped their creativity is long past."

Nine months later, on October 31, 1979, President Carter signed H.R. 1825/S. 490 with only a handful of relatively minor amendments, and the Archaeological Resources Protection Act of 1979 was the law of the land.

Notes

2. Public Law 96-95, codified as 93 Stat. 721.
5. 368 Fed. Supp. 838 (District of Arizona). For a more detailed discussion of this and the other criminal cases cited in this article see Dee F. Green and Polly Davis, Cultural resources law enforcement (Albuquerque: USDA Forest Service, 1980).
8. 18-6-10 N.M.S.A., 1978. In a case involving the same C. Frank Turley involved in the Quarrells case, the New Mexico Supreme Court effectively nullified the law, Turley vs. State of New Mexico, N.M. Supreme Court No. 13,424, August 17, 1981.
12. The Tenth Circuit Court of Appeals affirmed the decision of Judge Bratton in the United States vs. Smyer and May. The Tenth Circuit expressly disagreed with the Ninth Circuit's ruling in the Dazel decision. U.S. vs. Smyer and May, No. 78-1134 (10th Cir. filed April 2, 1979). The Tenth Circuit is composed of New Mexico, Colorado, Utah, Oklahoma, Kansas and Wyoming.
17. The Public Issues Committee was composed of Ray Thompson, Carl Chapman, Don Fowler, Bob McGimsey, Bruce Rippeteau, Dena Dincu and Steven LeBlanc.
18. "Memorandum of law" by David Douglas and Mark Michel, February 6, 1978, 10 pp., personal papers of the authors.
21. The U.S. Government sued Smyer and May for $76,000 in damages to the site. The suit was settled out of court for $7,000.
24. 49 Flood Supp. 42 (District of Arizona, 1978). The United States appealed Judge Coppie's decision to the Ninth Circuit Court of Appeals, which held that antiquities violations could be prosecuted under general Theft of Government Property and Malicious Mischief statutes. The Jones brothers and Gevans subsequently pled guilty under the Archaeological Resources Protection Act of 1979, the first use of the law.
27. Phone logs of Mark Michel, 1978, personal papers of the authors.
28. Jeffrey S. Dean to Don D. Fowler, February 26, 1979, personal papers of the authors.
29. "Memo to file" by Mark Michel, November 27, 1978, personal papers of the authors.
30. After leaving office Andrus commented that the most frustrating part of his tenure as Secretary was the inability to get the bureaucracy to respond to his directives.
31. The press conference was held in Tucson on February 9, 1979, after the introduction of H.R. 1825. Tucson Citizen, February 10, 1979.
33. House of Representatives, Office of the Legislative Counsel, bill drafts "UDALL017." See also Francis Sheehan to Mark Michel, December 19, 1978, personal papers of the authors.
35. "Memo to file" by Mark Michel, January 10, 1979, personal papers of the authors.
36. "Memo to file" by Mark Michel, January 12, 1979, personal papers of the authors.
37. For political reasons, Arizona's fourth congressman, Bob Stump, was not asked to be a cosponsor. Neither were Utah's senators Jake Garn and Orrin Hatch.
38. Congressional Record, February 1, 1979.
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P.L. 96-95, see page 93 Stat. 721

House Report (Interior and Insular Affairs Committee)
No. 96-311, June 29, 1979 [To accompany H.R. 1825]
Senate Report (Energy and Natural Resources Committee)
No. 96-179, May 15, 1979 [To accompany S. 490]
Cong. Record Vol. 125 (1979)

DATES OF CONSIDERATION AND PASSAGE
House July 9, October 12, 1979
Senate July 30, October 17, 1979
The House bill was passed in lieu of the Senate bill.
The House Report is set out.

HOUSE REPORT NO. 96-311

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 1825) to protect archaeological resources owned
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by the United States, and for other purposes, having considered the
same, report favorably thereon with amendments and recommend
that the bill as amended do pass.

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PURPOSE

The purpose of H.R. 1825† as reported by the Committee on Interior and Insular Affairs is to provide protection for archaeological
resources found on public lands and Indian lands of the United States.
The legislation provides civil and criminal penalties for those who
remove or damage archaeological resources in violation of the prohibi­
tions contained in the bill. The bill prohibits the removal of archae­
ological resources on public lands or Indian lands without first obtain­
ing a permit from the affected Federal land manager or Indian Tribe.

BACKGROUND

The basic statute protecting archaeological resources on public lands
is the Antiquities Act of 1906 (16 USC 431-433). That Act provides
that "any person who shall appropriate, excavate, injure, or destroy
any historic or prehistoric ruin or monument or any object of antiquity
situated on lands owned or controlled by the Government of the
United States without the permission of the Secretary . . . shall upon
conviction, be fined in a sum of not more than five hundred dollars or
be imprisoned for a period of not more than ninety days, or shall suffer
both fine and imprisonment . . . "

In a 1974 decision, the United States Court of Appeals for the
Ninth Circuit held that the 1906 Act was unconstitutional. The court
found that the definitional portion of the Act was unconstitutionally
vague; therefore, the Act is legally unenforceable in the Ninth Circuit.
The Ninth Circuit includes the states of Arizona, California, Nevada,

That court decision, coupled with the dramatic rise in recent years
of illegal excavations on public lands and Indian lands for private
gain, prompted Members of the House and Senate to introduce legisla­
tion intended to provide adequate protection to archaeological re­
sources located on public lands and Indian lands.

Much has changed since the 1906 Act was passed. The commercial
value of illegally obtained artifacts has substantially increased and
the existing penalties under the 1906 Act have proven to be an inade­
quate deterrent to theft of archaeological resources from public lands.

† H.R. 1825 was introduced on February 1, 1979, by Representative Morris Udall, and
was also sponsored by Representatives Rhodes, Seiberling, Clausen, Lujan, Runnels, Rudd,
Marriott, Clifton, and Hamerschmidt.

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SECTION-BY-SECTION ANALYSIS

Section 1. Short title.
Section 2. Sets forth the findings and purposes of the legislation.
Section 3. Includes the definitions of terms used in the Act.
Paragraph 1 includes a definition of the term “archaeological resource”. This definition has been included, in part, to address the problem of unconstitutional vagueness, created by the lack of definition, found by the United States Court of Appeals for the Ninth Circuit *U.S. v. Dios*, 449 F. 2d 113 (9th Cir. 1974). Provision has also been made to allow the Secretary of the Interior to promulgate a definition of this term under uniform regulations. Concern was expressed during full Committee deliberation that the definition of “archaeological resource” could be construed to include virtually any object found on the public lands. Amendments were adopted to ensure that only artifacts of true archaeological interest, at least 100 years of age, will be considered to be “archaeological resources” for the purposes of this legislation. Such items as coins, and bottles are clearly not intended to come under the purview of this Act unless found within an archeological site. The Committee has included language in its amendment of the bill to ensure that arrowheads and bullets found on the surface of the ground will not be considered as archaeological resources. The Committee is also concerned that the penalties contained in this bill will only be used in situations that clearly warrant an enforcement action. It is the recognition of the importance of the integrity of the archaeological site and the context in which archaeological resources are found that the Committee feels should guide land managers in their protection and enforcement efforts.

Paragraph 2 includes a definition of the term “Federal land manager”.

Paragraph 3 includes a definition of the term “public land” to include all lands actually owned by the United States other than lands on the Outer Continental Shelf. No privately owned lands within the exterior boundaries of a Federal land holding would be included. The Committee recognizes that it is often difficult to delineate public land from private or state land on the ground, particularly in the West. The Committee also realizes that many of the specific archaeological sites on public lands are currently unknown; therefore, specific signs around sites will not be required. The Committee does, however, urge Federal land managers to carry out an active public information program and to publish the appropriate prohibitions and warnings in their respective brochures, maps, visitor guides, and to post signs at entrances to public lands.

Paragraph 4 includes a definition of “Indian lands” to mean lands of tribes or individual Indians either held in trust by the United States or subject to a restriction on alienation.

Paragraph 5 includes a definition of the term “Indian tribe”.

Paragraph 6 includes a definition of the term “person”.

Paragraph 7 includes a definition of the term “State”,

Section 4. This section describes the method by which archaeological resources may be legally excavated and removed from public lands and Indian lands.

Paragraph (a) provides that any person may apply to the appropriate Federal land manager for a permit to excavate or remove archaeological resources from public lands or Indian lands. Any application shall include, among other items that may be deemed necessary by the land manager, information concerning the time, scope, and location and specific purposes of the proposed work.
Paragraph (b) describes the terms and conditions under which permits may be given by the Secretary to any applicant. Subparagraph (b)(1) requires that the applicant be qualified to carry out the proposed activity. The Committee intends that only individuals with adequate professional expertise (education, experience, or both) in archaeology be considered as eligible to receive permits. Subparagraph (b)(2) requires that the activity to be undertaken will be for the purpose of furthering archaeological knowledge in the public interest. Subparagraph (b)(3) requires that all archaeological resources removed from public lands and copies of the associated records and data will remain the property of the United States and be preserved in a suitable location, such as a museum or university. The Committee intends that archaeological specimens removed be adequately evaluated and the knowledge obtained used for scientific and educational purposes. The subsequent storage or display of these artifacts should not, however, be narrowly construed and may include private as well as public museums or institutions which have adequate resources to protect the artifacts and to provide a public, educational, or interpretive service. Subparagraph (b)(4) requires that any activity carried out under this Act be consistent with applicable land management plans for the specified area and consequently would not be in conflict with any laws governing the area in question or the agency managing it. This section is included with recognition that the science of archaeology, in the modern sense, is as much concerned with the conservation and protection of archaeological resources “in situ” as it is with the excavation and removal of specified archaeological resources. The protection of the integrity of an archaeological site is extremely important in that the scientific value to society—the unraveling of the secrets of the past—may be enhanced by not altering archaeological sites. A determination by the land manager as to the wisdom of allowing an applicant to excavate archaeological resources should take these factors into consideration. Paragraph (c) provides that if a permit application is for the excavation of a site determined by the Secretary of the Interior to be an Indian religious or cultural site, the Secretary is required to notify any Indian Tribe which may consider the site as having religious or cultural importance, prior to issuing a permit. Paragraph (d) provides that the land manager may impose such terms and conditions in any permit as the land manager deems necessary to carry out the provisions of this Act. Paragraph (e) requires that one individual be named in each case as the person responsible for carrying out the terms and conditions of the permit. This section was included with the recognition that, in many instances, “teams” of archaeologists from universities or museums are involved in one excavation, and in order to ensure that such excavations are conducted properly, one individual out of the group will be identified as responsible for the group compliance with the permit and applicable law. Paragraph (f) provides the Federal land manager with the authority to suspend any permit if he believes that the permittee has violated
any of the prohibitions of section 6. The land manager is also given the authority to permanently revoke any permit if a permittee has been assessed a civil penalty under section 8 or has been convicted under section 7.

Subparagraph (g)(1) provides that no tribe or member thereof is required to get a permit from the Secretary to excavate on their tribal lands. However, in the absence of tribal law regulating excavation or removal of archaeological resources on their lands, an individual tribal member must obtain a permit under this Act.

Subparagraph (g)(2) requires the consent of a tribe or individual Indian, as the case may be, for all permits for excavation on Indian lands.

Paragraph (h) meshes existing laws with the provisions of this Act.

Subparagraph (h) (1) ensures that an individual who receives a permit to excavate or remove archaeological resources under this Act shall not be required to obtain an additional permit under the 1906 Antiquities Act.

Subparagraph (h) (2) ensures that an individual who has an existing permit under the 1906 Antiquities Act before the date of enactment of this Act shall not be required to obtain an additional permit under this Act.

Paragraph (i) waives the applicability of section 106 of the National Historic Preservation Act of 1966 (80 Stat. 917, 16 USC 470f) to activities undertaken pursuant to this Act.

Paragraph (j) provides that any Governor may request a Federal land manager to issue a permit for archaeological research, excavation, removal and curation from federal lands to such Governor or any person the Governor deems to be qualified. Upon such request, the Federal land manager shall issue a permit.

Section 5. This section provides the Secretary of the Interior with the authority to establish regulations pertaining to the management and disposition of archaeological resources removed pursuant to this Act, the 1906 Antiquities Act, or the Archaeological Recovery Act of 1990, as amended.

Paragraph (1) permits the Secretary to promulgate regulations providing for the exchange of archaeological resources between suitable and appropriate bodies.

Paragraph (2) permits the Secretary to promulgate regulations providing for the permanent curation or disposal of archaeological resources removed from public lands or Indian lands.

This section further provides that any regulations governing the exchange or ultimate disposition of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the tribe or individual Indian involved.

Section 6. This section describes those activities which would be prohibited by this Act. It prohibits on public or Indian lands the excavation, removal, alteration or defacement of archaeological resources except in accordance with permits or exemptions; prohibits dealing in those resources which are excavated or removed illegally, and precludes the sale and transportation in interstate or foreign commerce when the resources are involved in violations of State or local law.
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This section also provides criminal penalties for those who knowingly commit one of the prohibited acts. This is a general intent crime, and therefore a person could be convicted if he acted of his own volition and was aware of the acts he was committing. The Committee is aware that these penalties overlap with more general statutes and regulations, and there is no intent to preclude action under those general provisions relating to the protection of Federal property under appropriate circumstances.

The Committee recognizes that many individuals and institutions may possess artifacts or collections of archaeological resources which have been obtained legally. Section 6(f) provides an exemption from the prohibitions on sale, purchase, exchange, etc. in such instances. The Committee notes, however, that archaeological resources which are in a person's possession illegally, are not covered by this exemption.

Field casting of paleontological specimens on the public domain has not been and is not intended to be prohibited by any section of this legislation. Such activities are presently carried out under separate authority of the local land managing bureau which has immediate jurisdiction over the land in question.

Section 7. This section provides civil penalties for those who violate regulations or permits issued under this Act, and it sets up administrative procedures for imposing those penalties. Civil penalties may be as high as twice the value of the archaeological resource involved, and double the cost of restoration and repair of the site involved, plus $1,000 in case of a first violation and $2,000 in case of any subsequent violation. Hearings must comply with title 5 USC section 554, and on judicial review the Federal land manager's action must be sustained if supported by substantial evidence.

This section is intended to give Federal land managers a strong enforcement authority, short of criminal sanctions, by which illegal activities on the public lands may be deterred. However, the Committee does not intend the civil penalties authorized to be used to harass citizens in their normal use of the public lands or to impose heavy penalties on persons who inadvertently violate regulations in a minor way. The regulations promulgated should take these factors into account.

Section 8. This section provides rewards to persons furnishing information leading to the finding of a civil violation. The reward may be equal to half of the penalty assessed under section 7. Section 7 also provides for forfeiture of archaeological resources, vehicles, and equipment involved in violations of section 6, but it is expected that the courts and the administrative law judges would exercise their discretion to avoid unduly burdensome forfeitures of property belonging to persons who neither know nor could have known of the illegal activities.

Section 9. This section stipulates the conditions under which the confidentiality of the location of archaeological resources on public lands and Indian lands can be maintained without violating the provisions of the Freedom of Information Act.

Paragraph (a) provides that information concerning the nature and location of archaeological resources may be withheld from the public unless (1) such disclosure would further the purpose of this Act, or the Archaeological Salvage Act of 1960, as amended; or (2) such dis-
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closure would not create a risk of harm to the archaeological resources involved.

Paragraph (b) provides for the Governor of any State to receive information concerning the nature and location of archaeological resources within said State from the appropriate land manager if the written request from the governor contains (1) the specific site or area for which information is sought; (2) the purpose of the request, and (3) a commitment by the Governor that the confidentiality of the information will be adequately preserved in order to protect the resource from commercial exploitation.

Section 10. Subsection (a) requires intergovernmental coordination and adequate public participation, including participation by official Indian tribes, prior to issuance of uniform regulations under this Act by the Secretaries of Interior, Agriculture, and Defense.

Subsection (b) requires each Federal land manager to promulgate rules and regulations, consistent with the uniform rules and regulations promulgated under subsection (a) as may be necessary to carry out his responsibilities under this Act.

Because in many parts of the country public land management is "checkerboarded", i.e. divided among a variety of different agencies, the Committee feels it is vital that a set of uniform regulations, easily comprehensible to the public, be promulgated for all public lands. The Committee also realizes that conditions may vary from situation to situation. so provision has been made for each Federal land manager to promulgate additional rules and regulations so long as they are consistent with the overall uniform rules and regulations.

Section 11. This section encourages the Secretary of the Interior to foster increased coordination and cooperation between professional archaeologists, Federal personnel responsible for managing archaeological resources, and private individuals with private collections, and other individuals interested in the science of archaeology. The Committee is concerned that greater efforts must be undertaken by the Secretary and professional archaeologists to involve to the fullest extent possible non-professional individuals with existing collections or with an interest in archaeology. The potential benefit of this increased cooperation is enormous; there is a wealth of archaeological information in the hands of private individuals that could greatly expand the archaeological data base of this country. The Committee is convinced that the key to success of a program of this nature is true cooperation between all parties concerned.

Section 12. This section assures that the Act will not be construed to impose significant additional restrictions on the activities permitted under existing multiple use laws and authorities relating to the public lands. Activities such as mining, mineral leasing, grazing, timber har-
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Paragraph (b) ensures that the private collection of rocks, coins, or minerals which are not considered archaeological resources will not require a permit under this Act for such activity.

Paragraph (c) ensures that this Act shall not be construed to affect any land other than public land or Indian land to affect the lawful recovery, collection or sale of archaeological resources from lands other than Indian lands or public lands.

Section 13. This section requires the Secretary to submit, as a distinct, separate component of the report required under section 5(c) of the Archaeological Recovery Act, a section detailing the activities carried out pursuant to the provisions of this Act, including efforts made to foster increased cooperation with private individuals pursuant to section 12 of this Act. The report shall also include such recommendations, including legislative recommendations, as the Secretary deems appropriate to improve the administration of this Act.

COST AND BUDGET ACT COMPLIANCE

The lands involved in the legislation are entirely Federally owned or Indian lands; therefore any costs incurred would be administrative in nature and are not expected to increase significantly once the current or future expenditures for protection of these resources is assured. The following analysis was received from the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN:

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 1825, the Archaeological Resources Protection Act of 1979, as ordered reported by the House Committee on Interior and Insular Affairs, June 13, 1979.

The bill provides for the protection of archaeological resources on public and Indian lands by prohibiting unauthorized removal or sale of antiquities and outlines a means of assessing penalties to be imposed on violators. Costs incurred by the Federal Government as a result of enactment of this bill will stem from enforcement and administration of the civil penalty process, promulgation of regulations, and the review of applications. Based on information available from the Department of the Interior, it is estimated that these costs will total approximately $4 million for fiscal years 1980 through 1984.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to rule X clause 2(1)(4) of the Rules of the House of Representatives, the Committee believes that enactment of H.R. 1825,
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as amended, would have virtually no inflationary impact on the national economy.

OVERSIGHT STATEMENT

In accordance with the Committee's jurisdiction over archaeological resources located on public lands and Indian lands, the Committee on Interior and Insular Affairs would have oversight responsibilities over any action of the Secretary taken to comply with the mandate of the legislation. No recommendations were submitted to the Committee pursuant to rule X, clause 2(b)(2).

COMMITTEE RECOMMENDATION

On June 13, 1979, after adopting amendments to the Subcommittee recommendation, the Committee on Interior and Insular Affairs, meeting in open session, reported H.R. 1825 by voice vote and recommends that the bill, as amended, be approved.

DEPARTMENTAL REPORT

The favorable report by the Department of the Interior, dated April 13, 1979, and the comments of the Department of Justice, dated May 22, 1979, follow:

U.S. DEPARTMENT OF THE INTERIOR,

Hon. Morris K. Udall,
Chairman, Committee on Interior and Insular Affairs,
U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: This responds to the request of your Committee for the views of this Department on H.R. 1825, a bill "To protect archaeological resources owned by the United States, and for other purposes."

We recommend that H.R. 1825 be enacted if it is amended as described herein.

H.R. 1825 would supplement our authorization to control archaeological excavations on Federally owned or controlled lands, and to remove objects of antiquity from such lands for scholarly purposes. In general, the bill will solve a number of problems in present authorizations and will provide much greater protection of the archaeological resources of the United States.

Specifically, H.R. 1825 would: (1) be of broader application than the Antiquities Act by allowing the archaeological permits to be issued to any qualified individual or private entity as well as any officer, employee, agent, department or instrumentality of the United States or a State or political subdivision thereof; (2) define "archaeological resource" as any material remains of past human life or activities which are at least 50 years of age and of archaeological interest; (3) set forth certain qualifications to be met by permit applications and the conditions under which the appropriate Secretary could either refuse to issue a permit or suspend or revoke issued permits; (4) prohibit commercial trade in archaeological resources obtained in violation of Federal, State or local laws; (5) authorize the appropriate Secretary to
assess civil penalties, subject to judicial review, for violations of the 
prohibitions contained in the bill or regulations or permits; (6) pro-
vide greatly increased criminal penalties for violations of the prohibi-
tions contained in the bill (up to $20,000 fine or two years imprison-
ment, or both, for a first offense and up to $100,000 fine or five years 
imprisonment, or both, for second and subsequent offenses versus a 
maximum $500 fine or 90 days imprisonment, or both, for violations 
of the 1906 Act); (7) authorize the appropriate Secretary to recom-
mand the payment of up to $2,500 of any fine or civil penalty, but not more 
than $2,500, to any person furnishing information leading to the find-
ing of a civil violation or criminal conviction; (8) direct the Secre-
tary of the Interior to report to the Congress by June 1, 1980, on the 
regulation of the excavation and removal of archaeological resources 
from Indian lands; (9) provide a specific exemption from the Free-
dom of Information Act for site location information concerning 
archaeological resources covered by the bill, unless the appropriate 
Secretary found the disclosure of this information would further the 
purposes of the bill and not create risk of harm to the resources or the 
site location; (10) authorize the Secretary of the Interior, after con-
sultation with other land management departments, to promulgate the 
rules and regulations to be followed by all such departments in carry-
ing out the purposes of the bill; and (11) require the Secretary of the 
Interior to report annually to the Congress on the activities carried 
out by him under the bill.

This Administration wholeheartedly endorses the purposes of H.R. 
1825. In recent years, the Antiquities Act of 1906, 16 U.S.C. 431-133, 
has had the application of its criminal sanctions severely circum-
scribed. The result has been a corresponding decrease in the effective-
ness of its protection of archaeological resources on Federal lands. 
The most severe problem is the holding in United States v. Diaz, 499 
F.2d 113 (9th Cir. 1974), that the criminal penalty provisions of the 
Antiquities Act are unconstitutionally vague. Another problem is that 
in light of the increased commercial trade in archaeological treasures, 
the penalties provided in the Act are insufficient to provide the deter-
rent effect necessary to protect these resources. Finally, we have found 
it increasingly a problem that information on permit applications and 
other cultural resource information, particularly relating to site lo-
cation, must be released under the Freedom of Information Act, lead-
ing to an increased threat of vandalism of archaeological sites.

This bill reflects the need demonstrated by these problems for a new 
comprehensive statute to deal with each of these issues. It provides 
a much clearer direction as to what resources Congress intends to be 
protected, and specifically grants to the Secretary of the Interior reg-
ulatory authority to further define those resources. This would over-

(page 16)
come the vagueness problem of Diaz. It also provides for a full range 
of enforcement tools running from civil penalties to felony provisions 
for particularly serious offenses. An additional facet is that it makes 
criminal the commercial trade in archaeological resources which were 
obtained in violation of either Federal, State, or local law. While rec-
ognizing that the problem of proof of how the object was initially ob-
tained is a difficult one, we support this additional layer of protection 
for the valuable resources which would be protected by this bill. These
two aspects of the bill would significantly improve the effectiveness of
the cultural resources protection program of this Department.

Finally, the bill would provide a specific exemption from the Freedom
of Information Act for site location information regarding
archaeological resources covered by the bill, unless the Secretary finds
that the release of such information would further the purposes of the
bill and would not create a risk of harm to such resources or the site
in which they are located. While this provision would be a positive
step, we would suggest that it is unnecessary and, probably uninten­
tonally, limited. Because the only archaeological resources covered
are those on Federal land, where, in the course of cultural resource
surveys or other activities required by other laws, information is col­
clected regarding sites not on Federal land, it would not be exempted
from release. We believe that this provision should be redrafted to
protect information relating to any archaeological site.

We strongly support the overall purposes of H.R. 1825. We would
like to recommend, however, a number of amendments to the bill which
will eliminate certain problems of language, interpretation and ad­
ministration. If so amended, we recommend the enactment of H.R.
1825. Our proposed amendments are attached to this report.

The Office of Management and Budget has advised that there is no
objection to the presentation of this report from the standpoint of the
Administration's program.

ROBERT HERBST,
Assistant Secretary.

Enclosure.

SUGGESTED AMENDMENTS TO H.R. 1825

1. Section 2(a)(2), page 2:
On line 6, after “resources” insert “which are the property of the
United States”.
Reason: We believe the bill should make it clear that these archaeo­
logical resources are in public ownership.

2. Section 3(1), page 2:
Delete paragraph (1) and insert the following new paragraph:

(1) The term “archaeological resource” means any material
remains of past human life or activities which are at least
fifty years of age and which are of archaeological interest, as
determined under regulations promulgated by the Secretary
of the Interior. The Secretary of the Interior shall promul­
gate regulations under this paragraph after consultation with
other Federal land managers, the professional archaeological
community, representatives of concerned States and all other
interested parties.

Reason: This change will eliminate a partial listing of archaeological
resources, which may be confusing. Instead, this can be handled
through regulations.

3. Section 3(2), page 3:
Delete lines 13-21 and insert:

(2) The term “Secretary” means, except where other­
wise specifically provided, the Secretary of the Department
or the head of any agency of the United States (as defined by section 551 of Title 5, U.S.C.) having primary management authority over the land concerned.

Reason: We believe this clarifies the intent of the definition and will also clarify the provisions of the bill where the term is used.

4. Section 3(3), page 3:
Delete all of section 3(3), and insert the following:

The term "Indian lands" means lands of Indian tribes or Indian individuals which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States.

Reason: The term "Indian lands" is defined to include all lands within the exterior boundaries of any Federal Indian reservation. This may be somewhat broader than is intended for there are situations in which either private or State owned lands may be included within these boundaries. Also, lands are often held in trust for individuals. The intent of this bill seemingly would be achieved by defining "Indian lands" as suggested.

5. Section 3(4), page 4, line 2:
Between "trust," and "association," insert institution,
Reason: Technical amendment.

6. Section 3(5), page 4:
Add new subparagraph (5) as follows:

An archaeological survey means a physical inspection, inventory, and/or assessment which has the potential for physically impacting archaeological resources located within a prescribed geographical area.

Reason: Required to further explain terminology in reference to Sections 4 and 8.

7. Section 3(6), page 4:
Insert a new subparagraph (6) as follows:

(6) The term "State" means any of the fifty States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Reason: The term "State", which appears several places in the bill, needs to be defined to clarify the application of this bill to land areas which are not strictly States.

8. Section 4, page 4:
Section 4 of H.R. 1825 should be revised as indicated below. We have completely rewritten this section:

EXCAVATION AND REMOVAL FROM FEDERAL LAND

(a) Any person may apply to the Secretary for a permit for archaeological survey, excavation, or removal of any archaeological resources located on land owned or controlled by the United States or to carry out any or all such activities.

(b) A permit may only be issued pursuant to an application under subsection (a) permitting archaeological surveys, excavation, or removal of any archaeological resource, or per-
mitting any or all such activities, if the Secretary to whom such application is made determines, under regulations promulgated by the Secretary of the Interior, that
(1) the research is important to the acquisition of data related to significant archaeological concerns, and
(2) capability exists to recover, analyze, synthesize or disseminate the results of the work; to meet curatorial responsibilities for the archaeological materials and resources removed; and to provide for appropriate preservation measures onsite, and
(3) a work plan is submitted meeting current professional standards (including necessary logistical, financial and project management data) which demonstrates the applicant and principal investigator have sufficient experience and capability to complete the work in accordance with purposes of this Act.

Such permit shall contain such terms and conditions as the Secretary concerned deems necessary (pursuant to regulations promulgated by the Secretary of the Interior) to carry out the purposes of this Act, to insure compliance with other applicable provisions of law, and to protect other resources involved. The Secretary of the Interior shall promulgate interim regulations within 90 days of the passage of this Act and shall promulgate final regulations within one year of the passage of this Act. Promulgation of final regulations under this subsection will occur only after consultation with—
(1) other departments, bureaus, and agencies of the United States having primary responsibility for management of land owned or controlled by the United States, and
(2) representatives of concerned State agencies.

(c) Systematic collections of archaeological resources and related physical and scientific evidences, archaeological resources with inherent data potential, and associated documentation shall be retained in a manner to assure their scientific integrity. The United States shall retain a proprietary interest in such collection and their conservation for public benefit.

(d) The Secretary to whom an application is made under subsection (a) may refuse to issue a permit under this section to any applicant—
(1) against whom a civil penalty has been assessed under section 6(a) or
(2) who has been convicted of a violation under sections 6(b) or 6(c) or under the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431-433).

Any permit issued under this section may be suspended by the Secretary to whom an application is made for not more than two years for each instance that he determines that the permittee has violated the terms of the permit or the prohibition contained in section 5. Any such permit may be revoked by such Secretary upon assessment of a civil penalty under section 6(a) against the permittee or upon the permittee's conviction of a violation under sections 6(b) or 6(c).
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(e) No permit or other permission shall be required under the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431-433) for any activity for which a permit is issued under this section. Nothing in this Act shall modify or affect any existing permit validly issued under the Act of June 8, 1906.

(f) Nothing contained in this section shall require any officer, employee, agent, department or instrumentality of the United States with land management responsibilities to acquire a permit to survey, excavate or remove archaeological resources, provided such activities are a part of the authorized duties of such officer, employee, agent, department or instrumentality of the United States, are undertaken with the consent of the land management agency, and are carried out in accordance with the purposes and intent of this Act, and in accordance with other applicable laws.

(g) Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 106 of the Act of October 15, 1966 (80 Stat. 917, 16 U.S.C. 470f).

(h) The responsibilities and duties under this Act of any Secretary may, with the consent of the Secretary of the Interior, be delegated to the Secretary of the Interior.

Reason: These recommendations are designed to clarify the policy of the Act by recognizing that archaeological resources are a diminishing resource in this nation today. Archaeological excavation is itself a process of study that destroys the resource. Because of this, and because of archaeological resources are finite and non-refinable, the objective should be to manage these resources for their long-term conservation while at the same time allowing the necessary consumption of them in the interests of advancing knowledge about the past or to illustrate or interpret to the public and the human history of this nation. The purpose of the recommended changes in this section is to strike a balance between this generation’s consumption and the archaeological resources on Federal lands and the conservation of these resources for future generations when new research problems and advanced research methods of a less destructive nature will be available.

Four additional provisions are recommended for inclusion: (1) to continue in force existing Antiquities Act permits issued under section 3 of the Antiquities Act of 1960; (2) language to clarify that any employee or agent of the Federal government does not need a permit under this act, provided the employee or agent is carrying out authorized, agency-related duties, in accordance with other applicable laws, such as the Archaeological and Historical Preservation Act of 1974 and the Historic Preservation Act of 1966; (3) the compliance with the permitting provision of this act would excuse compliance with section 106 of the National Historic Preservation Act of 1966; and (4) authorization for any Secretary to delegate to the Secretary of the Interior, where he consents, the authority to issue permits under this act.
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9. Section 5(a), page 6:
Delete line 10, and insert in lieu thereof:

Sec. 5. (a) Except as provided in section 4(f), no person
may excavate, remove, injure, or destroy any ar-

Reason: Technical amendment to make the language of this section
consistent with 16 U.S.C. 433, and to clarify the relationship of this
prohibition to the disclaimer in section 4(f).

10. Section 5(b), page 6, line 18, and sec. 5(c) page 7, line 2: Delete
“possess,”
Reason: There are Constitutional problems inherent in making the
possession of an object a criminal offense in light of the effective
date provisions in (d) (2). The deprivation of poverty and due process
clauses require that in such a situation the criminal offense be tied to
an intervening act. The way the bill is presently drafted, a person
possessing an object legally the day before the bill was passed could
be put into criminal violation the day the bill became effective. The
simplest remedy is to delete possession as a crime. Insofar as overall
enforcement is concerned, this deletion does not seem to weaken the
bill significantly.

11. Section 5(b) (2), page 6:
Reword paragraph (2) on lines 22–24 to read as follows: “any other
Federal law, rule, regulation, or permit.”
Reason: Technical amendment.

12. Section 5 (c) and (d) (2), page 7:
On line 5, reword as follows: State or
local law, ordinance, rule, regulation, or permit.
On line 15, following the word “any”, reword to read State or local
law, ordinance, rule, regulation, or permit or of any other Federal law
before, on or after the date of the enactment of the Act.
Reason: Technical amendment.

13. Section 6(a) (2), page 8, lines 3–14:
We believe that the Congress should set an upper limit on the pen­
alty which may be provided by the Secretary of the Interior. This is the
clearest way for the Secretary to establish a system of penalties which
most closely reflects the will of the Congress and which, therefore,
would withstand judicial review as reasonable. Failure to estab­
ish such a ceiling may well result in any system of penalties succumb­
ing to judicial challenge. We feel that under the bill as drafted the
Secretary could not impose a civil penalty higher than $20,000, since
the maximum fine provided in section 6(b) is $20,000. Because of the
extreme value of the properties involved, we believe that both of these
figures should be raised to more adequately provide the deterrent we
need.

14. Section 6(a) (2), page 8, lines 4 and 10:
Delete the word “guidelines” and insert the word regulations in lieu
thereof.
Reason: Technical amendment.
15. Section 6(a)(2), page 8, line 12:
Change the word "shall" to may.
Reason: To provide additional flexibility in the penalty assessment process.
16. Section 6(a)(3):
In lines 17-18, delete "Court of Appeals for the District of Columbia Circuit or for any other circuit in.
Insert in lieu thereof: District Court for the District of Columbia or for any other district in.
Reason: Review of the assessments of civil penalties is well within the province of the District Courts. To allocate the function to the already crowded Circuit Court calendars will only further delay resolution of the civil penalty assessment. Additionally, to require a person against whom a civil penalty has been assessed to seek his relief in the Circuit Court may well discourage meritorious appeals because of the distance to the courts and the expenses involved.
17. Section 6(a)(4)(A) and (B), page 9:
Section 6(a)(4)(A) and (B) should refer to paragraph (3) instead of paragraph (2).
Reason: Technical amendment.
18. Section 6(c), page 9:
Delete all of lines 17-20 and insert in lieu thereof:
(a) Any person who commits a second or subsequent violation of any prohibition contained in section 5.
Reason: Technical amendment.
19. Section 7(a), page 9:
In line 24, delete the word "recommendation", and insert in lieu thereof the word certification.
Reason: Technical amendment. The Department of Treasury indicates that it needs a certification and not just a recommendation.
20. Section 7(a), page 10:
After line 10, insert this sentence:
There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this subsection.
Reason: Without this amendment, funds from a fined person would go to the general fund of Treasury. This amendment would put the money raised from fines into an account for that purpose, so that rewards could be paid out of that account.
21. Section 7(a), page 10, line 6:
Change the word "shall" to may and delete the word "equally".
Reason: To allow the Secretary to provide for a division among persons which reflects the value of their contribution to the enforcement effort.
22. Section 7(b)(1), page 10, line 17:
Insert "or (c)" between "6(b)" and ".
Reason: Technical amendment.
23. Section 8, page 10:
Throughout section 8 of the bill, insert after "Secretary" the words of the Interior.
Reason: Technical amendment.
24. Section 8(a), page 11, line 5:  
Delete the words "proposed legislation designed to allow" and insert the words consideration of the feasibility of authorizing 
Reason: This amendment gives the Secretary discretion in the study process and does not prejudice the outcome of the study.  
25. Section 8(b), page 11, line 10:  
Delete the words "drafts of proposed legislation and".  
Reason: Same reason as in amendment number 24 above.  
26. Section 8(b), page 11, line 12:  
Delete "1980" and insert 1982  
Reason: We believe the Indian lands study required by this section will require an additional two years more than allowed the bill.  
27. Section 8(c), page 11, line 13:  
Delete "After the date of the enactment of this Act", and after "all", insert archaeological surveys  
Reason: All such archaeological resources are presently protected by the Antiquities Act. This subsection's design is to reinforce in clear language that during the interim time prior to the Secretary's report to Congress, such lands shall continue to receive equal protection under this statute when enacted.  
28. Section 8(d), page 11, lines 16-19:  
Delete all of section 8(d) and insert in lieu thereof the following:  
The Secretary shall not issue a permit under this Act with respect to Indian lands if the Indian tribe objects to such issuance and such objections are consistent with section 202 of the Civil Rights Act of 1968 (82 Stat. 77). With respect to permits issued under this Act with respect to Indian lands, the Secretary shall include and enforce terms and conditions in addition to those required by this Act as may be requested by the Indian tribe, consistent with section 202 of the Civil Rights Act of 1968 and other statutory responsibilities.  
Reason: This amendment requires the tribes' objections to be consistent with section 202 of the Civil Rights Act of 1968. In addition, the terms and conditions requested by a tribe should not be inconsistent with other statutory requirements imposed on the Secretary.  
29. Section 8, page 12:  
Delete all of lines 5-8, and insert the following:  
Sec. 9. Information obtained by the Federal government under this Act or under any other provision of Federal law concerning the location of any archaeological resource may not be made.  
Reason: We believe that in order to protect archaeological resources site location information regarding any archaeological resources obtained by the government under any law should not be disclosed unless the proper finding is made.  
30. Section 9(1), page 12:  
In line 13, delete "this" and insert in its place the relevant  
Reason: Technical amendment  
31. Section 11(a), page 13, line 5:  
Delete existing line 5, and substitute repeal or modify
Reason: We would suggest that section 11(a), as introduced, might preclude any cultural resource protection under this bill in the context of mining or mineral leasing. To remove such protection completely seems unnecessary. The provisions of the mining and mineral leasing laws can be preserved from modification or repeal, while at the same time giving a reasonable level of protection to cultural resources which might otherwise be endangered.

32. Add new section 11(c) as follows:

   (c) A permit under this Act shall not be required when an archaeological survey in compliance with section 106 of the National Historic Preservation Act of 1966 has been made and it has been determined that the subject project will not adversely affect archaeological resources. However, this shall not be deemed to exempt an agency from compliance with this act or the Archaeological and Historic Preservation Act of 1974 when new or additional archaeological resources are discovered.

Reason: To protect private contractors from criminal liability in the event of an inadvertent discovery and/or destruction of an archaeological resource, after there has been agency compliance with section 106.

33. Section 12, page 13, lines 13 and 14:

   Delete the words “annually, submit” and insert in lieu thereof the words

   as a part of the annual report submitted to the Congress pursuant to section 5(c) of the Archaeology and Historic Preservation Act of 1974 (74 Stat. 220) as amended,

   Reason: We believe a separate report to the Congress should not be required under this bill since an archaeology report is already being submitted annually to the Congress under the 1974 Act, and the reports can easily be consolidated.

DEPARTMENT OF JUSTICE,

Hon. Morris K. Udall,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to proffer the comments of the Department of Justice on H.R. 1825, “To Protect Archeological Resources Owned by the United States, and for Other Purposes.”

H.R. 1825 would replace provisions of the Antiquities Act of 1906, 16 U.S.C. 431-433, which require a permit “to excavate or remove any archeological resource located on land owned or controlled by the United States or to carry out both such activities.” Proposed Sections 4(a) and 4(d). In addition, the proposed bill would clarify the definition of what activities are to be covered, provide a stricter permitting system for excavation and removal of archeological resources, and provide stronger remedies and penalties for violation of the Act and Department of the Interior regulations.

As is well know, the current Antiquities Act has lost much of its effectiveness. The criminal penalties provision was held unconstitutionally vague in United States v. Diaz, 499 F. 2d 113 (9th Cir., 1974).
This holding has severely hampered enforcement of current Antiquities Act requirements. Although a recent case in the Tenth Circuit has upheld the constitutionality of the Antiquities Act, the fact remains that most of the sites and objects which require protection are found in the Ninth Circuit where the Act is still considered invalid.

Furthermore, the current penalties provision of the Antiquities Act, 16 U.S.C. §433, is insufficient to deter unlawful excavation and removal of archeological resources. The value of objects removed from federal lands exceeds many times over the current misdemeanor penalty of $500 or imprisonment for not more than 90 days or both. For many, the risk is well worth running of getting caught in view of such a meager potential penalty.

Because of these severe inroads into the effectiveness of current legislation and the severity of the existing problem, no one can contest that corrective legislation is necessary and should be enacted quickly. We do, however, have a number of reservations to H.R. 1825 as currently drafted. We feel the following issues must be addressed before we can recommend enactment of the bill.

(1) The purpose of the legislation is to allow the Secretary of the Interior to restrict access to “archeological resources” found on all lands “owned or controlled” by the United States. As the bill recognizes, much of the land “owned or controlled” by the United States is held as trustee for Indian tribes or individuals, who have a vested, judicially recognized property interest in such lands. It is our view that the proposed legislation, while acknowledging the political interest of Indian tribes, inadequately addresses the problems raised by the fact that archeological sites found on Indian trust or restricted land may be owned by the tribe or individual Indians possessing the beneficial interest in the land.

We assume that much of the “archeological resource” designed to be protected by the legislation is related to Indian culture and is found on Indian reservation lands. Often the Indians not only own such archeological material but, in fact, often are the descendants of those who manufactured it. We suggest therefore that some modifications be considered for Indian tribes.

We concur with the Department of the Interior’s proposed changes in the definition of “Indian lands.” While the term “Indian country” is statutorily defined so as to include all lands—even those in non-Indian ownership—within the boundaries of a reservation, we question whether non-Indian lands within a reservation should be made subject to this legislation which is directed to federal and Indian lands only. With regard to the other amendments proposed by the Department of the Interior, we believe that these matters are in the purview of their administrative responsibilities and thus defer to them.

We note that in Section (3) (1), the bill requires that the Secretary consult with the states before promulgating regulations. We believe that some consideration should be given to an amendment affording similar consultation rights to affected Indian tribes.

(2) We share the concern of the Department of the Interior reflected in their report on H.R. 1825 concerning the bill’s definition of “Archeological Resource.” As currently drafted, resources now covered by the Antiquities Act may not be covered under the bill.
We endorse Interior's proposed definition. In order to insure coverage at least as broad as presently exists under the Antiquities Act, such a definition is necessary.

(3) Section 5(a) of H.R. 1825, governing prohibited acts, should use the same wording as § 433 of the current Antiquities Act. Instead of "No person may excavate or remove any archeological . . ." (H.R. 1825), the section should begin "No person may excavate, remove, injure, or destroy any archeological . . ." In the absence of this change, a loophole may be provided allowing damage or injury to archeological resources to occur with impunity.

(4) Enforcement provisions of the statute would be much strengthened by adding authority to seek an injunction. Although such authority can sometimes be implied from general enforcement responsibility and authority, it would be much better to have injunctive relief specifically provided in the statute. We suggest the following wording:

"At the request of the Secretary, or in consultation with the Secretary, the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from violating the requirements of this Act, the regulations issued pursuant to it, or any requirement of a permit issued under this Act."

(5) Throughout Section 6, dealing with penalties, the word "prohibition" should be changed to "requirement." The Act, its regulations, and, in particular, permits issued under the Act, may not contain prohibitions so much as conditions and requirements. To avoid possible future technical disputes over wording of the provision and what is subject to penalties, the wording should be changed.

(6) The legislative history of H.R. 1825 and any future act should specifically state that any criminal penalties provided by Section 6 should be in addition to any criminal sanctions which may be imposed under existing criminal provisions, such as 18 U.S.C. § 641 (theft of government property) or 18 U.S.C. § 1361 (depredation of government property). Although as a matter of departmental policy, we would prosecute all violations of the Act under enforcement provisions of the Act, we should have the Title 18 alternative available, in case any "loopholes" are discovered in the Act.

(7) The Department would oppose any efforts to make violations of Section 5 a specific intent crime by adding the phrase "willfully." As currently drafted, Section 6(b) makes violation of Section 5 a general intent crime by using the word "knowingly" alone. It should remain this way.

In sum, subject to the above comments, we endorse H.R. 1825.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.
ANTIQUITIES ACT OF 1906

AN ACT For the Preservation of American Antiquities, Approved June 8, 1906 (Public Law 59-209; 34 STAT. 225; 16 U.S.C. 431-433)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

SECTION 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: Provided, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

SECTION 3. That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

SECTION 4. That the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act.

UNIFORM RULES AND REGULATIONS

The following uniform rules and regulations are prescribed by the Secretaries of the Interior, Agriculture, and War to carry out the provisions of the Act of the preservation of American antiquities, approved June 8, 1906 (34 Stat. 225; 16 U.S.C. 432-433).

1. Jurisdiction over ruins, archaeological sites, historic and prehistoric monuments and structures, objects of antiquity, historic landmarks, and other objects of historic or scientific interest, shall be exercised under the Act by the respective Departments as follows:

By the Secretary of Agriculture over lands within the exterior limits of forest reserves [national forests] by the Secretary of War over lands within the exterior limits of mili-
tary reservations, by the Secretary of the Interior over all other lands owned or controlled by the Government of the United States, provided the Secretaries of War and Agriculture may by agreement cooperate with the Secretary of the Interior in the supervision of such monuments and objects covered by the Act of June 8, 1906, as may be located on lands near or adjacent to forest reserves [national forests] and military reservations, respectively.

2. No permit for the removal of any ancient monument or structure which can be permanently preserved under the control of the United States in situ, and remain an object of interest, shall be granted.

3. Permits for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity will be granted, by the respective Secretaries having jurisdiction, to reputable museums, universities, colleges or other recognized scientific or educational institutions, or to their duly authorized agents.

4. No exclusive permits shall be granted for a larger area than the applicant can reasonably be expected to explore fully and within the time limit named in the permit.

5. Each application for a permit should be filed with [the local representative of] the Secretary having jurisdiction, and must be accompanied by a definite outline of the proposed work, indicating the name of the institution making the request, the date proposed for beginning the field work, the length of time proposed to be devoted to it, and the person who will have immediate charge of the work. The application must also contain an exact statement of the character of the work, whether examination, excavation, or gathering, and the public museum in which the collections made under the permit are to be permanently preserved. The application must be accompanied by a sketch plan or description of the particular site or area to be examined, excavated, or searched, so definite that it can be located on the map with reasonable accuracy.

6. No permit will be granted for a period of more than three years, but if the work has been diligently prosecuted under the permit, the time may be extended for proper cause upon application.

7. Failure to begin work under a permit within six months after it is granted, or failure to diligently prosecute such work after it has been begun, shall make the permit void without any order of proceeding by the Secretary having jurisdiction.

8. Applications for permits shall be referred to the Smithsonian Institution for recommendation.

9. Every permit shall be in writing and copies shall be transmitted to the Smithsonian Institution and the field officer in charge of the land involved. The permittee will be furnished with a copy of these rules and regulations.

10. At the close of each season's field work the permittee shall report in duplicate to the Smithsonian Institution, in such form as its secretary may prescribe, and shall prepare in duplicate a catalog of the collections and of the photographs made during the season, indicating therein such material, if any, as may be available for exchange.

11. Institutions and persons receiving permits for excavation shall, after the completion of the work, restore the lands upon which they have worked to their customary condition, to the satisfaction of the field officer in charge.

12. All permits shall be terminable at the discretion of the Secretary having jurisdiction.

13. The field officer in charge of land owned or controlled by the Government of the United States shall, from time to time, inquire and report as to the existence, on or near such lands, of ruins and archeological sites, historic or prehistoric ruins or monuments, objects of an-
tiquity, historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.

14. The field officer in charge may at all times examine the permit of any person or institution claiming privileges granted in accordance with the act and these rules and regulations, and may fully examine all work done under such permit.

15. All persons duly authorized by the Secretaries of Agriculture, War, and Interior may apprehend or cause to be arrested, as provided in the Act of February 6, 1905 (33 Stat.L. 700), any person or persons who appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity on lands under the supervision of the Secretaries of Agriculture, War and Interior, respectively.

16. Any object of antiquity taken, or collection made, on lands owned or controlled by the United States, without permit, as prescribed by the act and these rules and regulations, or there taken or made, contrary to the terms of the permit, or contrary to the act and these rules and regulations, may be seized wherever found and at any time, by the proper field officer or by any person duly authorized by the Secretary having jurisdiction, and disposed of as the Secretary shall determine, by deposit in the proper national depository or otherwise.

17. Every collection made under the authority of the act and of these rules and regulations shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum, which is a depository of any collection made under the provisions of the act and these rules and regulations, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.

Washington, D.C.
December 28, 1906

The foregoing rules and regulations are hereby approved in triplicate and, under authority conferred by law on the Secretaries of the Interior, Agriculture and War, are hereby made and established, to take effect immediately.

E. A. HITCHCOCK,
Secretary of the Interior

JAMES WILSON
Secretary of Agriculture

WM. H. TAFT
Secretary of War
OTHER STATUTES AND REGULATIONS USED FOR CULTURAL RESOURCES VIOLATIONS

36 CFR 2.1 Preservation of natural, cultural and archeological resources

43 CFR Part 3 Preservation of American antiquities

18 USC 641 Embezzlement and Theft

18 USC 1361 Destruction of Government Property
1.4 Definitions

“Archeological resource” means material remains of past human life or activities that are of archeological interest and are at least 50 years of age. This term includes, but shall not be limited to, objects made or used by humans, such as pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock

“Cultural resource” means material remains of past human life or activities that are of significant cultural interest and are less than 50 years of age. This term includes, but shall not be limited to, objects made or used by humans, such as pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, or any portion or piece of the foregoing items, and the physical site, location, or context in which they are found, or human skeletal materials or graves.

1.5 Closures and public use

(a) Consistent with applicable legislation and Federal administrative policies, and based upon a determination that such action is necessary for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, aid to scientific research, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities, the superintendent may:

(1) Establish, for all or a portion of a park area, a reasonable schedule of visiting hours, impose public use limits, or close all or a portion of a park area to all public use or to a specific use or activity.

(f) Violating a closure, designation, use or activity restriction or condition.

2.1 Preservation of natural, cultural and archeological resources.

(a) Except as otherwise provided in this chapter, the following is prohibited:

(1) Possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:

(i) Living or dead wildlife or fish, or the parts or products thereof, such as antlers or nests.

(ii) Plants or the parts or products thereof.

(iii) Nonfossilized and fossilized paleontological specimens, cultural or archeological resources, or the parts thereof.

(iv) A mineral resource or cave formation or the parts thereof.

(2) Introducing wildlife, fish or plants, including their reproductive bodies, into a park area ecosystem.

(3) Tossing, throwing or rolling rocks or other items inside caves or caverns, into valleys, canyons, or canyons, down hillsides or mountainsides, or into thermal features.

(4) Using or possessing wood gathered from within the park area: Provided, however, That the superintendent may designate areas where dead wood on the ground may be collected for use as fuel for campfires within the park area.

(5) Walking on, climbing, entering, ascending, descending, or traversing an archeological or cultural resource, monument, or statue, except in designated areas and under conditions established by the superintendent.

(6) Possessing, destroying, injuring, defacing, removing, digging, or disturbing a structure or its furnishing or fixtures, or other cultural or archeological resources.

(7) Possessing or using a mineral or metal detector, magnetometer, side scan sonar, other metal detecting device, or subbottom profiler.

This paragraph does not apply to:

(i) A device broken down and stored or packed to prevent its use while in park areas.

(ii) Electronic equipment used primarily for the navigation and safe operation of boats and aircraft.

(iii) Mineral or metal detectors, magnetometers, or subbottom profilers used for authorized scientific, mining, or administrative activities.
CHAPTER 19—CONSPIRACY

18 USC

Sec. 371. Conspiracy to commit offense or to defraud United States.
372. Conspiracy to impede or injure officer.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch. 645, 62 Stat. 701.)

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

(June 25, 1948, ch. 645, 62 Stat. 725.)

§ 1361. Government property or contracts

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 764.)
LIST OF SIGNIFICANT CULTURAL RESOURCES CASES

U.S. v. Diaz
C.A. AZ 1974 368 F.Supp. 856
Reversed 499 F.2d 113

Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel
C.A. FL 1978 569 F.2d 330

U.S. v. Smyer
C.A. NM 1979 596 F.2d 939
Certiorari denied 100 S.Ct. 84

U.S. v. Jones
C.A. AZ 1979 607 F.2d 269
Certiorari denied 100 S.Ct. 1043

Klein v. Unidentified Wrecked and Abandoned Sailing Vessel
D.C. FL 1983 568 F.Supp. 1562
The Antiquities Act of 1906, which has provided the primary protection for archaeological resources on federal lands, was rendered virtually unenforceable by United States v. Diaz, which held that the Act's penalty provisions were unconstitutionally vague.

Congress recognized the need for more effective protection for the nation's archaeological resources, and, in 1979, enacted the Archaeological Resources Protection Act (ARPA). ARPA is designed to overcome the deficiencies of the Antiquities Act; it authorizes stiff criminal penalties for illegal disturbance of archaeological resources and provides a framework for the protection and development of the nation's archaeological resources. Several federal agencies are presently writing a set of regulations to implement ARPA.

This article explains ARPA, examines the regulatory problems under it, and suggests solutions to these problems through proposed amendments and regulations. The article is divided into three sections: Section I outlines the problem of archaeological resource protection in the United States, Section II discusses the major provisions of ARPA and how they address the problems outlined in Section I, and Section III examines several regulatory problems under ARPA.

I. THE PROBLEM OF ARCHAEOLOGICAL RESOURCE PROTECTION

A. What Are Archaeological Resources and Why Do We Want to Protect Them?

An archaeological resource is evidence from which an archaeologist can extract information concerning past human life. The most obvious examples of an archaeological resource are human remains, which can answer many questions concerning past human life. Artifacts may be objects manufactured or modified by man, such as tools, baskets, pottery, jewelry, rock paintings, or they may be other physical evidence of past human activity such as food refuse, hearths, kilns, storage pits, structural remains, postholes, pithouses, or irrigation canals. Other examples of archaeological resources include human remains, which can answer many questions concerning past human life. The sites in which artifacts and human remains are found are themselves archaeological resources. The relationship of artifacts to one another in a site, a site's location in relation to other sites, and a site's sediment deposits, floral and faunal remains, and physical environment can provide information about the activities of its inhabitants. When archaeologists turn to other disciplines in their attempt to understand the past, other kinds of evidence become necessary. Geological formations, non-human paleontological sites, sediment cores from lake bottoms, and other environmental evidence all contribute to an understanding of human adaptation to environmental changes.

The basic and tangible data we use are derived from the survey and excavation of archaeological sites. The data might be treated simply as objects, but if we did so we should not be able to use them in reconstructing prehistoric cultural systems, because the essence of a system is its organization. What we must look for in archaeological data, therefore, are the attributes that pertain to organization. They are distribution, relative size, number, spatial arrangement, and hierarchy. These aspects are important with whatever archaeological data we are studying. Be they sites, houses, artifacts, or burials.

1. The data we use are tangible, derived from the survey and excavation of archaeological sites. We may or may not be able to use them in reconstructing prehistoric cultural systems, because the essence of a system is its organization. What we must look for in archaeological data, therefore, are the attributes that pertain to organization. They are distribution, relative size, number, spatial arrangement, and hierarchy. These aspects are important with whatever archaeological data we are studying. Be they sites, houses, artifacts, or burials.

2. Although not strictly speaking "archaeological data" under the common definition, see supra note 9, archaeologists make increasing use of these resources. See supra note 14.
By studying and analyzing these resources, archaeologists can reconstruct how North America’s early inhabitants lived. They can examine the technological development, social structure, warfare, subsistence strategies, reaction to climatic change or population growth, diseases, migration, or art of particular sites, cultures, or man in general.17 The unexplored questions and the types of archaeological resources that can be used to answer them are by no means fixed; they both expand as the knowledge of past human life and archaeological technology and methodology improve.18

North America’s archaeological resources reflect a rich and diverse cultural heritage. Evidence of man’s occupation of North America has been accumulating since the first settlers crossed the Bering Strait some 30,000 years ago.19 From the projectiles, knives, hearths, and remains of butchered bison and mammoths at hunting sites in Clovis and Folsom, New Mexico, Lubbock, Texas, and Sequim, Washington, archaeologists can reconstruct the activities of the early “big-game hunters.”20 Archaeologists trace cultural developments, political conflicts, and demographic changes in the American Southwest from the ruins of the pit-houses and cliff dwellers at Mesa Verde, Arizona, Chaco Canyon, New Mexico, and elsewhere.21 They can visualize the longhouses and ceremonial structures of early Midwestern agricultural communities from the pits, postholes, and mounds that dot the landscape today.22 They can follow the seasonal migrations of Great Basin hunters and gatherers from scattered traces of hearths, stone implements, seeds, and basket.23

Archaeologists have always been ready to exploit the natural sciences in order to make the material remains of the past yield more information about human activities and human history.24 Renfrew, supra note 14, at 1.

17 See F. HOYT & R. HEDER, supra note 9, at 303-467.

18 What is archaeological evidence to one excavator, or at one time, may not be considered as such for another. Thus carbonated wood was not usually saved as data for dating until the radiocarbon process was invented. Similarly,Until techniques of flotation were developed, archaeologists overlooked the seeds that might occur in the soil. What constitutes data thus depends on what the archaeologist thinks is data as well as on its actual occurrence.

19 HOYT & HEDER, supra note 9, at 87.


24 See G. WILLEY, supra note 20, at 343-56. See also Thomas, A Computer Sim-

Thus, to the archaeologist, archaeological resources offer a glimpse of vanished cultures and some understanding of the relationship between the past and the present.24 Archaeology also provides a unique perspective from which to study broader questions of cultural development and environmental adaptation.25 To the Native American, however, an archaeological resource may not only contain important information about the past but an important current religious site deserving protection from desecration by archaeological excavation.26 Of course, archaeologists and Indians alike deplore the pointless damage and destruction of archaeological resources.

B. Damage and Destruction of Archaeological Resources

No one knows how many archaeological sites there are in the United States, or how many have already been destroyed, because archaeologists have surveyed only a small part of the country and have only incomplete records of the destruction of sites.27 Archaeologists in several western states, however, estimate that fifty percent of the archaeological sites in their states have been destroyed,28 and it is likely that an equal
or even greater percentage of the archaeological sites in other states have been destroyed. The principal activities threatening the remaining archaeological resources are: (1) construction, mining, and other land development activities; (2) commercial looting or "pooihunting"; and (3) individual treasure hunting and vandalism.

Construction, mining, and other land development activities are rapidly diminishing the nation's archaeological resource base. Federal law requires federal officials to survey and salvage, if necessary, "significant" archaeological resources discovered in the course of federally funded or licensed activities. Developers, however, know that archaeological salvage work invariably causes delays and therefore sometimes fail to report archaeological discoveries. Even if all developers coop-

12. One witness before the Senate Committee hearings on ARPA estimated that before the year 2000, 30 to 80% of the archaeological sites in the eastern half of Arkansas will be destroyed by land leveling activities. The Archaeological Resources Protection Act of 1979: Hearings on S. 490 Before the Subcomm. on Parks, Recreation, and Renewable Resources of the Senate Comm. on Energy and Natural Resources, 96th Cong. 1st Sess. 77 (1979).


14. The Archaeological and Historical Preservation Act requires federal agencies to ensure the preservation of significant archaeological resources affected by any federal construction project or federally funded project, activity, or program. 16 U.S.C. §§ 470a, 470b (1976 & Supp III 1979). Project funds may be used to finance the necessary surveys and salvage activities. Id. § 489.

The requirement of "archaeological significance" has generated a considerable amount of debate concerning the appropriate criterion for assessing the significance of archaeological resources. See e.g., Ruhl & Klinger, A Critical Appraisal of "Significance" in Contract Archaeology, 42 Am. Antiquity 629 (1977); Glassow, Issues in Evaluating the Significance of Archaeological Resources, 42 Am. Antiquity 413 (1977); Sharrock & Grayson, Significance in Contract Archaeology, 44 Am. Antiquity 327 (1979); Ruhl & Klinger, A Reply to Sharrock and Grayson on Archaeological Significance, 44 Am. Antiquity 328 (1979); Barnes, Briggs & Nielsen, A Response to Ruhl and Klinger on Archaeological Site Significance, 45 Am. Antiquity 551 (1980). Although it is beyond the scope of this article to enter the fray, a few points are relevant. Department of Internal regulations governing the determination of archaeological significance for purposes of National Register designation consider a site "significant" if it has "yielded or may be likely to yield information important in prehistory or history." 36 C.F.R. § 1202.6 (1980).

The requirement is necessarily broad enough to encompass a diversity of sites of interest today and in the future. But whatever the criterion for "significance," the requirement is clearly intended to exclude certain classes of archaeological resources, and therefore effectively diminishes the resource base. Its impact on future archaeological research is uncertain in part because "significance" is a "dynamic concept varying through space, time, and even perhaps across investigators." Sharrock & Grayson, supra, at 327.

16. Harrison, supra note 1, at 30, cites an example of a Los Angeles contractor who knew months in advance that his housing project would destroy important prehistory.

18. Archaeological Resources Protection

Later, having capitalized on the publicity value of the archaeological investigations during

19. Because large numbers of archaeological sites are not mapped, developers may unwittingly submit out-of-date survey maps to authorities as proof that no sites will be affected by their proposed projects. They may also do "knowingly and with intent to misleading." Id. at 72.

36. Recent articles commenting on the increasing "interest" in archaeological investigation are informative. One recent report noted, for example, that "In addition to several hundred college-sponsored projects, more than 400 government archaeological digs are already under way at this time, including about 100 begun this year... Most of these scientific digs are being conducted in connection with federal construction projects..." It's a Banner Year for Archaeology, supra note 33, at 72. Another article notes:

[Much of the spirit in archaeological projects stems from the availability of federal money for checking likely sites in areas where dams, highways, and government structures are planned. Federal funds in 1974 were an effort to preserve historic evidence that was rapidly being destroyed by new construction, the program provides government funds amounting to more than 1 million dollars yearly. Widely known as contract archaeology, it is financing much of the boom this year in historic American digs.

Digging Up America—The Archaeology Craze. U.S. News & World Rep., May 22, 1978, at 76. Davis, supra note 1, at 267 speaks of a "crisis" in American archaeology stemming from the widening gap between the rate of site destruction and the level of funding for salvage work. It remains to be seen whether the current level and direction of activity will be maintained in the absence of pressure to salvage rapidly disappearing sites.

37. See supra note 18 and accompanying text.

38. As one commentator recently noted:

"In recent years archaeologists have found themselves acting like retired movie gunsmokers with their 45s: they may not have gone to the rubbish heap, but in many cases they have quietly been hung back on the wall. They have even been instances in which archaeologists sites have been deliberately left undisturbed or paved over with the express approval of archaeologists.

The change has come about because archaeologists have begun to recognize their own limitations and the terribly fragile nature of their material. The history of archaeology is studied with technological "if only" modern conservation methods could have been applied to the organic materials found in the first Egyptian pyramids opened by archaeologists. If only the infrared camera people could have been used in the Etruscan tombs. If only pollen analysis had been available at the time of some of the great Scythian finds. The list of archaeology's new tools—dating from thermoluminescence for pottery, carbon-14 dating. tree ring analysis—is a long and, even more important, a lengthening one. Who knows what future advances may have been made in ten, fifty, or two hundred years? But will there be any sites left by then, unless we conserve them today?"

G. McHAGUE & M. ROBERTS, A FIELD GUIDE TO CONSERVATION ARCHAEOLOGY IN NORTH AMERICA 19 (1977) (emphasis in original)
The activities of pothunters, or commercial looters, are of particular concern to federal and state officials. A large commercial looting industry has developed to satisfy the international art market's demand for artifacts. Especially in the American Southwest, looting and hoarding of archaeological sites for artifacts is common. Gangs of commercial looters "strip-mine protected sites with bulldozers and power-shovels," and sometimes "use helicopters and citizen band radios to spot approaching ranger patrols." Treasure hunters often take archaeological resources such as arrowheads, coins, bottles, bullets, or potsherds. Treasure hunting on public lands has increased as the number of people exploring previously inaccessible areas in National Parks and National Forests has increased.

This increase in the recreational use of the public lands has also led to an increase in the incidence of vandalism. Vandals are defacing rocks bearing petroglyphs and pictographs of considerable age and value and desecrating ancient Indian burial grounds. The harm done by treasure hunters and vandals cannot compare with the complete destruction accomplished by the commercial looter's bulldozer. Treasure hunters and vandals, however, do destroy contextual information, which is the basis of much archaeological inference. Without estimates of the number and distribution of archaeological sites destroyed, it is difficult to depict the combined effect of these destructive activities. Some patterns, however, are evident. First, there is a general correlation between high rates of destruction and high population density because of the more intensive land use and greater numbers of collectors in populated areas. Second, because there are few regulations of archaeological resources on private lands, many of the nation's remaining archaeological resources are located on undeveloped tracts of state and federal land, particularly the vast public lands in the western United States. As these lands become more accessible, the threat of destruction increases.

39. The term "pothunter" can apply to anyone who digs in archaeological sites for pots, arrowheads, and other small artifacts. See Hochfeld, supra note 1, at 30-31. As used here, however, the term refers only to persons who loot prehistoric and historic sites for profit in the illegal antiquities market.

40. Grave Robbers in the Southwest, NEWSWH.K. June 23, 1980, at 31. Pots from sites along the Rio Mimbres in New Mexico are selling for as much as $25,000 a piece, and one collection of relics allegedly looted from federal land in Arizona recently sold for $750,000. Id. Of the thirteen major sites along the Rio Mimbres, we are heavily damaged and six have been completely destroyed. Id

41. Id

42. Id

43. As used here, the term "treasure hunters" refers to "innocent" collectors, ranging from boy scouts to teachers. See Vandilizing America's Heritage, supra note 2, at 76. or 10. Those who find arrowheads or dart points on the surface and dig to find more, without realizing that they are destroying irreplaceable information in the process. See Davis, supra note 1, at 270

44. Davis, supra note 1, at 269. That digging by relic collectors has reached alarming proportions, in part because it is now more difficult to find "nice" pieces on the surface and in part because more people have leisure time to dig. See Senate Hearings, supra note 29, at 90. Testimony of Charles R. McManus III.

45. See supra note 40. Indian graves are prime targets for pothunters because Indians have traditionally buried their dead with "grave goods." Relics that now have great value. Davis, supra note 1, at 269.

46. See supra note 45.

47. Rock carvings and paintings are commonly covered with graffiti or used for target practice, and sometimes the face of the rock will be cut away with a diamond saw. Davis, supra note 1, at 270.

48. See supra note 46. One reporter recently spotted a prehistoric skull in the rear window of a car—with red lights installed in the eye sockets as turn signals. Grave Robbers in the Southwest, supra note 40. Indian graves are prime targets for pothunters because Indians have traditionally buried their dead with "grave goods." Relics that now have great value. Davis, supra note 1, at 269.

49. Hochfeld, supra note 1, at 33. Isolated artifacts provide little useful information. Id. Sites must be preserved intact to prevent the loss of valuable information. Id

50. See Moratto, supra note 3, at 21.

51. States may acquire resource-bearing land through their eminent domain power. E.g., ALASKA STAT. § 41.35.060 (1977). Similarly, states may designate historical districts through exercise of their police power. E.g., HAWAII REV STAT. § 6E-3 (1976). If a privately owned resource is included in a state historic district or under historic places, the state may require the owner to notify the appropriate state agency before damaging, altering, or removing the resource, thereby affording the agency time to conduct a proper investigation. Id. § 6E-10. See also ALASKA STAT. § 41.35.090 (1977). Few states have expressly provided for the exercise of these powers to protect archaeological resources. See C. R. McManus III, PUBLIC ARCHAEOLOGY 97 (1972).

In general, state and local efforts to regulate archaeological resources on private lands have been hampered by the fears of exceeding constitutional limits, by insufficient means of enforcement, and by the overall lack of public support. See C. R. McManus III, supra, at 46-49. As public awareness increases and concern over the problem increase, additional attempts at regulation will probably be forthcoming. See generally Vandilizing America's Heritage.

52. See supra note 2, at 76.
C. Federal Laws Protecting Archaeological Resources on Public and Indian Lands

Before the enactment of ARPA in 1979, the Antiquities Act of 1906 provided the primary protection for archaeological resources on lands owned and controlled by the United States, including Indian lands. Other federal laws, such as the Historic Sites Act of 1935, the National Historic Preservation Act of 1966, and the Reservoir Salvage Act of 1960 as amended by the Archaeological and Historical Preservation Act of 1974, protect only resources of "archaeological significance," and thus exclude resources which, though they interest archaeologists, are not "significant." Tribal ordinances protecting archaeological resources on Indian lands are largely ineffective because of jurisdictional restrictions. Thus, the only comprehensive protection for the nation's archaeological resources before 1979 was the Antiquities Act.

The Antiquities Act prohibits any person from "appropriating, excavating, injuring, or destroying any historic or prehistoric ruin or monument, or any object of antiquity" on federal lands without permission of the federal land manager. Until ARPA was passed in 1979, the Antiquities Act contained the primary statutory penalties for damage or destruction of archaeological resources on public lands and the only penalties applicable to non-Indians who damaged archaeological resources on Indian lands. Violators of the Antiquities Act are subject to a fine of $500, or 90 days in jail, or both. These penalties are, however, totally ineffective deterrents to looting. When prehistoric pots sell for $10,000 or more, most pothunters treat a $500 fine as a mere business expense.

The Antiquities Act, moreover, does not protect all archaeological resources on federal lands. Congress only attempted to preserve "objects of antiquity" when it passed the Antiquities Act in 1906 because archaeologists at the turn of the century were primarily interested in artifact typologies. Today archaeologists use a broad range of contextual information to explore man's prehistoric life and interaction with the environment. The Antiquities Act does not protect many archaeological resources, such as the relation of artifacts in the site and environmental evidence, that are crucial to the modern archaeologist's work.

Congress' emphasis on "antiquity" has also made it difficult to enforce the Act. United States v. Diaz, a 1974 decision by the Ninth Circuit, held that the penalty provisions of the Antiquities Act were unconstitutionally vague. The defendant in Diaz allegedly took sacred ceremonial face masks from a cave on the San Carlos Indian Reservation in Arizona. A medicine man had made the masks sometime in 1969 or 1970. At trial, a professor of anthropology testified that the term "object of antiquity" "could include something that was made just yesterday if related to religious or social traditions of long standing." On appeal, the Ninth Circuit held that the Antiquities Act violated the fifth amendment's due process clause because it provided no notice "that the word 'antiquity' can have reference not only to the age of an object but also..."
the use for which the object was made and to which it was put, subjects not likely to be of common knowledge.\footnote{21}

The \textit{Diaz} decision has severely hampered federal efforts to protect objects of antiquity in the Ninth Circuit and elsewhere. Even though some federal land managers have disregarded the broad language of \textit{Diaz};\footnote{22} and continued to use the Act to protect obvious antiquities\footnote{23} and the Tenth Circuit has upheld the Act against constitutional challenges,\footnote{24} prosecutors now face constitutional challenges in every enforcement proceeding.\footnote{25} Thus, for practical purposes, \textit{Diaz} has significantly weakened the Act.

\footnote{21} Id. at 115
\footnote{22} The Ninth Circuit should have limited its decision to the particular facts of the \textit{Diaz} case, and observed the penalties for cases which fall squarely within the meaning of the Antiquities Act. In reviewing the constitutionality of congressional acts, courts have a duty to seek a limiting construction that might save a statute. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973). In assessing vagueness, courts must consider a statute in light of the defendant's alleged conduct. See United States v. National Dairy Products Corp., 372 U.S. 29 (1963); United States v. Smyer, 596 F.2d 939 (10th Cir. 1979), cert. denied, 444 U.S. 843 (1979) (upholding the Antiquities Act as applied to appropriation of 800 to 900 year old artifacts from prehistoric Indian burial grounds). Thus, although the Antiquities Act may not give a person of ordinary intelligence a reasonable opportunity to know that collecting four or five year old artifacts is prohibited, see City of Rockefeller v. Crisp, 408 U.S. 568 (1972) (laws must give so much notice to the public that a person of ordinary intelligence a reasonable opportunity to know what is prohibited. So that he may act accordingly), it does give sufficient notice regarding obvious antiquities, such as 800 to 900 year old Mimbres pots. Smyer, 596 F.2d at 941.


The history of federal enforcement attempts after \textit{Diaz} is illustrative. In United States v. Durand, No. 76-4 (D.N.M. filed Jan. 13, 1976), federal prosecutors charged the defendants with excavation of a Mimbres Indian ruin in Gila National Forest in violation of the Antiquities Act of 1906. The case was tried before a U.S. magistrate in New Mexico citing \textit{Diaz}; defense counsel moved at the conclusion of the evidence for dismissal on grounds that the Act was unconstitutionally vague. The magistrate upheld the Act and found the defendants guilty. No appeal was taken. See Collins & Green, \textit{A Proposal to Modify the American Antiquities Act: 202 S. Rep. 1055, 1056-57 (1978)}.

In United States v. Camazine, No. 1416-M (D.N.M. filed Nov. 15, 1977), the defendant allegedly excavated a prehistoric ruin on the Zum Indian Reservation in western New Mexico in violation of the Antiquities Act. The ruin was an Anasazi pueblo inhabited approximately from A.D. 1100 to A.D. 1200, and the ceramic sherds that the defendant collected were 700 to 800 years old. At trial, the magistrate granted the defendant's motion to dismiss the complaint, holding that the Antiquities Act was unconstitutionally vague on its face and fatally vague as applied to the facts of the case. The double jeopardy clause of the Fifth Amendment precluded the federal prosecutors from appealing the magistrate's decision. See Collins & Green, supra, at 1057.\footnote{26} \textit{Antiquities Act Ruled Illegal, Art. 50: For Conservation, Archaeology Newsletter}, Oct. 1977, at 1. Subsequently the Tenth Circuit upheld the Act in United States v. Smyer, 596 F.2d 939 (10th Cir. 1979), cert. denied, 444 U.S. 843 (1979).

Thus, each case involving the Antiquities Act has been challenged on the basis of the \textit{Diaz} decision. Both federal officials and U.S. attorneys are confused as to how or whether to proceed with a case involving violations of the Act. See \textit{Senate Hearings}, supra note 29, at 13 (statement of John R. McGuire).

\footnote{26} See \textit{infra} note 226.

\footnote{76} See supra notes 9-18 and accompanying text.

\footnote{77} See United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

\footnote{78} See \textit{infra} text accompanying notes 33-35.

\footnote{79} See \textit{infra} text accompanying notes 31-42.


II. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

A. Overview of Major Provisions

Congress enacted ARPA to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." ARPA establishes

D. Problems Inherent in Providing a Comprehensive Program of Archaeological Resource Protection

The \textit{Diaz} decision illustrates one of the problems which Congress and the federal agencies face in attempting adequately to protect the nation's archaeological resources. Because the range of archaeological resources is broad and constantly changing,\footnote{81} there is a conflict between the desire to provide comprehensive protection for archaeological resources and the need to provide sufficient notice to the public that a resource is protected.\footnote{82} The tension between comprehensive protection and adequate notice, however, is only one of the problems inherent in a comprehensive program of archaeological resource protection. It is difficult, for example, to provide sufficient penalties to deter pothunters, without imposing unreasonable burdensome penalties on weekend treasure hunters and the "innocent" public. Similarly, it is necessary to make trade-offs between archaeological resource protection and mineral resource development. Finally, conflicts will arise about whether archaeological resources should be developed at all. Archaeologists generally want to develop archaeological resources in order to increase their understanding of the past.\footnote{83} Native Americans, however, may oppose development because it entails the desecration or destruction of important religious and cultural sites.\footnote{84} Because archaeological resources are often Native American resources, there is often conflict about who will determine the course of their development.\footnote{85}

In reconciling these competing interests, Congress was constrained by existing law. The Constitution protects the public from penalties imposed without sufficient notice.\footnote{86} The first amendment and the American Indian Religious Freedom Act protect Native American religious interests.\footnote{87} The mineral resource developer also has certain rights under existing federal law.\footnote{88} Congress enacted ARPA without altering this framework.

A. Overview of Major Provisions
a permitting procedure for excavation and removal of archaeological resources on public and Indian lands,
and prohibits excavation, removal, damage, alteration, or defacement of these resources without a
permit issued under ARPA or the Antiquities Act. ARPA also prohibits trafficking in artifacts obtained in violation of federal, state, or local law.

Violators of the Act face criminal penalties of up to $100,000 or five years in prison for second convictions. Federal land managers may impose civil penalties, and rewards of up to $500 may be paid for information leading to a criminal or civil penalty assessment.

ARPA seeks both to distribute and to prevent the distribution of information. ARPA exempts information about archaeological resources protected under the Act from the provisions of the Freedom of Information Act to prevent pothunters from using federal information to destroy archaeological resources. On the other hand, ARPA attempts, through its permitting procedures, to insure that excavated resources and related information will be preserved for the public. The Act also encourages the distribution of information from private archaeological collections that were obtained before the effective date of the Act.

The Secretaries of Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority, in consultation with other federal agencies, the states, and Indian tribes, will issue uniform regulations to implement ARPA. In addition, the federal land managers may promulgate rules that are consistent with the uniform regulations and necessary to perform their duties under the Act.

B. Lands Affected: Public Lands and Indian Lands

ARPA protects archaeological resources on public lands and Indian lands. Congress, however, rejected a proposal to include private and state lands within Indian reservation boundaries in the definition of "Indian lands." As a result, federal jurisdiction over archaeological resources under ARPA is no greater than under the Antiquities Act. ARPA's limited definition of Indian lands is inconsistent with other federal laws governing activities on Indian reservations; these laws extend federal jurisdiction to "Indian Country," which includes private and state lands within reservation boundaries as well as federally owned or controlled land. Moreover, ARPA's limited definition of Indian lands creates serious enforcement problems. ARPA's definition gives the federal government "checkerboard jurisdiction" over archaeological resources located within Indian reservations. It is difficult to determine the boundaries between private, state, and federal land within Indian reservations, and thus federal officials may have to "search tract books in order to determine whether . . . jurisdiction over each particular offense, even though committed within the reservation, is in the . . . Federal Government." Though the question is far from clear, it appears that Congress has authority under the Indian commerce clause and the federal trust responsibility for Indian property to extend federal jurisdiction over archaeological resources to all lands within reservation boundaries.

Congress should therefore reconsider whether to extend

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97. As originally drafted, section 3(3) included "all lands within the exterior boundaries of any Federal Indian reservation." House Report, supra note 7, at 17, reprinted in 1979 U.S. Code Cong. & Ad. News at 170. The drafters amended this section so that it does not cover private and state lands within reservation boundaries. Id.
99. See, for example, 18 U.S.C. § 1151 (Supp. III 1979) which defines "Indian Country" for purposes of the Major Crimes Act of 1885, 18 U.S.C. § 1153 (1976), as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation."
102. Seymour v. Superintendent, 368 U.S. 351, 358 (1962). The Supreme Court in Seymour upheld federal criminal jurisdiction over an Indian under the Major Crimes Act of 1885, 18 U.S.C. § 1153 (1976), for an offense committed on land held in fee-patent by a non-Indian. The Court did not consider whether Congress in fact had the authority to define "Indian Country" so broadly for purposes of federal jurisdiction and to supersede state jurisdiction within Indian reservations.
103. As a result, federal jurisdiction over archaeological resources under ARPA is no greater than under the Antiquities Act. ARPA's limited definition of Indian lands is inconsistent with other federal laws governing activities on Indian reservations; these laws extend federal jurisdiction to "Indian Country," which includes private and state lands within reservation boundaries as well as federally owned or controlled land. Moreover, ARPA's limited definition of Indian lands creates serious enforcement problems. ARPA's definition gives the federal government "checkerboard jurisdiction" over archaeological resources located within Indian reservations. It is difficult to determine the boundaries between private, state, and federal land within Indian reservations, and thus federal officials may have to "search tract books in order to determine whether . . . jurisdiction over each particular offense, even though committed within the reservation, is in the . . . Federal Government." Though the question is far from clear, it appears that Congress has authority under the Indian commerce clause and the federal trust responsibility for Indian property to extend federal jurisdiction over archaeological resources to all lands within reservation boundaries. Congress should therefore reconsider whether to extend
ARPA to all lands within reservation boundaries in order to simplify enforcement of the Act.

C. Scope of Protection: Archaeological Resources

ARPA defines "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act [and which are] at least 100 years of age." Because ARPA protects "material remains" rather than "objects of antiquity," ARPA protects more than the Antiquities Act. In addition to artifacts and other "objects," contextual data, such as the spatial relation of artifacts, fall squarely under ARPA's protection. ARPA, however, requires that the remains be of "archaeological interest" and thus does not protect all the "objects of antiquity" protected by the Antiquities Act. The "archaeological interest" requirement, however, should prove a minor limitation because increased knowledge and improved technology have expanded the list of remains of potential value to the archaeologist. Nevertheless, the word "interest" must be carefully construed to avoid setting too high a threshold.

The most obvious difference between ARPA and the Antiquities Act is ARPA's restriction to remains "at least 100 years of age." The 100-year limit has no archaeological significance. Material remains that are fifty or seventy-five years old are no less archaeological resources than those one hundred years old or more. The limit thus excludes many resources that are "material remains of archaeological interest," including many sites of religious or cultural significance to Native Americans.

The 100 year limit does, however, provide a convenient administrative cutoff and a way to avoid the vagueness problems raised in United States v. Diaz. ARPA's definition of archaeological resource is flexible; as archaeologists use new types of resources, these resources will become archaeological resources protected by ARPA. This flexibility, however, presents problems in light of the Diaz decision. A definition that is too broad and flexible creates vagueness and uncertainty which in turn creates enforcement problems. Congress therefore imposed some limits on the scope and flexibility of the definition of archaeological resource.

ARPA gives a partial list of material remains that qualify as archaeological resources under its definition. This approach reduces uncertainty, but it may also confuse citizens, who may think that they are not violating the Act when they only disturb resources not included in the list. In fact, this problem has already arisen in criminal actions under ARPA.

111. See F. Holc & R. Heizer, supra note 9, at 6:

Today information is recorded in diaries, books, magazines, newspapers and official records, but still a vast amount goes unrecorded and will vanish from man's record unless it is recovered by a future archaeologist. Thus archaeology can contribute to knowledge of the whole of man's past; it need not stop where history begins.

112. Vandalism and looters can thus continue to desecrate recent Indian burial grounds without penalty. Cf. supra note 48.

113. 499 F.2d 113 (9th Cir. 1974).

The original Senate bill contained a 50 year limit. S. REP. No. 179, 96th Cong., 1st Sess. 2 (1979) [hereinafter noted as S. REP.]. Because of concern over the Diaz decision, the final version which was enacted set a 100 year limit. See House Report, supra note 7, at 8, reprinted in 1979 U.S. Cong. & Ad. News at 1711.

114. Under Diaz, the definition may not be in "terms so vague that men of common intelligence must necessarily ... differ as to its application." 499 F.2d at 114. Accord Grayved v. City of Rockford, 408 U.S. 104, 108 (1972) (laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly).


116. One of the first criminal prosecutions under ARPA charged defendant Casey Shumway with illegally excavating and damaging Turkey Pen Ruin, a cliff site in San Juan County, Utah dating from 200-400 A.D. to 1250 A.D. Fike, Antiquities Violations in Utah, Justice Does Prevail, AM. SOCY. FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, OCT. 1960, at 32. The evidence established that Shumway did dig into a mound ("Midden") are refuse heaps.) After nine hours of deliberation, the jury sent the judge a note asking if a "midden" is an archaeological resource. The judge responded that a midden is not an
In addition to listing examples of protected remains, ARPA expressly excludes certain items from its coverage. Collectors of arrowheads from the ground surface, for example, are exempt from criminal and civil penalties;

"...even though such arrowheads are unquestionably archaeological resources under ARPA's definition." The Act also provides that neither its permitting procedure nor its prohibitions apply to the collection for private use of any rock, coin, bullet, or mineral that is not an "archaeological resource." The meaning of this provision is unclear: it could mean that resources which are not archaeological resources are not archaeological resources; it could mean that rocks, coins, and bullets are not archaeological resources. ARPA does not clarify when these items are archaeological resources, but the legislative history suggests that such items are not archaeological resources when they occur in isolation, even if they are more than 100 years old.

As a practical matter, federal land managers are unlikely to enforce the Act against the collector of an isolated rock, coin, bullet, or mineral given the Act's uncertain message in this regard.

ARPA thus is only moderately successful in providing comprehensive protection for archaeological resources on public lands and Indian lands. Although the Act defines "archaeological resource" to include a broad range of material remains, Congress' attempts to give adequate notice to the public have left significant gaps in the Act's coverage. Given the 100 year limit, the difficulty of dating isolated coins, bottles, rocks, or minerals may justify excluding them from the Act. The same cannot be said for arrowheads, however, especially considering the importance of surface arrowhead scatters in archaeological investigation.

Congress exempted arrowheads because it did not want to subject Boy Scouts and other arrowhead collectors to criminal penalties. A better way to achieve this goal would be to leave prosecution of arrowhead collectors to the federal land manager's discretion. Indeed, ARPA's arrowhead exclusion fails to serve its purpose because arrowhead collectors are subject to prosecution under general federal theft and malicious mischief statutes, which authorize penalties as high as $10,000 or ten years' imprisonment.

Congress should therefore amend ARPA to eliminate the exemptions granted arrowhead collectors from the Act's criminal and civil penalties. Congress should also amend the Act to clarify whether isolated rocks, coins, bullets, and minerals are excluded from its coverage.

Even if Congress resolved these statutory problems, however, gaps would remain in the protection afforded the nation's archaeological resources. ARPA signals broad coverage but leaves the precise scope of protection to be defined by the regulations. This approach offers the flexibility needed to accommodate an expanding resource base, but also creates a number of difficult regulatory problems to be discussed in Section III.

**D. Prohibited Activities: Section 6**

Section 6 provides that no person may "excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands" unless such activity is authorized by a permit issued under the Act or under the Antiquities Act or is subject to an exemption.

Section 6(b) prohibits the sale, purchase, exchange, or transport of any archaeological resource excavated or removed from public lands or Indian lands in violation of section 6(a) or any other federal law. This provision expands the enforcement authority of the federal land managers.
beyond their authority under the Antiquities Act; federal prosecutors can now pursue those who buy and sell artifacts which were obtained illegally and thus cut off the market that supports the commercial looting industry.a Museums, universities, and other institutions, which are subject to ARPA’s prohibitions, must now take care to determine the origin of their acquisitions. This provision may curtail dealing in antiquities because the origin of a particular piece is often difficult to ascertain.130

Section 6(d) does not distinguish between archaeological resources obtained illegally before ARPA’s enactment and resources obtained illegally after its enactment.131 Federal officials may thus prosecute under ARPA for trafficking in archaeological resources obtained in pre-1979 violations of federal law. This enforcement power may prove particularly useful in the Ninth Circuit, where the Antiquities Act has not been in force since the D'iaz decision in 1974. In United States v. Jones,132 the Ninth Circuit held that Congress did not intend that the Antiquities Act preempt other federal laws and therefore that the Antiquities Act did not preclude federal prosecutions of unauthorized excavation, removal, or damage of archaeological resources under the general theft and malicious mischief statutes.133 Thus, unauthorized excavation and removal of archaeological resources from federal lands in the Ninth Circuit violated federal law even after Diaz, and prosecutors will be able to use ARPA to punish violators who have sold the illegally obtained resources.

Section 6(c) prohibits the sale, purchase, exchange, or transport of any archaeological resource excavated or removed, sold, purchased, exchanged, or transported in violation of state or local law.134 This provides federal support for state and local efforts to protect archaeological resources. Violators of state or local law are now subject to stiff federal criminal penalties when they traffic in illegally obtained artifacts and are more likely to be prosecuted because enforcement does not depend entirely on the efforts of state and local governments with limited jurisdiction and inadequate enforcement resources.135

ARPA does not prohibit possession of illegally obtained artifacts.136 A prohibition on possession would make it easier to enforce the Act against relic collectors and treasure hunters.137 Congress was concerned, however, that ARPA would violate the taking and due process clauses of the fifth amendment if a person who had legally possessed an artifact became a criminal upon ARPA’s enactment.138 Congress could, however, have avoided these constitutional problems in other ways. The Eagle Protection Act, for example, prohibits possession, but with the proviso that possession of an object obtained prior to the effective date of the Act is exempt from the Act’s penalty provisions.139 The Migratory Bird Treaty Act contains no such savings provision,140 but it has been construed narrowly to avoid unconstitutionality.141 Congress probably declined to adopt these relatively simple solutions in ARPA because of pressure from museums and private collectors.142 If it had a grandfather clause, however, a prohibition on possession of illegally obtained archaeological resources would not impose any additional burdens on museums and other institutions; ARPA already requires these institutions to exercise greater care in ascertaining the origins of future acquisitions.143 There is thus no reason why Congress should not increase the protection of archaeological resources by amending ARPA to make the possession of illegally obtained artifacts a crime.

E. Enforcement

ARPA’s enforcement provisions equip federal land managers with a range of remedies necessary to pursue a variety of goals including education, deterrence, restoration, and repair. These remedies include stiff criminal penalties for convicted commercial looters and minimal civil penalties for unwitting treasure hunters.

1. Criminal Penalties: Section 6(d)

Under section 6(d), criminal penalties may be imposed on “any person who knowingly violates, or counsels, procures, solicits, or em-

128 See supra notes 39-42 and accompanying text
129 16 U.S.C. § 470bb(b) (Supp. III 1979) (defining “person” to include “an institution or any other private entity”)
130 A recent article, for example, quoted one dealer who said, “When it comes down to the nuts and bolts, one just doesn’t know where a piece came from. There’s a fair chance that most of the pottery now on the market is of at least questionable legality.” Grace Robbers of the Southwest, supra note 40.
131 16 U.S.C. § 470bb(b) (Supp. III 1979). Section 6(d), id. § 470bb(b), provides that nothing in id. § 470bb(b), id. § 470bb(b), which relates to resources excavated or removed in violation of ARPA, shall apply to any person with respect to an archaeological resource that the person lawfully possessed prior to the effective date of the Act. This provision does not apply, however, to id. § 470bb(b), id. § 470bb(b), which relates to resources excavated or removed in violation of other federal law.
134 See infra text accompanying notes 187-92.

137 Relic collectors and treasure hunters, unlike pothunters, are unlikely to sell or exchange illegally obtained archaeological resources.
140 Id. § 703 (1976).
142 See Senate Hearings, supra note 29, at 40 (testimony of Sen. Domenico).
143 16 U.S.C. §§ 470bb(b)-(c) (Supp. III 1979) (“receiving” or “purchasing” illegally obtained artifacts prohibited). Even though possession of illegally obtained artifacts does not trigger ARPA’s criminal and civil penalty provisions, such artifacts may be recovered under id. § 470gg(b). See infra text accompanying notes 187-92.
The crime defined in section 6(d) is a general intent crime; that is, it requires only an intent to perform the act in question, not intent to violate the law. Thus, violators are exempt from ARPA's criminal penalty provisions only if the violation was an accident or otherwise unintentional. Congress probably adopted a general intent standard in ARPA because a specific intent standard would have unduly impaired enforcement efforts. The general intent standard, however, itself raises some problems. There is no easy to define the difference between the pothunter's activities and the treasure hunter's, and therefore Congress subjected both to the same prohibitions. Under a general intent standard, however, this subjects treasure hunters who did not know the law to criminal penalties. Congress attempted to deal with this problem in part by reducing the Act's scope of protection. Recall that the Act exempts collectors of arrowheads off the ground surface from its penalties and exempts collectors of isolated bottles, coins, bullets, and minerals from its prohibitions. Such limitations on scope may not be necessary, however, in view of ARPA's variety of enforcement tools and the federal land manager's considerable enforcement discretion. Rather than diluting ARPA's protective provisions, Congress should have provided for public education and then relied on the federal land manager's discretion to protect unwitting treasure hunters.

For a first violation, ARPA authorizes misdemeanor penalties of up to a $10,000 fine or one year imprisonment, or both, when the value of the archaeological resources damaged or destroyed is less than $500, and felony penalties of up to a $20,000 fine or two years imprisonment, or both, when the value of the archaeological resources damaged or destroyed exceeds $5000. Subsequent violations, the maximum penalty is a $100,000 fine or five years imprisonment, or both. These penalties should be sufficient to halt commercial looting; pothunters will no longer be able to treat such fines as "a cost of doing business." ARPA bases penalties on the value of the affected resource. Felony charges are reserved for violations involving resources worth more than $5000. It is not always easy, however, to place a value on archaeological resources. Section 6(d) provides three elements of value to consider in determining whether a violation reaches the $5000 felony threshold: (1) commercial or archaeological value, (2) cost of restoration, and (3) cost of repair. "Commercial or archaeological value" is probably the cost of retrieval of scientific information from the disturbed or damaged portion of an archaeological site through archaeological excavation of the disturbed portions together with a sufficient portion of the adjacent nondisturbed site as a comparison base and includes the cost of the research design, fieldwork, laboratory analysis, and written report.

Green, supra note 116, at 30. Under this definition, restoration and repair are not synonymous. Restoration involves returning to the public whatever value can be salvaged from the resource; repair is limited to reconditioning and stabilizing the resource. Other authors take issue with this definition. See Donaldson, Goddard & McAllister, Response to Green, AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, Feb. 1981, at 28. They maintain that although ARPA distinguishes between restoration and repair, in fact the two terms are virtually synonymous. They define "restoration" as "measures taken to bring back resources to their predisturbance state insofar as possible and feasible. Such measures might involve rebuilding damaged walls of structures or reconstructing broken pots." Id. They define "cost of repair" as "the cost of the physical repair of archaeological resources which have been damaged or disturbed in order to return said resources to the condition existing prior to the damage or disturbance." This definition corresponds to the definition of "restoration" offered by Donaldson, Goddard & McAllister, supra note 157, at 30. Cf. id. (definition of "repair" as the "preventative measures taken to ensure that no further damages occur to disturbed resources").

Using the Green definitions of restoration and repair under ARPA will ensure that the full cost of restoring and repairing a disturbed resource will be recovered. Most restoration and repair efforts will require some salvage excavation, and the Green definitions are broad enough to cover such costs. Even though Green's definitions of "restoration" and "repair" differ somewhat from the usual meanings of the terms, see Donaldson, Goddard & McAllister, supra note 157, at 29, they comprise the normal range of operations undertaken to restore and repair a damaged archaeological resource.
ably the most difficult to estimate. The "commercial value" of artifacts that are commonly traded in the antiquities market, such as pots, baskets, jewelry, or ceremonial objects, is easy to ascertain. A standard of "archaeological value" is necessary, however, for resources that have no readily ascertainable commercial value. 163

The standard of "archaeological value" must approximate the resource's value to the archaeologist and be easy to administer. 164 Indeed, the value of an archaeological resource may not have a commercial market, if nonetheless has a scientific market. The value of an archaeological resource in the scientific market is what an archaeologist would pay for the resource, that is, what an archaeologist would be willing to spend to research and develop the resource, including costs of planning, survey, excavation, laboratory analysis, and report preparation. 165

This "informational value" standard appears both accurate and simple. It will not, however, always be easy to apply an informational value standard to specific violations. Informational value calculations are relatively straightforward when an entire site has been destroyed, but not when a site has been only partially destroyed. The language of section (d) suggests that only those archaeological resources actually "involved" in a violation, that is, only those resources damaged or destroyed, should be considered in the valuation. 166 Thus the informational value of the whole site would not be an appropriate measure of lost value. 167

One approach to this problem would be to determine what proportion of the site has been damaged or destroyed and to divide the informational value of the site accordingly. This approach would be easy to administer, but would produce artificial values because material remains are never spread uniformly over an archaeological site. An alter-

163 See supra note 155-59 and accompanying text. Purists may often have to apply the standard in criminal prosecutions. See, e.g., Green, supra note 116, at 30. Federal land managers will also be using this standard frequently in assessing civil penalties.

164 The proposed regulations adopt this approach. Section 1215(b) of the proposed regulations defines "archaeological value" as the "value of information associated with the archaeological resource" to be appraised "in terms of the costs of the retrieval of the scientific information contained in the archaeological resource which would have been obtained if the archaeological resource were found in its undisturbed state." 46 Fed. Reg. 8246, 8248 (1981) (to be codified in 36 C.F.R. § 1215(b) (proposed Jan. 19, 1981)). Among the factors to be considered in this determination are whatever costs of developing a research design, conducting fieldwork, performing laboratory analysis and preparing reports are necessary to realize the resource's information potential. Id. See also Green, supra note 116, at 30. Cf. Donaldson, Goldard & McAllister, supra note 157, at 29. "Archaeological value" should be defined in terms of the cost of scientific data recovery from those areas disturbed by the illegal activities.


166 Donaldson, Goldard & McAllister, supra note 157, at 28-29.

167 Id. at § 470(f)(1) (Supp. III 1979).

168 Id. at § 470(f)(2). This provision leaves "archaeological or commercial value" to be defined by the regulations. Id. Neither the Act nor its legislative history clarifies
manager may mitigate or remit the penalties or double the penalties for succeeding violations. Section 7, unlike Section 6, contains no intent standard.

Section 7 provides for judicial review of penalty assessments in the United States District Court either in the District of Columbia or in any district in which the aggrieved party resides. Should a violator fail to pay a penalty, the federal land manager may request that the Attorney General bring an action for enforcement and collection.

ARPA’s civil penalties are discretionary; they give the federal land manager the flexibility to impose penalties to educate, deter, or compensate. Congress intended that the civil penalty provisions of ARPA would supplement the criminal penalty provisions and provide a means of deterring illegal activities without unduly burdening the “ignorant” citizen.

The federal land manager must remit penalties collected for violations on Indian lands to the Indian tribe concerned. Because the civil penalties serve various noncompensatory functions, however, this money will not always fully compensate the Indian tribe for the damage to the archaeological resource. Moreover, only the federal land managers can invoke the civil penalty provisions, and the Act makes no provision for enforcement at the Indian tribe’s request.

what other factors may be considered in calculating a civil penalty. The legislative history suggests, however, that Congress intended to limit the amount of civil penalty by the archaeological or commercial value of the resource and the cost of restoration and repair. House Report, supra note 7, at 11. The “other factors” may refer to mitigating factors.

The committee adopted a civil penalties section based on existing procedures in the Endangered Species Act (16 U.S.C. § 1535-1543 (1976 & Supp. III 1979)). This section would give the federal land manager “ticket writing” authority for minor offenses which do not involve a knowing violation of the prohibitions of the act. The Committee agreed that enforcement authorities which did not involve the stigma of a criminal violation would be useful to the Federal land manager as a deterrent for illegal activities for users of the public lands who might unknowingly violate the act. The Committee cautions that civil penalties should be sparingly used, and then only in situations which clearly warrant an enforcement action and not to harass citizens in normal use of public lands or who inadvertently infringe on regulations in minor ways.

See supra note 150. The report of the Senate Committee on Energy and Natural Resources is informative in this regard.

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175 This is especially true when the penalties assessed against an “unknown” violator are mitigated. See supra text accompanying notes 119, 174-76.
and the federal land managers to assure adequate compensation in every case.

3. Forfeiture: Section 8(b)

Section 8(b) provides that a court may order the forfeiture to the United States of all archaeological resources, vehicles, and equipment that were involved in a violation of ARPA. If the violation occurred on Indian land, the items are forfeited to the Indian or Indian tribe concerned. Section 8(b) authorizes recovery of illegally obtained archaeological resources not only from persons who have violated ARPA but also from any person who has possession. Thus, even though possession alone will not trigger ARPA’s civil or criminal penalty provisions, it may expose the possessor to a civil suit for recovery of the illegally obtained artifact.

Section 8(b) does not specify who may sue for recovery. Indians appear to have standing to invoke the forfeiture provision because they are entitled to all resources removed from Indian lands.

To ensure that violators are not deprived of their property without “due process of law,” ARPA clearly intends that some kind of hearing will precede forfeiture. Only a court or administrative law judge may order forfeiture. The federal land manager must bring a civil suit if he wants to recover any resources, vehicles, or equipment involved in a violation when a civil penalty has been assessed without a formal hearing.

To avoid “unduly burdensome forfeitures of property belonging to persons who neither knew nor could have known of the illegal activities,” Congress left forfeiture to the discretion of the court or administrative law judge. Making forfeiture of illegally obtained archaeological remains discretionary, however, is inconsistent with the principle that archaeological resources on public lands are public resources that remain the property of the United States. In its zeal to protect unwitting violators from burdensome confiscation of vehicles and other property, Congress has needlessly diluted the protection for archaeological resources. Congress should amend section 8(b) to make forfeiture of illegally obtained archaeological resources mandatory: the recovery of public resources should not be left to a court or administrative law judge’s discretion.

4. Rewards: Section 8(a)

Section 8(a) authorizes rewards for information leading to the assessment of a fine or penalty under the Act’s civil or criminal penalty provisions. Specifically, the Secretary of Treasury may pay from the collected fine or penalty a reward equal to one-half the fine or penalty but not exceeding $300. This provision increases the federal land manager’s enforcement power by giving visitors to public lands an incentive to discover and report violations. Thus the federal land manager will not have to rely solely on a limited staff to police vast and often remote public lands.

F. Permitting: Section 4

Section 4 establishes a permitting procedure to govern the investigation and development of archaeological resources on public lands and Indian lands.

1. When Is a Permit Required?

Section 4(a) requires any person to obtain a permit from the federal land manager for excavation, removal, and “associated activities” involving archaeological resources on public and Indian lands.

ARPA does not require a permit for an archaeological survey alone. Requiring a permit for surveys would prove impractical. With such a requirement, even the activities of hikers could trigger ARPA’s penalty provisions; moreover, proving that an illegal survey had been conducted would be nearly impossible. Under the existing provision, however, a survey conducted concurrently with excavation can be conducted without a permit.
treated as an "associated activity" subject to the terms and conditions of the excavator's permit. To clarify this situation, Congress should amend ARPA to exempt all surveys from its permit requirements.

Because ARPA defines "person" to include "any officer, employee, agent, department, or instrumentality of the United States," the Act's permit requirements apply to the federal land manager's agents and employees. The extension of the permit requirements to government employees should be viewed as an attempt to ensure the rational development of archaeological resources rather than as a bureaucratic obstacle to effective management. To allow federal land managers to conduct emergency salvage work, the federal agencies could either establish an expedited permitting procedure or deem federal agents and employees conducting emergency salvage work to operate under a valid permit. In all other situations, the normal permitting procedure should not seriously hamper effective management.

Section 12(a) exempts activities relating to mining, mineral leasing, and reclamation from ARPA's permit requirements. The Act's legislative history suggests two reasons for this exemption: (1) an unwillingness to burden these legitimate uses of public lands with additional permit requirements; and (2) a concern that in the course of these uses a person might unwittingly trigger the Act's penalty provisions. ARPA thus leaves the protection of archaeological resources from such activities to other federal laws.

202 Congress declined to adopt amendments suggested by the Department of the Interior that would have exempted officers, employees, agents, departments or instrumentalities of the United States from the permit requirements when they perform official land management duties. Compare id. § 470c with House Report, supra note 7, at 19, reprinted in 1979 U.S. Code Cong. & Admin. News at 1722 (proposed exemption).
203 Congress was correct to reject this proposal because of the problems of Antiquities Act violations by federal employees. In April 1979, for example, two Wyoming Bureau of Land Management employees were convicted of violating the Antiquities Act by damaging several prehistoric rockshelters. Friedman, Antiquities Violations by BLM Employees: Further Developments, Am. Soc'y for Conservation Archaeology Newsletter, Apr. 1980, at 3. The federal government had to appropriate $25,000 to stabilize the damaged sites.
204 Such regulations could be issued pursuant to Section 10, 16 U.S.C. § 470a (Supp. III 1979).
205 Problems will inevitably arise in subjecting all federal agents or employees to ARPA's permit requirements. Accidental destruction of archaeological sites in the course of roadwork, for example, will subject a federal employee to stiff criminal penalties. Telephonic interviews with Charles M. McKinney, Department of the Interior (Oct. 26, 1981) In such cases, the employee will have to rely on the federal land manager to use discretion to avoid an unduly harsh result.
209 Section 12(a), 16 U.S.C. § 470k(a) (Supp. III 1979), provides that "nothing in this chapter shall be construed to repeal, modify, or impose additional restrictions on the manner or manner of obtaining existing laws and authorities relating to mining, mineral leasing, and reclamation from ARPA's permit requirements," Compare id. with id., supra note 103, at 216.

2. Indian Lands

Section 4(g) exempts Indian tribes desiring to excavate archaeological resources on their lands, from the permit requirements of the Act if the tribes have laws regulating the excavation and removal of those resources. In the absence of such tribal law, ARPA's permit provisions apply. ARPA's permit provisions extend to all non-Indians desiring to excavate archaeological resources on Indian lands regardless of the existence of tribal law regulating those resources. Both Indians and non-Indians desiring to investigate archaeological resources on Indian land must obtain the approval of the Indian tribe before a permit will issue under ARPA and any such permit must contain the terms and conditions requested by the Indian tribe.

ARPA thus leaves Indian tribes considerable authority over archaeological resources on Indian lands. Because the federal government regulates excavation by Indians on Indian lands only when Indian tribes decline to regulate them, Indian tribes may displace federal control simply by enacting tribal ordinances governing archaeological resources on their lands. Indian tribes may also incorporate tribal law into the terms and conditions of permits issued to Indians and non-Indians under ARPA or may refuse to approve such permits.

Indian tribes may also continue to have concurrent jurisdiction over archaeological resources on their lands. Prehistoric and historic Indian sites likely fall under tribal sovereign authority. A statute does not...
abrogate such authority absent a "clear showing" of congressional intent to abrogate.220 Nothing in ARPA suggests that Congress intended to abrogate Indian sovereign authority over archaeological resources on Indian lands. In particular, section 4(g) does not prohibit tribal regulation of archaeological resources on Indian lands.221 Failure to comply with tribal ordinances, therefore, may subject Indians to tribal criminal and civil penalties222 and non-Indians to civil penalties or expulsion from the reservation.223 ARPA thus can be viewed as a supplement to tribal regulation of archaeological resources on Indian lands that authorizes criminal and civil penalties for unauthorized excavation, removal, or damage.

Compared with the control that Indians exercise over archaeological resources on Indian lands, Indian control over archaeological resources on public lands is limited. Congress declined to give Indian tribes a veto power over permits which authorize archaeological investigation on public lands of sites of religious or cultural significance to Indians.224 Instead, ARPA merely requires notice to concerned individuals or tribes of any such permit application.225 This requirement does not raise any issues of Indian sovereignty; it does raise issues of Indian attempts to regain control over objects and sites that have been managed by archaeologists and non-Indians226 and of possible constitutional restraints against the

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Where non-Indians have entered into consensual relationships with Indians for the use of Indian land, the historical case for tribal civil jurisdiction and related tribal legislative authority is quite strong. Tribal authority to tax, license, and regulate conduct of non-members is subject to the same constitutional limitations that apply to the exercise of any other governmental jurisdiction. However, the same reasoning should apply to matters of domestic relations in instances of intermarriage to contracts, leases, and agreements concerning the use of Indian land, and other intertribal matters. See supra note 222, at 515 (emphasis added). See also Montana v. United States, 101 S. Ct. at 1254.

In addition to civil sanctions, Indian tribes have the power to exclude non-members from Indian owned lands or lands held in trust for the Indians by the United States for violation of tribal ordinances. See Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). See also Montana v. United States, 101 S. Ct. at 1254 (tribe may prohibit non-members from hunting or fishing on land belonging to the tribe or held by the United States in trust for the tribe or may condition entry by charging a fee or establishing bag and reel limits)

Tribal authority to regulate the activities of non-members on fee-tenant land held by non-members within reservation boundaries is limited to circumstances where "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 101 S. Ct. at 1258. Thus, the importance of prehistoric and historic Indian sites to tribal religion and culture, and the importance of tribal religion and culture to tribal sovereignty and cultural autonomy, may justify tribal regulation of archaeological resources on fee-tenant lands within reservation boundaries. This authority, along with tribal authority over members within reservation boundaries, therefore may allow tribal ordinances to extend protection to archaeological resources situated on fee-tenant lands that are not subject to ARPA's provisions.

The importance of prehistoric and historic Indian sites to tribal religion and culture, and the importance of tribal religion and culture to tribal sovereignty and cultural autonomy, may justify tribal regulation of archaeological resources on fee-tenant lands within reservation boundaries. This authority, along with tribal authority over members within reservation boundaries, therefore may allow tribal ordinances to extend protection to archaeological resources situated on fee-tenant lands that are not subject to ARPA's provisions.
establishment of religion. Thus if Indians want to affect or prevent the archaeological development of sites not on the reservation, they must establish overriding religious or cultural significance of the sites.

3. Grounds for Issuing a Permit

The federal land manager may issue a permit for investigation of archaeological resources on public lands and, when appropriate, on Indian lands, if (1) the applicant is qualified to perform the activity, (2) the activity is undertaken to further archaeological knowledge in the public interest, (3) the resources excavated or removed from public lands will remain the property of the United States and will be preserved in a suitable institution, and (4) the activity is consistent with any management plan for the affected lands. For archaeological investigation on Indian lands, tribal approval must also be obtained.

ARPA's solution to the problem of applicant qualifications is better than that of the Antiquities Act. Under the Antiquities Act, federal land managers issue permits only to qualified institutions such as museums and universities. Under ARPA, however, federal land managers may issue permits to any "person" who meets qualifications to be defined by the uniform regulations. ARPA thus relies on the federal land mangers to make case-by-case assessments of applicant qualifications rather than resorting to shorthand categories. This not only ensures that institutions and individuals undertaking archaeological projects are in fact qualified, but allows qualified individuals who are not affiliated with a museum or educational institution to conduct their own research.

ARPA, unlike the Antiquities Act, requires that excavation be in the public interest. The Antiquities Act provides that land managers may issue permits for investigations undertaken "for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects." ARPA provides that land managers may only issue permits "to further archaeological knowledge in the public interest." ARPA thus recognizes that archaeological resources belong to the public and that the archaeologist's interest and the public interest do not always coincide.

A federal land manager cannot issue a permit under ARPA unless he or she is satisfied that the applicant has made adequate provision for the preservation of the archaeological resources. Before ARPA, excavators generally retained archaeological resources retrieved from public lands or Indian lands. This created two problems: the public did not have access to public resources, and Indians lost all control over resources retrieved from Indian lands. ARPA attempts to deal with these by: (1) declaring that archaeological resources retrieved from public lands "remain the property of the United States," and (2) requiring the consent of the affected tribe to the exchange and ultimate disposition of archaeological resources recovered from Indian lands. ARPA, however, also provides that resources recovered from public lands, regardless of their religious or cultural significance to Indian tribes, remain public resources.

Congress inserted the requirement that the proposed excavation be consistent with any land management plan to allow for the conservation of archaeological resources. Conservation is sometimes preferable to destruction, cultural traditions and would gladly step aside in favor of protecting their manifestations. As a matter of principle and in the interest of our dwindling cultural resources, we should guard against having archaeological investigation nullified because of intimated traditions of questionable origin.
development because archaeological resources are nonrenewable and because future archaeologists may have the knowledge, technology, and methodology to extract more information from the resources. The consistency requirements, however, may have other, unintended effects. For example, a proposed archaeological research project could conflict with a mining project called for by a land management plan. Because ARPA does not impose permit requirements on mining, the archaeological resource would be developed only to the extent that it is protected by other federal law, such as the Archaeological and Historical Preservation Act.

ARPA generally leaves the decision whether to issue a permit for excavation on public lands to the discretion of the federal land manager. This, with one exception, applicants who meet ARPA’s requirements have no right to a permit. At the request, however, of any state governor acting for the state or its educational institutions, a federal land manager must find that an applicant is qualified and that the proposed activity is in the public interest and must impose no additional terms and conditions on the permit other than those requested by the governor. ARPA’s legislative history does not explain this provision. It appears, however, to be an attempt to give states greater control over their archaeological resources.

4. Procedural Aspects of Permits

Persons seeking a permit to develop archaeological resources on public lands, or on Indian lands if the persons are not exempt by section 4(i), must submit to the federal land manager an application describing the time, scope, location, and specific purpose of the proposed work. In the case of an application to excavate on Indian land, the federal land manager must seek the approval of the Indian or Indian tribal authorities having control over the land. In the case of an application to excavate on public land, the federal land manager must determine whether the proposed activity will harm or destroy a site of religious or cultural significance to an Indian or Indian tribe, and, if it will, notify the Indian or Indian tribe concerned.

ARPA does not tell the federal land manager what to do after giving such notice. The first amendment may require that the Indian or Indian tribe whose religious interests are threatened have an opportunity for comment. What weight to accord such comment is, however, an open question. ARPA does not require the federal land manager to deny an application because of unfavorable comments from concerned Indians. The American Indian Religious Freedom Act and the federal trust responsibility for Indian property, however, require the federal land manager to consider the effect on Indian religious and cultural interests of any action on a permit application. ARPA thus leaves the resolution of conflicts over the development of archaeological resources on public lands to the regulations and other federal law.

ARPA does not provide other interested parties notice or a chance to comment before permit issuance. In fact, section 4(i) of ARPA exempts ARPA permits from section 106 of the National Historic Preservation Act. That section requires that, before issuing any “license,” a federal agency must: (1) “take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register,” and (2) “shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.” ARPA’s legislative history suggests that Congress inserted section 4(i) to reduce the red tape involved in getting a permit and to eliminate apparent duplication of effort. In fact, however, this exclusion seems to shift responsibility for determining whether archaeological investigations will affect National Register properties, from the Advisory Council on Historic Preservation to the federal land managers.

A recent Ninth Circuit decision, County of San Bernardino Museum v. Smithsonian Institution, suggests that neither the Administrative Procedure Act nor the fifth amendment require that federal officials conduct a hearing before they issue an ARPA permit. The plaintiffs, the
G. Protection of Information From Disclosure Under the Freedom of Information Act: Section 9

Section 9 provides that information concerning the nature and location of any archaeological resources protected by ARPA may not be made available under the Freedom of Information Act unless the federal land manager determines: (1) that disclosure would further the purposes of the Archaeological and Historical Preservation Act, and (2) would not create a risk of harm to the resource.270

The purpose of section 9 is to protect archaeological resources by protecting information about these resources.271 Federal land managers have comprehensive lists of identified archaeological sites on public lands.272 Section 9 makes this information unavailable to would-be violators to prevent the destruction of these resources.

As with the permitting provisions, there are exceptions to this provision to accommodate state and local interests in archaeological resources. If a governor requests information concerning archaeological resources within the governor's state, and if the request states the specific place and purpose for which the information is sought, and if the governor makes a commitment to protect the information from release and the resource from commercial exploitation, the federal land manager must provide the governor with the requested information.273

II. Development of the Public Resource for the Public Benefit: Sections 5 and 11

Historically, private individuals and institutions have excavated and developed the nation's archaeological resources.274 Lack of communication about and a lack of awareness of archaeological resources already recovered has led to research designs that involve unnecessary excavations.275

270. 16 U.S.C. § 470hh. This provision is not waived by notice given pursuant to ARPA regarding sites of religious or cultural significance to Indian tribes. Id. Congress encourages the federal land managers, however, to "carry out a active public information program and to publish the appropriate prohibitions and warnings in their respective brochures, maps, visitor guides, and to post signs at entrances to public lands." House Report, supra note 7, at 8, reprinted in 1979 U.S. Cong. & Ad. News at 1711.

271. See Senate Hearings, supra note 29, at 43 (statement of Dr. Ernest Allen Connally).

272. In response to Executive Order 11593, the Forest Service, along with other land management agencies, has increased its efforts to inventory prehistoric, historic, and paleontological sites on Federal lands and to incorporate protection measures into the land management process. Conservatively, the Forest Service alone may inventory in excess of a million sites on National Forest lands within the next several years.

Id. at 44, 45 (statement of John R. McGuire).


274. See Senate Hearings, supra note 29, at 89 (statement of Dr. Raymond R. Thompson).
vations." To deal with this problem, section 11 directs the Secretary of Interior to institute a program of information sharing between federal agencies and private individuals regarding the nation's archaeological resources. Moreover, section 5 authorizes the Secretary of Interior to promulgate regulations that will foster the exchange between institutions and museums of archaeological resources recovered from public lands. These provisions should expand the nation's archaeological resource base.

III. REGULATORY PROBLEMS

ARPA fails to resolve all of the problems raised by the Antiquities Act. Moreover, section 5 authorizes the Secretary of Interior to promulgate regulations that will foster the exchange between institutions and museums of archaeological resources recovered from public lands. The federal agencies will also have to consider the notice requirements of the due process clause of the fifth amendment.

There are several approaches which regulators could take toward the problem of defining "archaeological resources." The regulations could, for example, focus on the words "archaeological interest." A material remain is of archaeological interest if it can provide information about man's past life. Because virtually any material remain of past human life is of potential informational value to the archaeologist, a definition based on this broad conception of archaeological interest would provide broad coverage and the flexibility to accommodate future expansion of the archaeological resource base.

Such a definition, however, would presume some understanding of archaeology, and therefore would probably not possess the clarity and specificity necessary to satisfy the due process requirements of the fifth amendment. Diaz stated that a statute is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily differ as to its application." While archaeologists of "common intelligence" would understand the scope of "archaeological resource" under this definition, non-archaeologists might not. Archaeologists seek a definition of maximum scope and flexibility to ensure the preservation of archaeological resources for the future. Native Americans, like archaeologists, want broad protection, but may also want to protect sites of current religious and cultural significance that are not necessarily of archaeological significance. Recreational users of public lands worry about ARPA's criminal penalties and thus seek a narrow definition that states exactly what resources are protected. Developers of mineral resources favor a narrow definition to avoid expanding the protection that other federal laws afford archaeological resources. The federal agencies will also have to consider the notice requirements of the due process clause of the fifth amendment.

A. Definition of Archaeological Resource

As seen in Section I, the term "archaeological resource" may encompass a wide variety of things. ARPA therefore seeks a flexible definition of "archaeological resource" that is also definite enough to avoid the vagueness problem of the Antiquities Act. Section 3(1) gives a basic definition of "archaeological resource" as "material remains of past human life or activities which are of archaeological interest" and then directs the federal agencies to define in regulations the remains which fall within this definition.

In writing a regulatory definition of "archaeological resource," the federal agencies must consider the interests of the groups that will be affected by the definition. Archaeologists seek a definition of maximum scope and flexibility to ensure the preservation of archaeological resources for the future. Native Americans, like archaeologists, want broad protection, but may also want to protect sites of current religious and cultural significance that are not necessarily of archaeological significance. Recreational users of public lands worry about ARPA's criminal penalties and thus seek a narrow definition that states exactly what resources are protected. Developers of mineral resources favor a narrow definition to avoid expanding the protection that other federal laws afford archaeological resources. The federal agencies will also have to consider the notice requirements of the due process clause of the fifth amendment.

284 See Senate Hearings, supra note 29, at 87 (testimony of Dr. Raymond H. Thompson).
285 Id. at 93 (testimony of Leroy Wilder).
286 See, e.g., 46 Fed. Reg. 5566, 5567 (1981). Early comments on the issuance of regulations under the Act suggested, for example, that a definition of "what is not an archaeological resource" be used for the benefit of collectors. Id. at 5567.
287 See Senate Hearings, supra note 29, at 40 (testimony of Sen. Dominick A.
A broad definition of "archaeological resource" under ARPA may expand protection under other acts. The survey and salvage provisions of the Archaeological and Historical Preservation Act, 16 U.S.C. §§ 469-469a. (1976 & Supp. III 1979), for example, are triggered when federally licensed or funded activities may cause "irreparable loss or destruction of significant ... archaeological data." Id. § 469a-1. 469a-2 (emphasis added).
288 See supra note 114 and accompanying text.
289 The proposed regulations adopt this construction. Section 1245 (a) provides in part: "An object, site, or other material remains is of archaeological interest if, through its scientific study and analysis, information or knowledge can be obtained concerning human life or activities." 46 Fed. Reg. 5566, 5570 (1981) (to be codified at 36 C.F.R. pt. 1245 (a)) (proposed Jan. 19, 1981).
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One disadvantage of this approach is that it would be difficult to decide on a list of categories. Archaeologists would want to include a broad range of artifactual, organic, contextual, and environmental data. Native Americans would seek to include "non-archaeological" sites of religious or cultural significance. Recreational users and developers would argue that Congress never intended to cover such a broad range of resources. Thus, the debate over the scope of the Act's protection would shift from the functional definition to the list.

One advantage of this approach is that it would be easier to modify a list than a basic functional definition. In fact, it would probably be necessary to modify the list of categories frequently. However comprehensive the list, situations would arise in which an item deserving protection was not included, and prosecution for damage to the "unlisted" resources would be difficult. In recent prosecution under ARPA in Utah the judge instructed the jury to consider only damages listed in section 3(1). Although this case could be distinguished from future

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Archaeologists would probably differ as to what constitutes a "material remain of archaeological interest." Without more, then, this broad definition would probably fail to satisfy Diaz. The 100 year age limit reduces the vagueness problem if it can be assumed that it is a matter of common understanding that "old things" are of interest to archaeologists. The broad definition would still, however, include a variety of "remains," such as the distribution of artifacts within a site, that are less obviously of archaeological interest.

A broad definition would create administrative as well as constitutional problems. The broader and more flexible the definition of "archaeological resource," the more pervasive the permit requirement for activities on public and Indian lands, and the more frequently questions will arise concerning the Act's coverage. A broad definition would thus increase the burdens on the federal land managers administering the permitting system.

Congress did not want ARPA to cover "virtually any object located on public lands"; it intended to protect only remains of "true archaeological interest." A narrow construction of "archaeological interest" would, however, be the best way to limit the scope of the Act. If archaeological investigation were viewed as primarily involving artifact analysis, much contextual and environmental information would be excluded from the definition of "archaeological resource," and the Act would not offer any greater protection than the Antiquities Act.

If the regulations were to focus instead on the value of a material remain in a particular research design, the definition would begin to resemble a requirement of "archaeological significance." Section 3(1) suggests an alternative approach to the problem of defining "archaeological resource." Section 3(1) contains a list of material remains that are intended to fall within the definition of archaeological resource. Using this list as a guideline, the federal agencies would specify categories of material remains, such as artifacts, structural remains, and site sediments, which would generally be of archaeological interest. Remains in these categories would be deemed "archaeological resources" under the Act.

Section 3(1) contains a list of material remains that are intended to fall within the definition of archaeological resource. Using this list as a guideline, the federal agencies would specify categories of material remains, such as artifacts, structural remains, and site sediments, which would generally be of archaeological interest. Remains in these categories would be deemed "archaeological resources" under the Act.

292 When age might be difficult to ascertain as with isolated coins or bullets, ARPA's exemptions would apply (Id. § 470k(bt)).
293 Act supra text accompanying note 107.
295 Act supra text accompanying note 107.
296 Act supra note 34. Another possibility would be to refine further the notion of "archaeological interest" by defining the nature of the investigation for which the material remains are of use. This would entail, however, a long and complicated discussion of archaeological methodology not suitable for purposes of the Act.
298 The proposed regulations seem to adopt this approach. Section 1215.3 sets forth several categories of "material remains of past human life or activities" including

(t) Surface or subsurface structures, shelters, facilities, features, (ii) surface or subsurface artifact concentrations or scatters and the three-dimensional relation of the artifacts to each other on the ground, (iii) whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing and ornaments, (iv) byproducts, waste products, or debris resulting from manufacture or use of human made or natural materials, (v) organs, waste (vi) skeletal and associated remains, (vii) rock carvings, rock paintings, rock engravings and similar works, (viii) rock shelters and caves or portions thereof containing any of the above material remains, (ix) all portions of shipwrecks, (x) paleontological remains when they are found in direct physical relationship with archaeological resources, (xi) the physical site, location, or context in which any of the foregoing are situated, and (xii) any portion or piece of any of the foregoing.

The proposed regulations apparently presume such remains to be of "archaeological interest" and to be protected under ARPA if more than 100 years old. Id. at 5567.
299 Senate Hearings, supra note 29, at 87 (testimony of Dr. Raymond H. Thompson).
300 Id. at 93 (testimony of Leroy Wilsden). These sites are arguably excluded, however, by the requirement that they be "material remains of past human life or activities of "archaeological interest." 16 U.S.C. § 470bb(1) (Supp. III 1979).
301 In support of their argument these groups may point to the language of the Act. The list of "archaeological resources" in section 3(1), 16 U.S.C. § 470bb(1) (Supp. III 1979), does not include many categories of contextual and environmental data. The Act's legislative history suggests, however, that Congress was fully aware of the range of non-artifactual remains of potential use to the archaeologist, and did not intend the definition in section 3(1) to be so restricted. See Senate Report, supra note 113, at 7.
302 Great care has been taken in the proposed regulations to list a wide range of resources covered under the Act. Even so, the list contains notable omissions. For example, it does not include inorganic remains in an archaeological setting that have not been modified by man. See § 1215.3(a), 66 Fed. Reg. 5566, 5570 (1991) (to be codified at 36 C.F.R. § 1215.3(a)) (proposed Jan 19, 1981). Unworked shell, stone and other raw materials are not strictly speaking tools or byproducts and an argument can be made that they are not "archaeological resources" as defined by the regulations, yet they are material remains of past human activities that can yield a great deal of information to the archaeologist. See R. Dunning, supra note 10, at 119. Another example of an omitted resource is fossil footprints. See, e.g., N.Y. Times, Sept 2, 1978 at 64 (tumbleweed of material sent over N.Y. Times News Service and Associated Press wires during the 1978 hunters' strike).
303 See supra note 116.
cases because there are at present no regulations under ARPA, the same considerations of notice and fairness would often prevent successful prosecution under the regulations for damage to an “unlisted” resource. Thus, as these situations arose, the list would have to be modified.

A second, more obvious advantage of using a list of categories to clarify the definition of “archaeological resource” is that it would give the public adequate notice. Because a list approach would reduce the vagueness problem, it would reduce the need for the 100 year limit, and would thus allow Congress to expand ARPA’s protection by eliminating or reducing the 100 year limit.

B. Penalty Assessment

The federal agencies writing regulations to implement ARPA’s civil penalty provisions must provide guidance to the federal land managers about (1) when to assess civil penalties, (2) how to determine the amount of a civil penalty, and (3) when to mitigate a civil penalty. In writing these regulations the agencies face two related basic problems. First, the civil penalty provisions serve several purposes: they are to deter violations, to compensate the public and Indians for lost resources, and to educate the public. These purposes may conflict; a $100 penalty may suffice to educate a treasure hunter but be utterly inadequate to compensate the public for the pot which the treasure hunter destroyed. Second, the groups affected by the civil penalties have conflicting interests. Archaeologists and recreational users fear that an unwitting violator of the Act or a permit may subject them to high civil penalties.

The proposed regulations for several stages of “hearing” prior to penalty assessment are an effort to maximize the opportunity for settlement and compromise. 46 Fed. Reg. 35,574-75 (1981) (to be codified at 36 C.F.R. § 1215.17) (proposed Jan. 19, 1981). During initial “paper hearing” stage, the person charged is served with a “notice of assessment” which states the facts believed to show a violation, the provisions of the Act or the permits alleged to have been violated, the amount of the penalty, and the right of the person charged to file a petition for relief. Id. It may also contain an offer of mitigation or compromise. Id. The person charged is then given the opportunity to have informal discussions with the federal land manager, and to petition for relief. Id. Failing resolution through the process of “paper hearing,” the person charged is given the opportunity to request a formal adjudicatory hearing. Id. In the end, judicial review is available. Id.

307 Section 1215 17 of the proposed regulations, for example, requires the federal land manager to issue a “notice of violation” upon discovery of a violation of the Act or of the terms and conditions of a permit issued under the Act or the Antiquities Act. 46 Fed. Reg. 35,574-75 (1981) (to be codified at 36 C.F.R. § 1215.17) (proposed Jan. 19, 1981). The notice of violation must state the facts believed to show a violation, the provisions of the Act, regulations or permit that are alleged to have been violated, and a statement that a civil penalty may be assessed or that no penalty will be assessed. Id. Section 1215 17 requires that a notice of violation be served in every case whether or not concurrent criminal proceedings are pending. Id. The notice of violation must also state whether or not the federal land manager intends to assess a civil penalty. Id. Thus the function of the notice of violation appears to be largely educational in nature.


309. When the value of the lost archaeological resource is great and the cost of restoration and repair is high, compensation will usually be the goal. The amount of penalty involved will be high, thus burdensome to the average citizen contrary to congressional intent. House Report, supra note 7, at 11; reprinted in 1979 U.S. Const. & Admin. News at 1714. Compensation will not be burdensome, however, in the case of egregious violations warranting criminal prosecution. Id. See also Senate Hearings, supra note 29, at 61 (testimony of Michael D. Hawkins).

310. Section 1215 18a(100) of the proposed regulations allows the federal land manager to elect to assess a predetermined fixed amount. 46 Fed. Reg. 35,574-75 (1981) (to be codified at 36 C.F.R. § 1215.18(a)100) (proposed Jan. 19, 1981). This approach is recommended, however, only in situations where the person charged has not committed a previous violation, the damage is minimal, and all archaeological resources have been recovered. Id. Thus, if confronted with numerous minor violations involving minimal damage, the federal land manager may establish a fixed penalty schedule for administrative convenience so long as the penalties assessed do not exceed the ceiling imposed by the Act. Id.
for example, could specify that the penalty for an unintentional first violation that causes less than $200 worth of damage would be $20. A schedule would give users of public lands notice and would be easy to administer. A schedule would also, however, encourage litigation. ARPA places a ceiling on civil penalties equal to twice the sum of: (1) the archeological, or commercial value of the damaged resource, and (2) the cost of restoration and repair. Unless the penalties in the schedule were quite low, they would often approach or exceed this limit. Thus, civil penalties set by a schedule, particularly large penalties, would often be challenged.

Alternatively, the regulations could require the federal land manager to calculate the maximum penalty in each case and then decide whether to reduce the penalty based on specific criteria, such as the nature of the violation, the violator's intent, the violator's financial situation, or other relevant considerations. This approach would offer federal land managers greater flexibility to tailor the penalty to the facts of the particular case. It would, however, entail a greater administrative burden.

The uniform regulations could achieve a relatively satisfactory resolution of the competing concerns of those affected by civil penalties by making compensation the goal except where it would be unduly burdensome. The regulations should therefore direct the federal land manager to calculate the maximum penalty amount and then to consider mitigating circumstances if appropriate. Mitigation would not, for example, be appropriate in cases where concurrent criminal actions are pending. Nor would mitigation be appropriate in cases of severe damage to archeological resources unless the maximum penalty would cause extreme financial hardship. Substantial mitigation would, however, be appropriate if damage was minimal and modest penalties would adequately educate and deter.


1982] Archaeological Resources Protection

C. Conflicts Between Archaeological and Other Interests

Archaeological investigation can be controversial. Conflicts can arise, for example, between archaeologists who want to survey, excavate, and remove archeological resources, and Indians who view these activities as a desecration of important religious or cultural sites. Conflicts can also arise when archeological investigation interferes with commercial development of natural resources. ARPA and other federal laws establish ways to resolve some of these conflicts. Questions remain, however, that the regulations must address.

1. Conflicting Commercial and Archaeological Interests

Section 12(a) of ARPA exempts activities relating to mining, mineral leasing, and other multiple uses of public lands from ARPA's permit requirements. ARPA thus leaves the regulation of these activities to other federal laws. This exemption significantly reduces the protection for archeological resources on public lands.

The federal laws regulating mineral leasing, "mining," reclamation, and multiple uses require federal land managers to consider the possible adverse effects of these activities on archeological resources and to mitigate these effects whenever possible. These laws, however, do not provide complete protection for archeological resources. The
Archaeological and Historical Preservation Act requires archaeological survey and salvage work only when commercial activities harm resources of "archaeological significance." Therefore, when a conflict arises between commercial interests and archaeological interests in "insignificant" resources, commercial interests prevail. At first glance, it appears sensible to favor tangible present economic interests over uncertain future archaeological interests. Archaeological resources, however, must be protected because they are vanishing rapidly and cannot be renewed. Even archaeological resources that are presently "insignificant" may be made significant by advances in archaeological research techniques and therefore deserve protection.

Section 12(b)’s exemption of commercial activities also means that the federal land managers cannot use ARPA to prevent or punish violations by commercial developers of the other federal laws and regulations protecting archaeological resources. This is a serious problem because commercial developers often conceal or destroy archaeological resources and the other federal laws do not contain penalties to prevent these practices. To stop these practices, Congress should amend ARPA to provide that mineral leasing, mining, reclamation or other multiple uses of public lands will be treated as complying with a constructive ARPA permit if they comply with other federal laws, regulations or permits. A violation of these laws would then constitute a violation of an ARPA permit and could be punished under ARPA.

ARPA does not discuss how to resolve conflicts between present excavations and planned mining projects. The federal agencies have the authority, however, to issue regulations for permit termination. The regulations could, therefore, require or allow federal land managers to terminate ARPA permits if amendments to the applicable land management plan brought the permitted archaeological activity into conflict with the proposed commercial activity. Such regulations, however, would be untimely for the archaeologists who, in reliance on the permit, have begun to develop the archaeological resources. The regulations, therefore, should limit permit termination to specific circumstances, such as where conservation is appropriate, or where the public interest in the proposed conflicting land use is significantly greater than the public interest in the present archaeological investigation. Such regulations would strike a fair balance between the development of natural and archaeological resources.

2. Indian Religious Interests in Archaeological Resources on Public Lands

To accommodate Indian religious, cultural, and sovereign interests, ARPA provides: (1) that federal land managers cannot issue ARPA permits to excavate on Indian lands without the approval of the Indian or Indian tribe that controls the land; and (2) that federal land managers must provide notice to Indians or Indian tribes whose religious or cultural interests are potentially affected by excavations on public lands. Section 10(a), however, directs the federal agencies to consider the American Indian Religious Freedom Act in writing regulations to implement ARPA. That Act states that it is the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." The regulations, therefore, must establish a permitting procedure for archaeological investigation on public lands that reconciles the development of the nation’s archaeological resources with Indian religious interests. The difficulties of such reconciliation arise in all stages of the permitting process: notification of potentially affected Indians or Indian tribes, review of the permit application, and granting or denial of the permit.

Section 4(c) of ARPA requires the federal land manager to notify Indians or Indian tribes if an application to develop archaeological resources on public lands involves sites of potential religious or cultural significance to Indians. This requirement creates two problems: (1) how to decide whether a site is of religious or cultural significance to an Indian tribe, and (2) how to locate the interested tribe in order to serve notice.

Neither ARPA nor the American Indian Religious Freedom Act sets forth objective criteria of religious or cultural significance. Indeed, it seems that "significance" necessarily depends on the subjective views of the concerned Indians. Section 4(c) does not require notice to Indians until the federal land manager decides that the activity may harm an archaeological interest.
Indian religious or cultural site, but making this decision without Indian assistance may prove nearly impossible. Several responses to this problem are available. The regulations could, for example, provide that all historic and prehistoric Indian sites are of potential religious or cultural significance, which would trigger the notice requirement in almost every case. Alternatively, the regulations could solicit Indian assistance in identifying religious or cultural sites on public lands; this would simplify the subsequent permitting process.

After he or she decides that harm to Indian religious or cultural sites may occur, the federal land manager faces the problem of serving notice locating the concerned tribe is no easy task: the modern distribution of Indian tribes bears little relation to the prehistoric distribution. This underscores the need to solicit Indian assistance in identifying religious and cultural sites. As noted above, the first amendment probably requires that the regulations give affected Indians a chance to comment on proposed ARPA permits that involve sites of religious or cultural significance to the Indians. Neither ARPA nor the first amendment, however, requires the federal land manager to accede to the desires of the affected Indians. Indeed, the first amendment probably prohibits regulations giving Indians a veto over archaeological development on non-Indian land.

During Senate Committee hearings on ARPA, American Indian groups sought veto power over all permit applications involving sites of religious or cultural significance to Indians, whether on Indian lands or public lands. Congress declined to adopt such a provision for public lands and left resolution of potential conflicts between Indians and archaeologists to the regulations and the federal land managers.

The regulations probably cannot give concerned Indian tribes broad veto power over archaeological resource development on public lands without violating the establishment clause of the first amendment. A recent case, Badoni v. Higginson, dealt with a similar question, and concluded that the government could not issue regulations in aid of religious practice without violating the establishment clause. The plaintiffs in Badoni were Navajo Indians who sought an order requiring federal officials to issue regulations to prevent further desecration and destruction of the Rainbow Bridge area by tourists. The plaintiffs claimed that the government impeded the practice of their religion by allowing tourists to visit Rainbow Bridge because it permitted desecration of the site’s sacred nature and denied them the right to conduct religious ceremonies there. The Tenth Circuit said that the affirmative government actions requested by the plaintiffs, such as regulations to exclude tourists from the Monument, would be clear violations of the establishment clause.

The Court noted that the government had not extended plaintiff’s religious activities in the area of Rainbow Bridge and that the plaintiffs could enter the monument on the same basis as others. Regulations under ARPA which would give Indians a veto power over excavations on public lands would be virtually indistinguishable from those requested by the plaintiffs in Badoni. In some cases allowing excavation of archaeological resources may not interfere with Indians’ free exercise of religion. Granting veto authority to Indian tribes over all permit applications involving sites of potential religious significance would appear to run afoul of the establishment clause. Cases may arise, however, where archaeological investigation would restrict the exercise of Indian religion or even destroy an Indian religious site. In such cases, the free exercise clause may compel federal land managers to deny a permit or to impose terms and conditions on the permit to mitigate adverse effects. Because regulations granting veto authority

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338. Id.
339. Id.
340. Id. at 179.

The text may be stated as follows: what are the purposes and the primary effect of the enactment. If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say, that to withstand the structure of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion.

Id. (quoting School District of Abington v. Schempp, 374 U.S. 203, 222 (1963)).

341. Id. at 178.
342. See supra note 340.

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Government may not finance religious groups or undertake religious instruction or blend secular and sectarian education or use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence. The government must be neutral when it comes to competition between sects, it cannot favor any sect or any person. It may not make a religious observance compulsory. It may
to Indians would probably be an impermissible establishment of religion, reliance on the federal land manager's discretion may be the only way to reconcile the mandates of the free exercise clause and the establishment clause.

The regulations and the federal land managers must also consider the federal trust responsibility for Indian property. Often archaeological sites are important cultural as well as religious resources for Indians or Indian tribes. As such, they are subject to the fiduciary obligations imposed on federal officials in the management of Indian property.\(^{34}\)

The regulations should establish a procedure that: (1) gives adequate notice to concerned Indians or Indian tribes of permit proceedings that may affect sites of religious or cultural significance, and (2) affords concerned Indians and Indian tribes adequate opportunity to comment on permit applications. The regulations should encourage Indian participation at an early stage. Indian assistance in the identification of religious or cultural sites would not only serve Indian interests; it would simplify the task of the federal land managers in finding and notifying affected Indians and enable the managers to make more informed decisions.

IV. CONCLUSION

ARPA offers greater protection for archaeological resources on public lands than did prior federal law. ARPA's definition of "archaeological resource" includes a wide range of artifactual, contextual, and environmental information and can expand as archaeologists begin to use new types of information. ARPA's enforcement provisions give federal land managers the tools necessary to curtail commercial looting of archaeological sites and trading in illegally obtained archaeological resources.

In addition to providing increased protection, ARPA clarifies federal policy concerning the development of archaeological resources and establishes, in conjunction with other federal laws, a comprehensive program for the management of the remaining archaeological resources on public lands and Indian lands. ARPA gives the federal land managers considerable discretion to deny permits if development is inconsistent with land management plans or if conservation is more appropriate. ARPA leaves the resolution of conflicts with natural resource development to other federal laws; implicitly, ARPA says that the public interest in such cases requires preservation only of "archaeologically significant" resources. ARPA also contains the first statutory recognition of Indian religious and cultural interests in archaeological resources and offers them a greater role in archaeological resource management, particularly on Indian lands.

Though ARPA is a significant improvement over prior law, ARPA also creates or leaves in place significant gaps in the protection of archaeological resources. Congress believed it had to leave these gaps to comply with the Constitution or to protect certain groups. Congress often, however, could have accomplished these objectives at less cost to the nation's archaeological resources through more careful drafting.

Congress' attempt to avoid unconstitutional vagueness, for example, resulted in an unnecessary limitation on the scope of the Act's protection. The due process requirements set forth in the \(14=\) case could be met by defining "archaeological resource" generally in the Act and then providing in the regulations lists of archaeological resources encompassed by the definition. The 100 year limit is, therefore, an unnecessary gap in the protection of archaeological resources.

Congress' decision not to make possession of illegally obtained artifacts a crime also creates an unnecessary gap. The Constitution allows Congress to prohibit possession if objects possessed at the date of enactment are subject to a grandfather clause. Congress should, therefore, amend ARPA to make possession of illegally obtained artifacts a crime and thus to improve enforcement of ARPA.

Congress' desire to protect treasure hunters and recreational users of public lands from unreasonable civil or criminal penalties has also resulted in several significant exceptions to ARPA. For example, the exemption provided to collectors of arrowheads found on the ground surface unduly restricts the Act's protection. There is no reason to give collectors of arrowheads greater protection than persons who destroy other resources, such as shell mounds, that are less clearly of archaeological interest. Congress should eliminate the exemption; it can rely on the federal land manager's discretion to protect innocent treasure hunters. Congress in fact already relies on this discretion to protect
innocent treasure hunters from severe penalties under the general government property statutes. Similarly, discretionary forfeiture need not include the public's archaeological resources. It hardly seems burdensome to require that violators of the Act return to the public archaeological resources that they have taken illegally. Congress should therefore amend the forfeiture provisions to provide mandatory return of archaeological resources involved in violations of the Act. Finally, Congress' concern over unreasonably burdensome penalties led it to undue reliance on the federal land manager's discretion to seek compensation for lost or damaged archaeological resources. Understandably, compensation cannot be required in all cases if the civil penalty provisions are to serve their multiple purposes. There is no reason, however, not to require compensation in cases where criminal convictions have been obtained. At the very least, therefore, Congress should amend ARPA to impose liability on convicted violators for the archaeological or commercial value of the damaged archaeological resources and the cost of restoration and repair.

Congress did not want to subject mineral resource development, reclamation, and other multiple uses of public lands and Indian lands to additional permit requirements and therefore exempted these activities from ARPA. This exemption ultimately reduces the protection of both insignificant and significant archaeological resources. Congress could accomplish its objective by providing that these activities are conducted in compliance with a constructive ARPA permit as long as they are conducted in compliance with other federal laws. This would allow the federal land managers to use ARPA's criminal or civil penalty provisions to protect archaeological resources from destruction by developers.

ARPA provides little guidance for resolving competing Indian and archaeological interests in archaeological resources on public lands. Here, however, amendments or regulations may not be helpful because both Congress and the federal agencies are constrained by the Constitution. To deny permits whenever activities would affect sites of religious significance to Indians would probably violate the establishment clause of the First Amendment, yet to grant permits would, in some cases, effectively prohibit the free exercise of Indian religion. Thus, the federal land managers must carefully consider the facts of each case. The regulation, however, significantly aid the land managers by establishing a notice and comment procedure which ensures adequate consideration of Indian interests.

Archaeological resources are valuable, vanishing, and nonrenewable. ARPA is a significant step toward halting unnecessary destruction of these resources and ensuring their rational development. The effort must not end here, however. Congress should amend the Act to eliminate unnecessary loopholes. The federal agencies should carefully draft regulations to provide the comprehensive protection for archaeological resources which Congress intended. The federal land managers should comply with the permit provisions of the Act and the regulations, give adequate consideration in the permit process to the interests of Native Americans and other concerned parties, and require conservation where appropriate. Environmentalists and other citizens can, of course, contribute by reporting any illegal removal, damage, or destruction of archaeological resources on public lands and Indian lands. With such efforts, archaeological resources can be preserved for both the present and the future.
CIVIL CASE BACKGROUND PAPER

CIVIL RESPONSIBILITIES UNDER THE FEDERAL COLLECTIONS ACT OF 1966

By
Donna Lear

The Federal Collections Act of 1966 (P.L. 89-508, 80 Stat. 309) requires that Government agencies attempt collection of all claims for money or property arising out of their activities. Title 4 of the Code of Federal Regulations (CFR), Chapter II, contains the regulations issued jointly by the Comptroller General and the U.S. Attorney General prescribing standards for administrative actions to carry out the intent of the Act. These regulations provide standards for referral to the Department of Justice for litigation of those claims that agencies are unable to collect in full.

Employee responsibilities are:

1. Keeping informed of policies and requirements for internal action for handling of claims.

2. Reporting promptly and obtaining facts of any accident or incident that may result in a claim against a private party for damages to the Government.

3. Taking such action as may be required to protect the interest of the U.S. or its employees, including doubtful debt claims (usually referred to the USDA, Office of the General Counsel (OGC) for legal advice).

4. Knowing that you do not have the authority to independently waive the right of the U.S. to collect damages due it.

Damage appraisal standards (other than those arising from a contract or other formal agreement):

1. All measurable damages caused by illegal or negligent acts.

2. Appraisals by Forest Service officer or non-Government person who can qualify as an expert in court, if necessary.

3. Use methods, simple and explainable to a violator or in court. Do not include:
   a. Investigation costs.
   b. Surveys to establish Forest boundaries.
   c. Intangible damages.
   d. Penalties (unless under terms of agreement).

Claims may result from unauthorized or illegal activities on Federal land when the activity results in damages to, or loss of, the resource (e.g., timber, grazing, cultural) and there is a known suspect. The investigative report should contain all known facts or evidence to support such a claim. Forest Service regulations require that if there is a known suspect and the damages are estimated at over $10,000, an opinion of an appropriate legal counselor will be obtained concerning the legal merit of such a claim. Regardless of the amount of the damages incurred by the Government, the decision as to whether to pursue collection action must not be arrived at arbitrarily, but must be based on the facts available.

An historical site or an Indian ruin is considered a resource. Unauthorized digging on these sites results in resource loss just as much as an unauthorized cutting of timber. The problem is how to compute that damage in a simple and understandable manner.

Although the Forest Service, Southwestern Region, has on file investigations of unauthorized diggings in archeological sites dating back to 1975, it was not until the middle of 1977 that the Fiscal and Accounting Unit of the Regional Office became involved in potential claim actions to recover damages incurred by the Forest Service as a result of these diggings.

We knew of no court decisions related to monetary damages for this type of case. We were not discouraged by recent court decisions on criminal charges, as claims for monetary damages require a preponderance of evidence that the Government has suffered a loss, and are not wholly dependent upon disposition of misdemeanor or felony charg-
es. Regulations require that civil action will not be initiated until violation has been disposed of or the U.S. Attorney advises that such action will not prejudice criminal proceedings. We realize that it might be months or even years before those already in the court system would be settled, thus freeing us to pursue claims for monetary damages. However, we began preparing data to support the claim of loss from unauthorized diggings in current cases. I will outline these efforts in four current cases.

Case No. 1 (Smyer and May - New Mexico)

We first considered the actual, or tangible, losses such as the restoration of disturbed surface areas (backfilling and reseeding). Documenting this cost would be simple, but it represents only a small amount of damages as compared to loss of artifacts and historical data.

At the request of the Forest Service, the anthropology departments of the University of New Mexico and New Mexico State University prepared estimated budgets for the cost of excavating the disturbed sites and recovering historical data to the extent possible. In addition to this, they presented estimates for work required to disassemble pots retrieved from the violators and reassemble them to meet museum standards; and to analyze and reconstruct skeletal materials uncovered by the diggings. In support of the loss of the cultural resource, Dr. Dee F. Green prepared a report dated June 1978 to evaluate the resource damages as they applied to the subject sites. The following is a quotation from that paper:

Cultural resource values reside more in the information which sites contain about past human behaviors than in the objects which such sites produce. While part of the information necessary to understand human behavior resides in the objects themselves, a great deal more comes from an understanding of the relationships of the objects in the site to each other. Some objects do have aesthetic value as pieces of art, however, the primary value of a site lies in the information about all realms of human behavior not just the artistic. In order for us to understand as much of past human behavior as is possible, the total relationships of objects within a site to each other and to features such as rooms, firepits, burials, and other behavioral activity areas must be known and recorded. Damage to the site occasioned by the unauthorized digging of [deleted] has resulted in a great deal of loss of such information. Some of that loss is irreparable but by properly controlled excavation of the disturbed areas and by properly controlled excavation of undisturbed areas which would serve as a control base, repair of some portions of the human behavioral record at sites [deleted] can be accomplished.

We realize that this item might be difficult to prove in a court case. It would not be "simple," as specified under the damage appraisal standards previously outlined.

We included the following estimates for damages:

1. Work to minimize the loss of historical data. ($70,000)
   a. Excavation project.
   b. Data recovery (field data gathering).
   c. Analysis and reporting of data gathered in relation to the culture history of the area.

2. Value of pots known to have been sold by the violators. ($4,000)

3. Restoration of vessels retrieved from violators (disassembling and reassembly). ($462)

4. Analysis and reconstruction of skeletal material uncovered by the diggings. ($344)

5. Costs to restore the disturbed surface area. ($700)
   a. Plastic to line potholes.
   b. Grass seed.
   c. Labor for backfilling and reseeding.

Assistant U.S. Attorney James Loss wrote to the Attorney in Charge, OGC, proposing that
in cases where we can show specific damages, we could seek not only these specific damages, but also punitive damages. The latter would provide the judge with a vehicle with which to impose a substantial penalty. As at that time the Act did not provide for "penalty damages," we believed that punitive, as well as "actual" damages would become part of the criminal proceedings. The Attorney in Charge requested that we present the above estimates as quickly as possible. These were sent to the Washington Office of the OGC.

In December 1978, we were directed by that office to make formal demand for payment of over $75,000 from the two violators before referring the case to the Department of Justice. The criminal case was still in appeal status. They also advised us that even though we could not show full collectibility from a financial data report, they would refer the completed case file to the Department of Justice.

The attorney for one debtor replied, denying liability of his client. The other did not respond to the first or second demand letters. A month and 15 days after the first demand for payment, the case files were returned to the Washington Office with documentation of collection actions and financial reports on each debtor. The case is now in the hands of the U.S. Attorney's Office. Having lost their appeal case, the two violators served 90-day terms. On April 23, 1979, OGC wrote to the Department of Justice to consider taking action to enforce collection of the Government's claim against Smyer and May. On July 21, 1980, the U.S. Attorney filed a COMPLAINT against the defendants for over $76,000.

Simultaneous with the above actions, we began collection activity to claim damages incurred by illegal diggings in 1975.

Case No. 2 (M. J. and C. L. Quarrell - New Mexico)
The violators in this case were tried and received suspended sentences and fines of $500, subject to 40 hours of community service. Our demand for damages included: 1) cost to complete excavation of the site and an analysis of historical data ($100); and 2) labor to restore surface area ($600). This case has also been sent to the Department of Justice with financial data to support collectibility.

Case No. 3 (Jones, Jones and Gevara - Arizona)
This violation occurred in 1977. The criminal case was resolved on June 6, 1980, when the defendants were convicted of violating Title 16, U.S.C. 470(ee), Destruction of Archeological Resource. The Government's claim for damages will be based on the following: 1) excavation work and analysis by professional archeologists to minimize the loss of historical data in disturbed areas; 2) cost to mend pots that were broken by the diggings; and 3) restoration of surface area.

Case No. 4 (Frederick W. and John R. Wagner - Arizona)
No criminal action has been taken in this violation which occurred in December 1977. In June 1979, the U.S. Attorney's Office made demand on the violators for payment of over $15,000. This included a proposed budget for excavation work, analysis, and report preparation by a professional archeologist to minimize the loss of historical data. The attorney for the Wagners proposed a compromise settlement. A Settlement Agreement was signed by the defendants and the U.S. Attorney's Office on June 16, 1980, in which Frederick W. Wagner agreed to pay the U.S. $450 and "deliver to the United States all artifacts in his possession, custody and control which he has previously taken from National Forest lands." John R. Wagner agreed to pay the U.S. $250. The U.S. waived criminal proceedings for the December 21, 1977, violation.

These four cases illustrate how the Forest Service, with the advice of legal counsel, has attempted to redeem its responsibility to enforce the Federal Claims Collection Act; namely, to attempt collection of claims of the United States for money or property arising out of its activities.

The Archaeological Resources Protection Act of 1979 recognized the problems in establishing a just claim for loss of this resource and provides for civil penalties based on the archeological or commercial value of the resource involved as well as the cost of restoration and repair of the resource. The method for arriving at these amounts, including a penalty, will be determined by uniform departmental regulations.
FOLLOW LAW ENFORCEMENT OFFICIALS' INSTRUCTIONS!

Upon arrival at the site do not touch anything, follow law enforcement officials' instructions. Wait to begin until they give you the go ahead.

Examine the site with law enforcement officials and identify evidence collection loci.

Before touching anything be sure photographs have been taken of the material being collected. Find out if fingerprints will (or can) be lifted from any of the tools before touching them. If prints might be taken, special handling is required. Wait for go ahead from Law Enforcement Officials before collecting such tools.

I. MAP site locating all loci on map. Also indicate ALL disturbed areas, distinguish between old and recent disturbance (recent is defined as areas suspected to have been dug by suspects). Be sure to indicate all other nonarcheological features (i.e., roads, trails, antiquities signs, caches not on site, etc.).

II. PHOTOGRAPH all loci before collection. Photograph antiquities sign with clear view of site (if present). Take several overviews of site showing recent disturbance areas. Make records of every picture as required on Photo Log (Figure 4). Tie in descriptions with Evidence Log (Figure 3).

III. COLLECTION of artifacts requires Forest officer's undivided attention. Once you start, the evidence must never leave your possession or be out of direct visual contact. ONE person should be exclusively in charge of the Evidence Log. Do not collect anything until it has been photographed and recorded on the Evidence Log. Fill out one log for each locus.

A. Fill out the evidence tag (Figure 2) completely, making sure evidence locus, evidence number, and photo numbers coincide with what is on the Evidence and Photo Logs.

B. Collect evidence and seal it in a container. If the container is a plastic bag, put the tag in the bag so it is visible. If the container is a box, tape the tag to the outside of the box. If the object is too large for either the bag or box, tape the tag directly to the object. Seal the box with a band of tape going completely around the box (make sure it doesn't cover the tag).

C. All evidence must be kept in possession or in visual contact until it is secured under lock and key. Only you may pick up evidence and put it in containers exhibiting tags with your name on them. No one else may handle evidence out of visual contact with you. Once boxes and bags have been sealed they cannot be reopened without correction of evidence tag.

REMEMBER the success or failure of a case may depend on the chain of evidence that you create. Don't break the chain.

Tonto National Forest Evidence Tag

<table>
<thead>
<tr>
<th>Evidence No.</th>
<th>Case No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date:</td>
<td>Time:</td>
</tr>
</tbody>
</table>

(Name & address of suspects, victim, owner - circle one)

Article(s):

Officers(s): serial #

serial #

Location: locus

LOST & FOUND TYPE OF CRIME:

SAFEKEEPING LAB-ANALYZE FOR:

Evidence

FIGURE 2
FIGURE 3. EVIDENCE LOG

Recorder: ____________________________    Page: ___
Date: ___________________    Times (inclusive): _________
Forest: ____________________________    District: __________
Site: ____________________________    Site Locus: __________

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<tr>
<th>Evidence No.</th>
<th>Articles</th>
<th>Photo No.</th>
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Transcribed by: ____________________________    Title: __________

Signature ____________________________    Date __________
EVIDENCE LOG

Recorder:
Date:
Times (inclusive):
Forest:
District:
Site:

Site Locus:

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Transcribed by: 
Signature ___________________________ Date ____________

Title: ___________________________
EVIDENCE LOG

Recorder: McAllister
Date: 3/19/81
Times (inclusive):
Forest: Tonto
District: Payson
Site: Cane Springs Site

Site Locus: A - from datum S45E, 711
Site datum is 1'9" south of large juniper in proximity of area D

<table>
<thead>
<tr>
<th>Evidence No.</th>
<th>Articles</th>
<th>Photo No.</th>
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<tbody>
<tr>
<td>1</td>
<td>Sherds</td>
<td>Roll 1, 14&amp;15</td>
</tr>
<tr>
<td>2</td>
<td>Sherds from area of large broken pot in undercut wall</td>
<td>Roll 2, 19</td>
</tr>
<tr>
<td>3</td>
<td>Human bone</td>
<td>Roll 1, 14&amp;15</td>
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<tr>
<td></td>
<td>Also observed lithics but did not collect</td>
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Transcribed by: Jjgnatur*
Title: D

signature: ___________________________ D:

EXHIBIT Mc
FIGURE 4. PHOTOGRAPHIC LOG

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<th>Subject</th>
<th>Locus</th>
<th>spd</th>
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Recorder: ____________________________  Page: ______
Film: ____________________________  Roll No.: ______
Forest: ____________________________  District: ______
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PHOTOGRAPHIC LOG

Recorder:
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District:
Site(s):

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<tr>
<td>14</td>
<td>3/19/8</td>
<td>E</td>
<td>Freshly excavated room</td>
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<tr>
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<tr>
<td>18</td>
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<td>E</td>
<td>Freshly disturbed room</td>
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<td>20</td>
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<tr>
<td>2</td>
<td></td>
<td>S</td>
<td>Freshly excavated rooms E&amp;F and sherd pile in between</td>
<td>E, F</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td>NE</td>
<td>Freshly excavated room</td>
<td>G</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>NE</td>
<td>&quot;</td>
<td>G</td>
<td></td>
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</tbody>
</table>
**FIGURE 5. EVIDENCE COLLECTION KIT**

_IN KIT_

1. Evidence Tags - (large quantity) (Federal Stock No. 8135-00-292-2356 - 2 7/8 x 5 3/4)
2. Evidence Logs - minimum of 50
3. Plastic Bags - Large (8105-00-655-8286)  
   Medium (GLAD storage bags - zip-loc)  
   Small (GLAD sandwich bags - zip-loc)
4. Fiber Tape - minimum of 10 rolls (7510-00-582-4772)
5. Masking Tape - minimum of 5 rolls (7510-00-283-0612)
6. Scissors - 2 pair (5110-00-293-9199)
7. Ballpoint pens (black) - 1 dozen (7510-00-543-6792)
8. Graph Paper - 1 pad (7530-00-272-6917)
9. Film - 10 rolls minimum
10. Photo Logs - minimum of 50
11. Clipboards - 2 (7520-00-281-5918)
12. Forest Maps - 3
14. Scribe - (5120-00-421-0000)
15. Cotton Gloves - 2 pair minimum

_NEEDED BUT NOT IN KIT_

1. Camera - 1  
   Telephoto Lense  
   Electric Flash  
   Tripod
2. Radio - minimum 1
3. Binoculars - minimum 1 pair
4. Pocket Tape Recorder & extra tapes
5. Measuring Tape - minimum 1 (50 meter)
6. Heavy Duty Flashlight
7. Cardboard Boxes - as many as possible  
   Large (8115-00-417-9416 - 24x24x24)  
   Small (8115-00-117-8344 - 15x12x10)
8. Newspaper or other packing material
9. U.S.G.S. Topographic Map of area involved

_MISC._

1. Violation Notices
2. Law Enforcement Field Guide
3. 
4. 
5.
OUTLINE

SITE ANALYSIS

PROOF OF GOVERNMENT OWNERSHIP
1. LAND STATUS RECORDS
2. MAPS
3. STIPULATION
4. SURVEYOR/SURVEY MARKERS
5. TESTIMONY (HEARSAY EXCEPTIONS)
   - BOUNDARIES
   - RECORDS

SITE RECORDS
1. IS SITE RECORDED?
2. LOCATE ALL SITE INVENTORY RECORDS
   - SITE NUMBER
   - MAP
   - PHOTOGRAPHS
   - SITE SIGNIFICANCE DETERMINATION
   - SITE RECOMMENDATIONS
   - SITE CONDITION
   - SITE PROTECTION

SUPPLEMENTAL SITE INFORMATION
1. SITE OR REGIONAL PUBLICATIONS
2. NEWS MEDIA COVERAGE
3. NATIONAL/STATE HISTORIC REGISTER
4. OTHER SPECIAL PROTECTION (I.E. AGENCY MANAGEMENT PLANS)
5. SITE SIGNIFICANCE
6. UNIQUENESS OR RARITY OF SITE
NATIVE AMERICAN VALUE ASSESSMENT

1. AMERICAN INDIAN RELIGIOUS FREEDOM ACT (AIRFA)

EXPERT WITNESS SELECTION

1. VARIOUS ROLES OF ARCHAEOLOGIST
   - CULTURE HISTORY OF SITE/REGION
   - LAND OWNERSHIP
   - PERMIT STATUS AND PROCEDURES
   - WITNESS TO VIOLATION
   - DAMAGE ASSESSMENT
   - SITE RECORDS
   - AGE OF SITE
   - EVIDENCE ANALYSIS
   - EVIDENCE COLLECTION
   - AGENCY POLICIES
   - DEFENSE EXPERT WITNESS

2. SELECTION PROCESS
   - PREVIOUS EXPERIENCE
   - REPUTATION AMONG PEERS
   - EDUCATION
   - NUMBER OF EXPERT WITNESSES
   - EMPLOYMENT
   - DEMEANOR

PERMITS

1. ELEMENT OF PROOF IN A.R.P.A.
2. PERMIT REGISTER AND SYSTEM
HISTORY OF SITE PROTECTION

1. SITE PATROLLED OR NOT PATROLLED BEFORE VIOLATION?
2. USE OF SENSORS AND DETECTION DEVICES?
3. WHEN WAS SITE LAST CHECKED? PHOTOGRAPHED?
4. IS SITE SIGNED? FENCED?

ASSESSMENT OF PREVIOUS SITE DISTURBANCE

1. SCIENTIFIC EXCAVATIONS UNDER PERMIT?
2. ANIMAL OR NATURAL EROSION CONDITION
3. PREVIOUS ILLEGAL DISTURBANCE
   - ANY REPORTS ON FILE?
   - WHAT HAS PREVIOUSLY BEEN REMOVED OR DISTURBED AT SITE?
   - GENERAL CONDITION OF SITE?
   - ANY PREVIOUS SITE PHOTO SERIES?

COURT EXHIBITS

1. MAPS
2. DRAWINGS
3. PHOTOGRAPHS
DATE: March 30, 1983

REPLY TO ATTN OF: Kristine Olson Rogers
Assistant United States Attorney

SUBJECT: Archaeological Resources Protection Act of 1979

TO: S/A Walter J. Main, BIA-Warm Springs
Supt. William Sandoval, BIA-Umatilla
Richard M. Johnson, Chief, BLM
Becky Ransom, Corps of Engineers
Loren K. Parcher, SAIC-Fish & Wildlife Service
Hugh Speight, Director, Law Enforcement- U.S. Forest Service
S/A Ken Harrington, Fish & Wildlife
S/A Carola E. Stoney, U.S. Forest Service

Some of you have requested a checklist of suggested procedures for personnel patrolling or responding to calls from archaeological resource sites to assess potential ARPA violations. Here are the basics:

1. Know the archaeological sites in your area. Read the site reports. Go out of your way to stop by each site as often as possible and periodically photograph its condition (most of these sites are out of your way, but the only pothunters we've caught in the last five years were by chance encounters in remote places).

2. Post the sites or areas clearly and permanently as federal property. (There are two schools of thought on this: one, that posting attracts pothunters; and the other, that posting is necessary for public awareness and jury convictions!)

3. Be armed at all times with a camera and several speeds of film (and, ideally, a telephoto lens). Photograph any findings from every angle, but be careful to keep a log of times, distances, etc.

4. If a suspect is encountered at a site, questioning is encouraged and proper. No need for Miranda warnings if you are not a law enforcement officer or if the person is not under arrest, but avoid words like "custody", "seizure", "crime", etc. Get as much identifying data as possible. Ask to see a driver's license, social security number, etc.

5. Note equipment and vehicles (get careful description and license plates) in area. ARPA provides for their forfeiture upon conviction. You are entitled to seize screens, shovels, dust masks, etc., in plain view, but give the subject a receipt, have it signed and keep a copy. You are entitled to inquire about any equipment and inspect items in the beds of pickup trucks. By all means take any abandoned property.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan
6. Take notes on the condition of the area (e.g., light, fresh dirt piles, weather, moisture, approximate sizes of any holes, etc.). Write down everything you can remember as soon as possible after the incident and retain your original notes (they are subject to review by defense attorneys).

7. Carry names and phone numbers of important contacts with you at all times. After any encounter with suspect(s) at a site, immediately phone:

1. law enforcement assistance—with within your own agency, if available, or the FBI, Oregon State Police, or the County Sheriff;

2. an agency archaeologist to determine if there is a need to get an emergency professional assessment of any damage;

3. an Assistant U.S. Attorney—Kris Rogers if she can be reached, or the "desk" attorney on call for that week.

Prompt reporting in these cases is crucial.

8. These are all potential felony criminal cases. Handle and preserve the evidence accordingly. Take careful field notes. If for some reason criminal prosecution is inappropriate or unsuccessful, there are always civil remedies which need the same sort of documentation.

9. Finally, do not let a suspect remove or keep possession of any artifact from a federal site. Any objects found at these sites are federal property and should be retained by you as such. Objects which you may not be able to readily identify (such as manos and metates) can nonetheless be quite valuable. So, no removal of even "ordinary" appearing rocks, dirt, etc!

10. Good luck—because that's what these cases seem to hinge on!

cc: S/A Ron Stuart, FBI-Bend
S/A Mike McPheters, FBI-Pendleton
S/A Larry Gorman, FBI-Medford
Viable Forensic Archeology through Interdisciplinary Deference and Dialogue: A Prosecutor’s Prescription
Kristine Olson Rogers

Recent federal criminal cases brought pursuant to the Archaeological Resources Protection Act of 1979 (ARPA) have given rise to debate both within and without professional archeological circles over the soundness of mixing legal and anthropological modes. Lawyers are tempted to decline cases involving pontificating professionals who cannot agree among themselves about the “archeological interest” or “significance” of a site, but who lobby those terms into statutes that lawyers must litigate. Similarly, archeologists find themselves seconding Shakespeare's characters' sentiments about members of the bar: “The first thing we do, let's kill all the lawyers.” Do these differences signal the demise of forensic archeology? If we can learn to defer and discuss rather than usurp and undermine, the subject may survive.

Context —
What, Where, When and How?

Defining forensic archeology is best done through standard journalistic openers. What does the prefix “forensic” mean? Where is this professional blend likely to occur? When are we operating in that dual mode? How does it happen?

“Forensic” implies the application of a science in an investigatory or trial setting. Litigants are quite accustomed to forensic psychiatrists testifying on issues of criminal insanity or forensic photographers developing evidentiary films. Forensic paleontologists (or physical anthropologists) sometimes examine skeletal remains to determine the characteristics of a murder victim. But forensic archeologists? What do they do? They simply give expert opinions about archeological issues in civil and criminal cases.

Where do archeologists become witnesses? Initially, in the field, when they happen across a violation or are called upon to assist law-enforcement officers in site examinations and collecting and evaluating archeological evidence. Secondly, archeologists may become expert witnesses in law offices where advice may be offered to prosecutors (or plaintiffs’ counsel) and defense attorneys concerning the archeological values involved in a case. And finally, archeologists may be qualified as expert witnesses in grand juries, at pretrial hearings or trial, or in administrative proceedings.

An archeologist becomes a forensic archeologist when he or she is assisting in legal interpretations, whether they are connected with assessment of values associated with sites, artifacts, and other evidence or with the interpretation of terminology and assumptions contained in statutes and regulations. Whenever an archeologist’s professional action will have legal consequences, that professional person is labeled “forensic.” This context can sometimes sneak up on academic or agency archeologists who are accustomed to performing a helpful role in assisting public understanding of archeological data, but who then are forced by opposing attorneys to reconsider their volunteered statements during cross examination.

For example, in a recent probation-revocation hearing involving an ARPA violation, during cross examination of a BLM archeologist, the defense attorney began quoting the witness’ opinion (reported in the local newspaper) that ARPA cases should be brought against only the most “heinous” offenders. In arguments to the court at the close of the hearing, defense counsel then implied that the prosecution was singling out this simple “arrowhead collector,” even contrary to the wishes of the federal agency involved.

How does this transformation from professional archeologist to courtroom player occur? It occurs as archeologists become involved with one party to a controversy or are sought as expert witnesses as they develop an expertise in the subject matter of the dispute. Archeologists may work for the agency that manages the land on which a site is located. Archeologists may be retained as private consultants by parties to litigation, or archeologists may be appointed by a judge to render an objective opinion to assist the court in its fact-finding process.

In any event, archeologists in any role in a courtroom drama soon discover that that milieu does not lend itself to creative conversation. They are interrupted in their responses to questions by opposing counsel. They are warned by judges to confine their answers to the
limited questions asked. Their responses are often misconstrued either because an attorney does not understand archeological language or because of deliberate litigation ploys. In short, they often leave the witness stand highly frustrated, having experienced only one portion of the system but convinced that it does not function as a truth-seeking enterprise. One issue on which archeologists who have served as expert witnesses to date appear to concur is that testifying can be a harrowing experience at best.6

As Lawrence Rosen, who is himself an embodiment of some of the best the legal and anthropological professions have to offer notes there are few roles that confront conscientious anthropologists with more serious scholarly and ethical problems than those posed by their appearance in legal proceedings as expert witnesses. Drawing on specialized knowledge and ostensibly attuned to a professional superego that demands an impartial analysis of the data, the expert witness is brought, usually by one of the adversary parties, into a proceeding whose form and goals often appear foreign, if not overtly antithetical, to scholarly capacities and purposes.7

**Archeologists' Angle**

The first rude realization that confronts archeologists in the courtroom is that the adversary system sometimes appears to involve obfuscation and semantic subterfuge rather than its often-touted "search for the truth, the whole truth and nothing but the truth." The reasons for this mutation are many and complex and are grounded in an entirely different ethical system than that advocated in Philosophy 100. The result sometimes is traumatic for the uninitiated expert, and there is a tendency to take adversarial attacks personally, rather than as a parry in time-honored legal dueling etiquette.

Another source of discomfort to archeologists in their forensic role is the need to price invaluable cultural resources. For many archeologists, placing a dollar value on artifacts appears to give credence to a black-market system, which is the antithesis of all their professional training. However, the courtroom's values are couched in dollar signs—jurors are routinely asked to determine the worth of a child's life or a pianist's hands.

Archeologists righteously recoil at arguments over whether a resource is worth more or less than the felony threshold amount in a statute such as ARPA.8 Jurors are likewise reluctant to apply this expense accounting to assess culpability in the criminal context, and many litigators believe that these specific dollar provisions may be the instrument of ARPA-prosecutions downfall. Nonetheless, expert testimony on this issue was presented to the congressional committees considering ARPA, and once embroiled in a dispute, archeologists can become fairly adamant in their appraisals, intransigent to the last cent.

Archeological experts, too, often resent the litigator's bent to translate terms of art. Archeologists chafe at hearing carefully chosen words with precise, scholarly refined definitions mangled in trial parlance. Certainly this can result from the language barrier that archeologists may unintentionally erect around their discipline. Of particular concern, however, is the deliberate misuse by one expert of a term employed by the adversary expert—the misconception clearly calculated to confuse the jury. Frequently the ploy works, and this abuse is extremely difficult to correct in the course of the litigation.

Finally, a focus of frustration within archeological circles is the debate over "public archeology" and the proper extent and form of that endeavor. Public-archeology advocates are particularly prominent in ARPA cases.9 What would be most productive at this juncture would be more practice of public education and fewer in-house publications extolling its virtues.

Archeologists appear to prefer talking among themselves, favoring internal dialogues over public engagements. Experts are accused by pothunters' attorneys of hoarding all the resource information in the backrooms of museums. The forensic archeologists who emerge from the witness stand intact are those who have made some effort to involve the members of the public (i.e., the jurors' friends and relatives) in their quest for prehistoric knowledge.

**Attorneys' Angle**

According to many prosecutors, the technical terms inserted into the process by experts are responsible for many declined cases, judicial dismissals, and jury acquittals. Archeological definitions, they argue, are unsuited to determinations of criminality. They may be inappropriate in civil cases but not in criminal cases. Convictions that must turn on such nuances as what constitutes a "midden," a "coprolite," or a "projectile point" (just to mention a few portions of the new ARPA regulations) are difficult to obtain or secure. Of course, if legal interpreters would take the time to study the terminology and to ask some questions, they might be better equipped to explain their case to the fact finders. To assist this process, archeologists might hone their tactful-teaching skills to convey such information without offending the Darrowesque ego.

The ARPA-type approach to drafting a criminal statute provokes rantings from lawyers over "academicians' laundry lists'' finding their way into the criminal code. At the very least, both attorneys who specialize in criminal law and law-enforcement officers should be included by agencies on task forces charged with proposing regulations (for which those attorneys and officers will later be expected to seek a court's blessing). This bidisciplinary approach was not taken with respect to the recent promulgation of ARPA regulations.

Assuming that an indisputable resource is the basis for a prosecution (a great kiva, for instance), attorneys next find themselves contending with a lack of coordi-
nation between law-enforcement officers and the archeologists assigned to assist them in investigation and case preparation. The Federal Law Enforcement Training Center course that has been offered four times since May 1983 to law-enforcement officers and federal-agency archeologists nationwide is designed to ameliorate this problem (see Friedman, this volume). At least it has generated some spicy interdisciplinary dialogue.10

If a case manages to wend its way through the grand jury and pretrial motion stages to trial, a litigator may be treated to a spectacle of the “battle of the experts.” Hearing archeologists argue over what does and does not rise to the level of “archaeological interest” required by ARPA to bring a resource within its ambit is enough to sour a statistics-conscious prosecutor’s office on authorizations to pursue future antiquities thieves and vandals. Jury convictions are a measure of a prosecutor’s success and are more easily obtained absent debates between expert witnesses.

And then come closing arguments—emotional pitches where jurors are invited by pothunters’ attorneys to give in to their natural curiosity and urge to explore.11 If the prosecution has not been able to create some distance between the average juror and the collector by this point, the cause is lost. Archeological experts must be able to assist in the conversion from juror to archeophile, not alienate by their disdain for “amateurs.” Experts must come prepared to discuss how they work with the public.

The A, B, Cs of Interdisciplinary Communication

Aside from the alliterative appeal, there is something to be said for simple reminders about steps to interpersonal understanding. Some forget that the lofty legal process is peopled. What follows is the author’s attempt at reducing these relationships to meaningful terms.

Appreciation through Acquaintance

A precursor to communication is familiarity. If the participants in a case with archeological implications have some personal experience with one another, they can at least make some attempt to be on the same channel. The Federal Law Enforcement Training Center course; the SAA meetings, which lawyers and law-enforcement officers can attend; internal agency training programs; and graduate seminars (taught jointly to both law students and anthropology advanced-degree candidates) in “forensic archeology” are a positive step in this direction.12

The author recently joined the SAA during its annual meeting in April 1984 in Portland, Oregon. Other professional societies, such as the American Academy of Psychiatry and the Law, are not so open about admitting “outsiders” (particularly lawyers) to their ranks. Similarly, the American Bar Association has not been known to warmly welcome “lay” people as members.

Even though archeologists may eye “supercops” warily, they are to be complimented on their openness in these congregations. The other components of the forensic trinity (attorneys and law-enforcement officers) have a long way to go in this regard.

Bearing With, Not Belittling Others’ Problems

When disciplines meet (or clash) it often is all too easy to dismiss a concern raised by an “other” (who should by all rights be a colleague in these cases) with “that’s your problem.” It is not only the archeologist who has to contend with conflicting site reports and measurements describing the resource in question. Or if a law-enforcement department needs to reconstruct a chain of custody for some evidence, all participants and observers during a crime-scene approach must be taken into account.

In the courtroom, this team sinks or swims together. It behooves each member to study and then “shore up” each other’s weakness whenever possible. Enough said.

Cooperation for Common Goals

As a prosecutor, I assume that ARPA cases imply common inter-disciplinary goals of the archeologists and law-enforcement officials involved. I am, therefore, somewhat taken aback when my fellow archeophiles start taking potshots at the prosecution, second guessing, for instance, whether a pothunter’s trading activities are sufficient to render him a heinous offender “worthy” of prosecution as a commercial looter. When agency administrators start pinching pennies during costly litigation (e.g., “the film should be developed out of their budget”; “tell the U.S. attorney to bear the travel costs”), I feel like the protagonist in “Friendly Fire.” If I hear archeologists telling me “you should have gone civil” (when I haven’t been able to because the necessary regulations haven’t been promulgated by their agencies), my prosecutive zeal somehow fades. Which brings me to my final (and in many respects, most important) point.

Dialogue Through Deference

Productive dialogue among professionals implies deferring to each other’s expertise. Archeophiles cannot afford to have inaccurate or inflammatory articles about ARPA in print that will most assuredly surface on cross examination. I hope I do not offend anyone or appear condescending in these comments, but enough participants in this process have urged me to make my private mutterings public that at least there is a perceived audience for these remarks.

Especially galling, according to law-enforcement witnesses, is to have to respond to quotes from expansive papers written by archeologists (who have not recently been called to defend their own words on the witness stand) that are an unwelcome source of unease to those who are called to testify. This point may be made best
The comments I received ranged from gentle corrections on phraseology to strong admonitions to not stray into areas that I obviously knew little about. I incorporated most of these recommendations into my text, and I am grateful for them. I want to assure the reader that this was not done in a vacuum. When I wrote my first article about this subject matter, "Visigoths Revisited . . .," I circulated the draft to five archeologists with experience in the topics covered. The comments I received ranged from gentle corrections on phraseology to strong admonitions to not stray into areas that I obviously knew little about. I incorporated all of those comments, and the paper is much the better for them.

However, such strategy is not always applied when the situation is reversed. I write when I read descriptions by archeologists (even within this volume) of principles such as the burden of proof in a criminal case that are not only inaccurate, (e.g., the prosecution does not need to prove guilt "beyond the shadow of a doubt") but impose obstacles on prosecutions that sometimes are difficult to overcome because they are repeatedly quoted to jurors by defense attorneys. Archeologists in these instances can become advocates, make assumptions, and lapse into inflammatory language (e.g., calling defendants "culprits"). In their enthusiasm to share their new "expertise," archeologists sometimes bandy about what they take to be legal terms with wild abandon (e.g., "under parole" when what they really mean is "on probation"). Archeologists even sometimes forget their forum and speculate publicly about why cases are lost or describe ongoing undercover operations' techniques.

Conclusion

Creative dialogue through mutual listening, can elevate both our disciplines to a higher plateau. Contributions to communication do not come from prima donnas (of which both law and archeology have their share). But my theme is an optimistic one—forensic archeology does have a future—through seeing ours as a linked fortune, recognizing that the best forging will combine our symbiotic elements, each bringing its own strength to form an unparalleled bond.

I envision a vital esprit de corps as we approach future victims of the pothunting plague. Together, practicing deference and dialogue, we will effect resounding recovery.

Notes

5. See note 4, pp. 569-71.
7. See note 4, p. 555.
10. The author serves on the faculty of this advanced in-service training program.
11. Defense counsel urged the Jaques jury to consider that:

    what this is about really is the human spirit. Because what Bill Jaques was doing is no different than anybody in this room ever does, and no different than anyone in all of human time has ever done.

We, as intelligent people living on this planet, have always explored our environment. We have crossed oceans to discover new worlds. We as a people, white American people, took over this land from an indigenous people. We have always made discoveries and we are continuing to make discoveries. And it's sort of the human spirit to explore. We are now exploring the universe, the moon, the stars, sending up space laboratories. But each of us I would just bet has been to the beach and just walked on the beach. It's almost impossible to not walk on the beach and look for shells, or sand dollars. And if you find a sand dollar that's whole, you just—it's beautiful. You wonder at it and you start looking for more. You want—you just want to find these things. They're so beautiful. It's kind of the spirit. You find beautiful shells.

I've gone to the beach with children and they start picking up one and they come back with armfuls. They're disgusting looking rocks but to them they're just beautiful. Collecting is just a natural human universal thing. Everyone has done it. There are stamp collectors, there are people who collect Coca Cola memorabilia, Mickey Mouse memorabilia, baseball cards, rocks, stamps. I've already mentioned coins. I mean, you name it, people collect it. Clothespins, bottle caps, people collect everything you can imagine. And that's what this case is about.

Now, here's Bill Jaques, and he is not the only person who collects arrowheads. A lot of people collect arrowheads because they also love archaeology. They don't love it like scientists do. They maybe don't study every technique and run every pollen test that an archeologist might do, but he loves archeology as well and he does this because he wants to know about what's happened in the surrounding environment on the land that he's lived on for the last 25 years.

And there's other old-timers who have taught him about it and they have done the same thing. Since we came here we have been doing this. Since white people came to the West Coast we have been doing this. And it's unfortunate that people have to be treat-
ed it, this particular fashion when they are pursuing something that's a hobby and that's a fairly common human endeavor.

12. Along with C. Melvin Aikens, chair of the Department of Anthropology at the University of Oregon, the author taught such a seminar at the University of Oregon Law Center in Eugene to approximately 20 graduate students in 1984.

Appendix A:


Q. Did you ever read an article called "Prosecuting under ARPA, What to do until Regulations Arrive" by D. Green?
A. Yes.
Q. Who is D. Green?
A. D. Green is an archaeologist for the United States Forest Service, stationed in New Mexico.
Q. And that article described basically how to testify and prove a case under ARPA or regulations promulgated under the law that was supposed to be but hasn't been done yet; is that right?
A. Yes.
Q. Now, when you read the article, she described very carefully that there were only certain things that would be considered archaeological resources until there was a promulgation by further regulations. Wasn't that the general gist of the article?
A. I remember reading an article in which that was discussed.
Q. That's basically the problem with the ARPA status right now, isn't it, as far as archaeologists are concerned?
A. What is the problem? Excuse me.
Q. That it doesn't fully describe all the archaeological resources that archaeologists would like to include at this point?
A. It does not specifically give a detailed list.
Q. So part of the task is to make the prosecutions conform to the list that has already been given?

MS. ROGERS: Oh, objection, Your Honor. He doesn't know what the task of the prosecution is.
THE COURT: Sustained.

Q. (By Mr. Lerner) When you did your reading on — in preparation for going out to investigate this case and testifying, have you familiarized yourself with other articles that have been written about enforcement of the Archaeological Resource Protection Act?
A. Yes.
Q. Have you ever read an article by Dee Green? Do you know who Dee Green is?
A. Yes, I do. I'm not familiar with the article you are referring to.
Q. One is called "Prosecuting Under ARPA, What To Do Until the Regulations Arrive," by Dee Green.
A. I've read that.
Q. You've read that. And that's basically—who is Dee Green?
A. Dee Green is an archaeologist for the U.S. Forest Service who works in New Mexico, stationed in Albuquerque, I believe.
Q. And he describes what some of the problems are in winning these cases in that article, doesn't he?
A. I must say I can't recount for you in detail the substance of the article, but I think that is fair to say.
Q. Well, it tells how to satisfy the elements, the criminal elements for the crime and what testimony is necessary to do that, doesn't it?
A. Yeah. I haven't read that in some months so forgive me if I'm not up on all the details of it.
Q. I'd be glad to show it to you if you want to review it. Would that be helpful?
A. I suppose it would if you have specific questions you want to ask me about it.

MS. ROGERS: Your Honor, again, an objection on behalf of the government. Dr. Aikens is not on the stand to testify about his prior readings, his past knowledge of other cases, and if defense counsel is going to pursue this line of questioning, we would object that it's irrelevant and inadmissible.

MR. LERNER: Your Honor, if there is a discussion in the archaeological community about how to tailor testimony to fit this statute, I think that's important and if he's read it and relied on it in coming here to testify, I think it's important to pursue.

THE COURT: All right. I'm going to sustain the objection to the last question.

MR. LERNER: I'm not sure I understand the Court's ruling. Am I not allowed to question at all about this article that he said he read?
THE COURT: Well, I don't know whether you're trying to impeach him with someone else's article. If it's
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something: besides impeachment, he can't remember the article. He's already said he can't remember it.

MR. LERNER: Would you like to refresh your recollection by seeing if this is the article you looked at?

THE COURT: Well, what is your question going to be? Your next question.

MR. LERNER: Well, there are a series of questions, Your Honor, but it talks about how to prove the elements and what cost of restoration means and what cost of repair means and what language to use and how to avoid certain things, and I think that I want to ask him whether he has read this and he agrees with it. He says he's read it. I don't know whether he's using it or not.

THE COURT: Well, I'm going to sustain the objection to handing him an article and having him read and ask him if he agrees with it.

MR. LERNER: Well, he's already said he's read it. He just doesn't recall what it says at this point.

THE COURT: Well, I'm going to sustain the objection.

And later in the proceedings...

MR. LERNER: I also wanted to make a motion for mistrial based on the cross-examination that I was doing of Dr. Aikens that was prohibited by the Court regarding an article which he acknowledged that he had read and that he had read prior to this case in preparation for this case by a Mr. Dee Green, regarding what archeologists should do when prosecuting ARPA cases — that's A-R-P-A — prior to the regulations, and I believe it goes directly to his credibility as to whether or not he has tailored his testimony consistent with the suggestions of Mr. Green so that they could make the proof of the elements fit with what archeologists actually think. And this is what this article's about, and I wanted this marked and entered into the record so that if this case has to be appealed that the Court of Appeals will know the basis of what I would be questioning about and what I expected to show Dr. Aikens.

THE COURT: Well, what did you intend to do? You intended to hand him that document and have him read it to the jury or what?

MR. LERNER: Well, I intended to refresh his recollection by having him review it because he said he had read it earlier and even though he didn't remember everything precisely that it said that he had read it and relied on it.

THE COURT: Then after that, what were you going to ask him?

MR. LERNER: I was going to ask him if he agreed that it's necessary to fit the testimony to the elements and archeologists have to rethink their positions in order to prove these cases until the regulations are out. And whether he argued with Mr. Green that repair assessments have to be limited to pit houses and not to pit house sites, and things of that nature. 'Cause those are directly relevant questions to this jury.

ARPA: Some Lessons
Stephen A. LeBlanc

There is an old railroad hotel in Santa Fe, New Mexico, now converted into offices. There, one afternoon, Mark Michel and I sat down with a lawyer I hired and wrote a draft law to preserve archeological sites on federal lands and to prosecute violators. "What would we like to have in it?" "Well, they confiscate drug runners' airplanes, why can't they confiscate archeological-site looter's bulldozers?" After a couple of hours of such discussion, the lawyer left with his notes, soon to return with a draft of a law that surprisingly bears some resemblance to what is now known as ARPA. The events leading up to this exercise are chronicled in the Collins and Michel article.

I am not sure whether I ever really felt we could get a "new antiquity act," as we called it, passed, or whether ours was more of an exercise designed to reduce our own frustration over the inadequate concern about the looting frenzy then going on. I certainly was ignorant of the legislative process and unaware that a law could be passed so rapidly.

Several roughly concurrent steps were taken with this draft (again as discussed by Collins and Michel). However, I always have felt that the critical steps came when Raymond Thompson and Emil Haury discussed the draft with Rep. Udall and received a very favorable response. Suddenly, this was not an idle
LIST OF HELPFUL PUBLICATIONS

The Federal Bureau of Investigations has produced a number of short publications (listed below) which will aid investigators in case development. They can be obtained from or ordered through your local FBI office.

Boutwell, J. Paul

Burke, John J.

Donahue, Paul G.

Federal Bureau of Investigation

1979 Suggestions for Handling Physical Evidence.
BIBLIOGRAPHY

Adams, Robert M.

Albuquerque Journal

Anderson, Bruce A.

Ascher, Robert

Barnes, Mark

Bates, Robert W.

Beals, Ralph L.

Bransford, Gordon

Bratton, Howard
1977 Opinion for United States v. Smyer and May, criminal no. 77-284, United States District Court, Albuquerque, New Mexico.

Brody, J. J.

Byers, D. S.

Clewlow, C. Williams, Jr., Patrick S. Hallinan, and Richard D. Ambro

Collins, Robert Bruce

Collins, Robert Bruce and Dee F. Green

Cooper, Robert L.

Copple, William P.

Corbett, John M.

Darden, John A.
1976 Opinion for the United States v. Mike J. Quarrell and Charles L. Quarrell, criminal no. 76-4, United States District Court, Las Cruces, New Mexico.

Davis, Hester A.

Federal Reporter
1975 Cases argued and determined in the United States Court of Appeals, United States Court of Claims, United States Court of Customs and Patent Appeals, and Temporary Emergency Court of Ap-
peals. West Publishing Co., St. Paul, Minn., Volume 499 F.2d. 113 (9th Cir.).

Grayson, T. J.

Grayson, Donald K.

Green, Dee F.


1980b A summary of the first court cases under ARPA. ASCA Newsletter, in press.

Green, Dee F. and Steven LeBlanc

Hawkins, Michael

Jennings, Jesse D.

King, Thomas F.

LeBlanc, Steven and Roger Anyon

LeBlanc, Steven and Dee F. Green
LeBlanc, Steven and Paul Minnis  

Lee, Ronald F.  

Los Angeles Herald - Examiner  

McAllister, Martin E.  


McGinsey, Charles R., III  

Mckinney, Charles M.  


McWilliams, Robert H., Jean S. Breitenstein, and Monroe G. McKay  

Merrill, Charles M., M. Oliver Koelsch, and William T. Sweigert  

Meyer, Karl E.  

Museum of Northern Arizona  

National Park Service  

Nickens, Paul R., Signa L. Larralde and Gordon C. Tucker, Jr.  

Nickerson, Gifford S.  
1962 Considerations on the problems of vandalism and pothunting in American archaeology. Anthropology and Sociology Papers No. 22, Montana State University.

Petty, Paul Edward  

Rippetau, Bruce E.  

Robertson, Merle Green  

Scott, Douglas D.  

Seattle Times, The  
Setzler, F. M., and William Duncan Strong  

ets, Payson D.  

Society for American Archaeology  


Stephenson, Robert L.  

Sutton, Henry P.  

Time  

Tanner, Frederick Jackson  

Wallace, J. Clifford, Thomas Tang and Gordon Thompson, Jr.  
1979 Opinion for the United States v.


Weaver, Donald E.  

Wikstrom, Francis M.  
1980 Government's Response to Memorandum in Support of Defendant's Motion to Dismiss Indictment. United States v. Casey Shumway, criminal no. 80-5W, United States District Court, Salt Lake City, Utah.

Wilcox, Brent W.  
1980 Memorandum in Support of Defendant's Motion to Dismiss Indictment. United States v. Casey Shumway, criminal no. 80-5W, United States District Court, Salt Lake City, Utah.

Williams, Lance R.  
1978 Vandalism to cultural resources of the Rocky Mountain West. Cultural Resources Report No. 21, USDA Forest Service, Southwestern Region.

Williams, Stephen  

Witkind, Max  
1. Defendant on or about (date) knowingly excavated, removed, damaged, altered or defaced an archaeological resource (as defined in Act or later regs).

2. The resource was on public or Indian lands.

3. Defendant acted without a permit.

4. Value (either commercial or archaeological) plus cost of restoration and repair (more or less than $5000).