

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
MAY 31 PM 6:11

SOUTHERN DISTRICT
OF INDIANA
JOHN A. DONNELL
CLERK

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JOHN WILLIAM WAY,)
)
 Defendant.)

NO. EV 90-32-CR

I N D I C T M E N T

The Grand Jury charges that:

AT ALL TIMES PERTINENT HERETO:

1. GE Plastics Manufacturing Division, Mount Vernon Plant Site (hereinafter "GE Plastics"), was a complex of manufacturing and warehouse facilities owned by the General Electric Company, a New York corporation duly licensed and qualified to do business in the State of Indiana, and engaged in the manufacture of plastic materials and resins. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

2. Indiana Department of Highways Project Number RS-6665() involved the construction of a new County Road 850S running southeast to northwest and connecting old State Road 69 to New State Road 69 near the entrance to GE Plastics. Project Number RS-6665() was funded by the Federal Highway Administration and the General Electric Company, and was administered by the

Indiana Department of Highways in accordance with Indiana Department of Highways regulations and Standard Specifications.

3. The Indiana Department of Highways Standard Specifications in force and effect provided, at Section 104.06 ("Rights in and Use of Materials Found on the Project"), that "[i]f archaeological artifacts are encountered during excavation operations, the Contractor shall cease operations in the immediate vicinity and notify the Engineer. An Archaeologist will be provided by the State and a determination will be made as to the significance and the disposition of such findings. In no event will any employee of the Contractor or the State of Indiana share in such ownership, or profit from any salvaged archaeological findings." The Indiana Department of Highways, Division of Location and Environment, employed an archaeologist on its staff for the purpose of responding to such notifications by contractors that archaeological artifacts had been encountered during highway-related excavations.

4. Indiana law, at Indiana Code Section 35-43-2-2, provided that "[a] person who . . . [k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent . . . commits criminal trespass."

5. Indiana law, at Indiana Code Section 35-43-4-3, further provided that "[a] person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion." A person's control over property of

retained by J.H. Rudolph, was required to be done in conformity with applicable laws and regulations, and with the Standard Specifications of the Indiana Department of Highways.

8. Fluor-Daniel Construction Company, also known as Daniel Construction Company (hereinafter "Fluor-Daniel"), of Mount Vernon, Indiana, was a general construction contractor, and had been awarded a contract by the General Electric Company for the grading and reclamation of property of GE Plastics surrounding the construction site of County Road 850S.

9. Boyd Brothers, Incorporated (hereinafter "Boyd Brothers"), of Sesser, Illinois, was an earth moving contractor, and had been awarded subcontracts by both J.H. Rudolph and Fluor-Daniel, for work at and in conjunction with the construction of County Road 850S. Specifically, during August, 1987, Boyd Brothers contracted with J.H. Rudolph for the hauling of "borrow" dirt from the flanks of the upland knob or ridge (the GE Site) for use as fill during the construction of County Road 850S. During April, 1988, Boyd Brothers contracted with Fluor-Daniel for the grading and reclamation of the "borrow" areas adjacent to the project, including the area of the GE Site.

10. Before beginning work pursuant to its subcontract with Fluor-Daniel, Boyd Brothers was required by the Indiana Department of Highways to obtain an archaeological survey of the area of the GE Site. Boyd Brothers received the required survey on or about April 25, 1988. The survey stated that, based upon a records search, surface observation, and intermittent shovel

probing, no archaeological sites were identified. The survey concluded, however, that "if any concentration of archaeological materials or evidence of subsurface features should be encountered during borrow operations, an archaeologist from the Division of Historic Preservation and Archaeology should be immediately notified for an on-site assessment."

11. JOHN WILLIAM WAY, the Defendant herein, was employed by Boyd Brothers as a heavy equipment operator, and performed duties at the location of the "borrow" areas for Indiana Department of Highways Project Number RS-6665().

THE GRAND JURY FURTHER CHARGES THAT:

12. Beginning on or after April 13, 1988, and not later than in or about June, 1988, JOHN WILLIAM WAY excavated and removed from the GE Site numerous Hopewell Indian artifacts which had been buried under the surface of the ground, including but not limited to approximately four hundred (400) pieces of carved flint and chert points, twelve (12) copper axeheads or celts, thirty (30) drilled and undrilled bear teeth, freshwater pearls and items of cloth and leather.

13. Beginning on or after April 13, 1988, and not later than in or about June, 1988, the exact date being unknown to the Grand Jury, near Mount Vernon, Posey County, within the Southern District of Indiana,

JOHN WILLIAM WAY,
the Defendant herein, did knowingly transport in interstate

person, specifically, that piece of real property located on a ridge immediately south of County Road 850S near Mount Vernon, Indiana, herein referred to as the GE Site, being the property of the General Electric Company, by removing items of property from under the surface of the ground, and taking and carrying away such items of property without the consent of the General Electric Company.

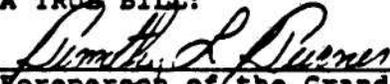
15. Further, the excavation, removal and transportation of the said archaeological resources constituted criminal conversion, in violation of Indiana Code, Section 35-43-4-3, in that beginning on or after April 13, 1988, and not later than in or about June, 1988, the exact date being unknown to the Grand Jury, in the County of Posey, State of Indiana, JOHN WILLIAM WAY, the Defendant herein, did knowingly exert unauthorized control over property, to-wit: numerous Indian artifacts of historic and economic value, including but not limited to flint and chert points, copper axeheads or celts, freshwater pearls, bear teeth, and items of wood and leather; of another person, to-wit: the General Electric Company; by obtaining, taking and carrying away the foregoing property in a manner and to an extent other than that to which the General Electric Company had consented.

16. Further, the excavation, removal and transportation of the said archaeological resources constituted a violation of the permission to perform work accorded to Boyd Brothers by the Indiana Department of Highways, and a violation of the provisions of the Indiana Department of Highways Standard Specifications

then in force and effect, which specifications applied to the work being performed by Boyd Brothers and agents thereof, in that on or after April 13, 1988, and not later than in or about June, 1988, upon encountering archaeological artifacts at the GE Site, neither the Defendant nor any agent of Boyd Brothers ceased operations in the immediate vicinity and notified a state highway engineer or archaeologist.

All in violation of Title 16, United States Code, Section 470ee.

A TRUE BILL:



Foreperson of the Grand Jury



DEBORAH J. DANIELS
United States Attorney
Southern District of Indiana



LARRY A. MACKEY
Chief, Criminal Division
Southern District of Indiana



SCOTT C. NEWMAN
Assistant United States Attorney

3. That the plain meaning of the charged provision of the Archaeological Resources Protection Act [16 U.S.C. §§470ee(c)], its relation to other subsections of the Act, and the congressional purposes behind its enactment, demonstrate that the statute is applicable to the interstate trafficking of archaeological resources excavated in violation of state or local law, regardless of whether the land from which the resources were excavated was publicly or privately owned.

MEMORANDUM OF LAW

Defendant John William Way has been charged, by way of Grand Jury Indictment, with a single violation of Title 16, United States Code, Section 470ee(c), a provision of the Archaeological Resources Protection Act (hereinafter, "ARPA"). The Indictment alleges that Defendant Way unlawfully excavated and removed hundreds of specified prehistoric Indian artifacts, being property of the General Electric Company, and transported them in interstate commerce in violation of federal law.

Defendant Way has filed a Motion to Dismiss the Indictment, on the following grounds: (1) that the Indictment as drafted does not sufficiently, and with adequate particularity, state the offense with which he is charged; (2) that the ARPA statute itself is void for overbreadth and for vagueness; and (3) that the ARPA statute was not intended to cover the kind of conduct he is alleged to have committed. The government will address each of these asserted grounds for dismissal in turn.

I. THE GRAND JURY INDICTMENT SUFFICIENTLY ALLEGES A VIOLATION OF THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT.

The particular provision of ARPA under which Defendant Way has been charged states as follows:

- (c) Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law.

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) Penalties.

Any person who knowingly violates. . . any prohibition contained in [subsection c] shall, upon conviction, be fined not more than \$10,000 or imprisoned not more than one (1) 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 imprisoned not more than two (2) years, or both.

16 U.S.C. §§470ee(c), (d). The Act further 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 Chapter. Such regulations . . . 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 No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

16 U.S.C. §§470bb(1). Regulations in effect at the time of this offense further refined the definition of "archaeological resource" to include, inter alia, "surface or subsurface structures," "ceremonial structures," "artificial mounds," "surface or subsurface artifact concentrations or scatters," and [w]hole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments." 18 C.F.R. Part 1312. See also 49 Federal Register, no. 4, 1016, 1028 (Jan. 6, 1984).

The Indictment states with specificity, at ¶13, each element of the offense set forth above and, in fifteen additional rhetorical paragraphs, goes well beyond the mere recital of those elements.

Thus, the indictment alleges that between April 13, 1988 and June, 1988, John William Way was employed by Boyd Brothers Construction as a heavy equipment operator. Boyd Brothers had been subcontracted both by J.H. Rudolph & Company and by the General Electric Company to perform earth moving work in and around a state-administered road project near Mount Vernon, Indiana. The project was funded jointly by the Federal Highway Administration and the General Electric Company. The construction permit, Indiana Department of Highways Standard Specifications, and archaeological

survey for the project required that all work cease, and the highway engineer be notified, if any concentration of archaeological resources was uncovered.

The indictment further alleges that during the period in question, "borrow" work for obtaining fill dirt had been performed on property of the General Electric Company by employees of Boyd Brothers. During grading work that followed the "borrow" operation, Defendant Way discovered an immense concentration of prehistoric Indian artifacts on an upland knob or ridge belonging to General Electric. Work was not stopped, nor was the state engineer notified. Instead, according to the indictment, Defendant Way excavated and removed hundreds of the artifacts -- including approximately four hundred flint and chert tools, twelve copper axeheads, thirty bear teeth, freshwater pearls, and items of cloth and leather -- and transported them in interstate commerce.

The indictment goes on to set forth, in appropriate formal charging language under state law, the predicate state and local law and permit violations alleged as predicates to the ARPA transportation offense. Thus, the excavation and removal of the artifacts is alleged to be without the authority of the owner, in violation of the Indiana criminal conversion and trespass statutes, and further in violation of the state highway permit.

Contrary to defendant's assertion in his Motion, therefore, the indictment is not only sufficient, it far exceeds the minimum standard for sufficiency of indictments under federal law. An

indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecution for the same offense. Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Fusaro, 708 F.2d 17, 23 (1st Cir.), cert. denied, 464 U.S. 1007 (1983). When the counts in an indictment track the statutory language with specificity and the language sets forth all the elements necessary to constitute the offense, the Hamling test is satisfied. Fusaro, supra, 708 F.2d at 23; United States v. Gordon, 780 F.2d 1165, 1171 (5th Cir. 1986).

The ARPA offense described in this indictment clearly satisfies all sufficiency requirements. With preciseness and specificity, the indictment alleges that Defendant Way transported archaeological resources in interstate commerce, which resources had been removed (in this case, by Defendant Way himself) in violation of state laws and permits. Well beyond those fundamentals, the instant ARPA charge goes into great detail in describing the circumstances making up the charged offense. The defendant, therefore, is not left to speculate upon what he is being charged with, and can easily raise a conviction as a bar to further jeopardy for the same conduct.

II. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT
[16 U.S.C. §§ 470aa et seq.] IS CONSTITUTIONAL,
BEING NEITHER VAGUE NOR OVERBROAD ON ITS FACE,
OR AS APPLIED TO THIS DEFENDANT.

Defendant further asserts a constitutional challenge to the ARPA statute on the grounds of vagueness and overbreadth. ARPA has already been upheld by a Court of Appeals as against this very challenge, and it should be upheld in this case as well.

The apparent basis for defendant's vagueness challenge is his assertion that the statute is "silent on mens rea," and, because it is a felony provision, is therefore fatally vague unless other words appearing in the statute have "historical meaning" comprehending an element of mens rea. Memorandum of Defendant, at 5.

The most that can be said of defendant's argument is that it is factually incorrect. It is true that 16 U.S.C. § 470ee(c), which describes the prohibited conduct with which defendant is charged, does not contain any reference to the state of mind required to establish a criminal violation. However, as is the case with many statutes containing both regulatory and criminal provisions, the general penalties section [16 U.S.C. § 470ee(d)] provides criminal sanctions only for those who "knowingly" violate the prohibitions set forth at 16 U.S.C. § 470ee(a), (b) and (c). Accordingly, the indictment in this case alleges, at ¶ 13., that Defendant Way "knowingly" transported archaeological resources in interstate commerce, which resources had been removed in violation of state law and permits.

In drafting the piece of legislation that became ARPA, the Congress devoted thought and discussion to the very issue of the appropriate level of mens rea for the criminal provisions. A

formulation that would have required a "willful" state of mind--and therefore an intent to violate the law and knowledge of the basis for the illegality of the removal and excavation--was specifically rejected upon the recommendation of the Justice Department. See H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News 1709, 1728. The House Report notes further that in its final form, "[ARPA] 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." Id., at 1714 (emphasis added).

Relying on the foregoing language from the legislative history, at least one district court has ruled in an ARPA prosecution (under the "unlawful removal from federal lands" subsection, 16 U.S.C. § 470ee(b)) that the word "knowingly" modifies only the actions prohibited by the statute, such as selling, purchasing and exchanging archaeological resources, and does not extend to knowledge of whether the artifacts were removed from (in that case) federal land, or were removed without a permit. United States v. Leroy James Kohl, No. 85-10044 (D. Idaho Feb. 13, 1986) (A copy of this Memorandum Opinion is attached hereto as Appendix A).

Of course, whether the district court in the Kohl case is correct -- and the government submits that it is -- is an interesting issue that may have to be resolved in the context of the settling of jury instructions, or perhaps with regard to a motion in limine. The constitutionality of the statute, however, does not hinge on the decision of this question. The statutory provisions as

to mens rea, which are fully replicated in the indictment itself, clearly are sufficient to negate defendant's assertion of vagueness owing to the asserted malum prohibitum nature of the offense charged.

This issue is particularly academic as raised by this defendant. As the indictment makes clear, in this case it is the defendant himself who is alleged to have excavated and removed archaeological resources in violation of state law. The indictment alleges, therefore, that the defendant himself "knowingly or intentionally" interfered with the possession and use of property in violation of Indiana Code 35-43-2-2(4), and the defendant himself who "knowingly" exerted unauthorized control over property in violation of Indiana Code 35-43-4-3. Thus, if the government is to prove that the state offenses of trespass and conversion were committed, it will also have to prove that this defendant possessed the requisite state of mind for each predicate offense under state law.

"In assessing vagueness, a statute must be considered in the light of the conduct with which the defendant is charged. . . ." United States v. Smyer, 596 F.2d 939, 941 (10th Cir. 1979). In light of the conduct with which Defendant Way is charged, there is nothing unconstitutionally vague about the provisions of ARPA or of the underlying state statutes and permits. In upholding the constitutionality of the Antiquities Act, 16 U.S.C. § 433, the predecessor to the ARPA statute, the Smyer court noted that the act

gave "a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial grounds and appropriating 800-900 year old artifacts is prohibited." Smyer, supra, 596 F.2d at 941. That is all that is required, and the ARPA statute, which was itself drafted in part to settle vagueness challenges directed at the Antiquities Act, see H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News 1709, 1710, meets that standard.

Defendant also seeks to raise an overbreadth challenge to the statute, but fails to point out what constitutionally protected conduct is reached by the provision in question. "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct; if it does not, then the overbreadth challenge must fail." United States v. Austin, 902 F.2d 743, 744 (9th Cir. 1990). Indeed, both the Smyer, court and the court in Austin, have found that the excavation of native American archaeological sites is not constitutionally protected conduct, even where such excavation is motivated by "curiosity" or in the interest of "academic freedom." Austin, supra, 902 F.2d at 744-745; Smyer, supra, 596 F.2d at 941. And while defendant cites such cases as Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the Smyer court noted that an artifacts excavation case is not "a sit-in case," or a "vagrancy case like Papachristou." Smyer, supra, 596 F.2d at 941.

The Ninth Circuit Court of Appeals, which certainly must encompass those jurisdictions producing the highest incidence of archaeological looting cases, had no difficulty in upholding the constitutionality of ARPA as against both vagueness and overbreadth challenges in United States v. Austin, cited above, in a factual context similar to the instant case. The Austin court found that the statute "provided fair notice that it prohibited the activities for which Austin was convicted," and further that the statute did not impermissibly reach constitutionally protected conduct. Austin, supra, 902 F.2d at 745. Defendant's constitutional challenge in this case should meet a similar fate.

III. THE PLAIN MEANING OF THE CHARGED PROVISION OF THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT [16 U.S.C. § 470ee(c)], ITS RELATION TO OTHER SUBSECTIONS OF THE ACT, AND THE CONGRESSIONAL PURPOSES BEHIND ITS ENACTMENT, DEMONSTRATE THAT THE STATUTE IS APPLICABLE TO THE INTER-STATE TRAFFICKING OF ARCHAEOLOGICAL RESOURCES EXCAVATED IN VIOLATION OF STATE OR LOCAL LAW, REGARDLESS OF WHETHER THE LAND FROM WHICH THE RESOURCES WERE EXCAVATED WAS PUBLICLY OR PRIVATELY OWNED.

Citing principally the "Congressional findings and declaration of purpose," or preamble to the ARPA statute, defendant next contends that 16 U.S.C. § 470ee(c) should not be applied where, as here, the land from which the trafficked artifacts was removed or excavated was privately owned. The issue here is clearly joined: both parties agree that the artifacts in this case, which were transported in interstate commerce, were excavated and removed from,

and themselves constituted property of, the General Electric Company. The issue is one of first impression, in that there are no reported cases under the "state or local law" subsection of ARPA [16 U.S.C. § 470ee(c)] at issue in this case.

The plain language of § 470ee(c), particularly when read together with §§ 470ee(a) and (b), is its own refutation of defendant's argument:

(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

(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.

16 U.S.C. §§ 470ee(a), (b), (c) (emphasis added).

Clearly, in drafting this statute, the basis for federal jurisdiction over the first two prohibitions, those contained in subsections (a) and (b), is that the matters described affect lands of the United States or of Indian tribes. The sole jurisdictional requirement for the prohibition at subsection (c) is that the archaeological resources move in interstate or foreign commerce.

There is no requirement set forth under subsections (a) or (b) that the items move in interstate commerce; conversely, there is no requirement set forth under subsection (c) that the items have been removed from public lands or Indian lands. The two distinct groupings of prohibitions arise from two independent bases for federal jurisdiction, each one sufficient by itself.

Thus, the present case is not one in which, arguing by analogy and citing to other congressional enactments using similar terminology, one must maintain that Congress knew how to express itself when it meant to proscribe only conduct involving "public lands or Indian lands." To the contrary, in this case, within the very same statute, Congress did express itself in specific terms when it intended its prohibitions to cover only "public lands or Indian lands," and omitted that same phrase when it did not so intend. See also H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News, at 1713 ("[ARPA] prohibits on public or Indian lands the excavation etc. 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.") (emphasis added) (punctuation as in original). According, therefore, to the established principal of statutory construction known as noscitur a sociis (a provision may be known "by the company it keeps," i.e., its meaning should be ascertained by reference to its context), Congress meant what it said in enacting 16 U.S.C. § 470ee(c). See

generally Annot., "Supreme Court's Application of the Rules of Eiusdem Generis and Noscitur a Sociis," 46 L.Ed.2d 879.

Despite the force of the plain meaning of the specific statutory provision with which he is charged, defendant maintains that Congress could not have meant to proscribe the conduct with which he is charged. In support of his position, defendant cites the broad statement of congressional findings and purpose, a form of preamble to the ARPA statute codified at 16 U.S.C. §470aa:

(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 chapter 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 October 31, 1979.

Preliminarily, the prohibition of interstate trafficking in artifacts illegally removed from privately owned land is entirely

consistent with the foregoing statement of congressional purpose. One of Congress's principal concerns in enacting this legislation was the spiralling commercial value of prehistoric American artifacts, which created such substantial economic incentives to looters of all prehistoric sites. These incentives had overwhelmed existing enforcement mechanisms, and overridden the rather paltry monetary fines which could be levied under the Antiquities Act. See H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News, at 1710. As ARPA's drafters noted, the prohibition contained in subsection (c) simply adds "an additional facet..., an additional layer of protection for the valuable resources which would be protected by this bill." H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News, at 1718.

The prohibition of interstate trafficking in artifacts removed in violation of State or local law, therefore, whether the provenance of those specific items is publicly or privately owned lands, is complementary to the goal of keeping looters away from public and Indian lands. The legislation, being designed to have a chilling effect on the market for Indian artifacts, could thereby penetrate the private "museums" scattered throughout small western and midwestern towns, the back rooms of the tourist "trading posts," the sophisticated suburban galleries of "primitive art"; and the rented hotel exhibition halls of the private dealers.

Congress could also reasonably have concluded that an additional layer of enforcement of state laws relating to

deseccration, trespass, theft and conversion of artifacts from private property, where such artifacts moved in interstate commerce, would promote the stated goal of enhanced awareness and cooperation between private owners of artifacts (presumably, including ownership by virtue of owning the land containing concentrations of artifacts), government officials, and the archaeological community.

Even assuming, arguendo, that the statement of policy contained in the preamble to the statute is incompatible with the plain meaning of 16 U.S.C. § 470ee(c) as outlined above and applied to the present case, another familiar principle of statutory construction holds that express provisions in the body of an act cannot be controlled by a preamble. See, e.g., Coosaw Mining Co. v. South Carolina, 144 U.S. 550 (1892). Where the language of a statute is plain and unambiguous, a court may not resort to the preamble of the act to ascertain its meaning. See, e.g., Yazoo & M. Valley R. Co. v. Thomas, 132 U.S. 174 (1889).

Further support for the government's position lies in the fact that ARPA violations under subsection (c) require a predicate violation of "any provision, rule, regulation, ordinance, or permit in effect under State or local law." 16 U.S.C. § 470ee(c). If only federally owned lands were encompassed by this provision, it would be difficult to conceive of what "State or local permit" could be violated by the removal of archaeological resources. On federal reserves such as national forests and national monuments, permitting for almost any conceivable activity is the domain of federal laws

and regulations. Thus, for example, ARPA itself (a federal law) creates the system for granting permits for the excavation of artifacts on public lands, so that any permit violation would constitute excavation in violation of a federal permit, and would therefore fall under the provisions of 16 U.S.C. § 470ee(a) or (b). Similarly, permits for construction or mining on public lands with respect to concentrations of archaeological resources, and requirements for obtaining archaeological surveys before beginning such work, are controlled by the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 et seq., a federal law. Any violation of that Act occurring on federal land would be a federal violation, and therefore chargeable under subsections (a) and (b) of ARPA; subsection (c) would be rendered superfluous.

The ARPA "savings provision," at 16 U.S.C. § 470kk, is not contrary to the government's position, and does not vary the plain meaning of 16 U.S.C. §470ee(c). That provision states that ARPA should not be construed to "affect any land" other than public or Indian land, or to affect "the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land" (emphasis added).

As described above in the government's analysis of ARPA's legislative history, only subsections (a) and (b) "affect land," in that the ARPA-enacted regulatory scheme requiring the obtaining of permits applies only to public and Indian lands. Under ARPA, then, no federal permit is to be required before excavating archaeological

resources on private land, i.e., private land is not affected by the regulatory scheme. Subsection (c), while it may or may not have incidental effects on commerce in items removed from private lands, is a provision that affects that commerce only. Congress would not have specified that only lawful commerce in artifacts removed from private land was unaffected by ARPA, were this not so. The negative implication of that very phrase is that unlawful commerce in artifacts removed from private land has indeed been affected by ARPA.

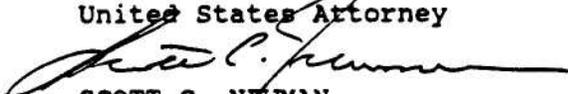
Finally, defendant's citation to more recent proposed legislation in the form of S. 1579 (101st Congress, 1989), is inapposite. Defendant argues that this proposed legislation "deals with" archaeology on private land, and because it has not become law, previous federal legislation must have been thought not to deal with commerce in artifacts excavated unlawfully on private land. Aside from the questionable merit of examining the intent behind an earlier legislative enactment by looking at a later one, an examination of S. 1579 (the pertinent portions of which are attached hereto as Appendix B) reveals that the criminal prohibitions of this proposed amendatory legislation leave ARPA's criminal provisions virtually unchanged. The new law would simply add provisions whereby, inter alia, the federal government would provide funding to the states to foster archaeological preservation and study on private land.

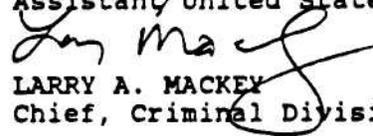
Defendant, therefore, can provide no authority and no compelling reason to deviate from the plain meaning of 16 U.S.C. § 470ee(c), and his challenge to the indictment on this ground must be rejected.

WHEREFORE, for all of the above reasons, the Motion of the Defendant to Dismiss the Indictment should be, in all particulars, denied.

Respectfully submitted,

DEBORAH J. DANIELS
United States Attorney


By: SCOTT C. NEWMAN
Assistant United States Attorney


By: LARRY A. MACKAY
Chief, Criminal Division

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing GOVERNMENT'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT has been served upon counsel of record, by placing same in the United States Mail, first-class postage prepaid, and addressed to Jack Davis, Esq., 516 Hulman Building, Evansville, Indiana 47708, this 28th day of September, 1990.



SCOTT C. NEWMAN
Assistant United States Attorney

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Indianapolis, Indiana 46204
(317) 226-6333

APPENDIX A:

United States v. Leroy James Kohl

APPENDIX B:

S. 1579, 101st CONG. (1989)

42
SEC. 106. PROHIBITION OF UNAUTHORIZED ARCHAEOLOGY
AND TRANSACTIONS INVOLVING ARCHAEOLOGICAL RESOURCES AND PENALTIES FOR VIOLATION.

5 The Archaeological Resources Protection Act of 1979 is
6 amended by striking sections 6, 7, and 8 (16 U.S.C. 470aa,
7 470al, and 470gg) and inserting the following new sections:

8 "PROHIBITION OF UNAUTHORIZED ARCHAEOLOGY AND
9 TRANSACTIONS INVOLVING ARCHAEOLOGICAL RE-
10 SOURCES.

11 "SEC. 6. (a) It is unlawful to—

12 "(1) excavate, remove, damage, destroy, or other-
13 wise alter or deface; or

14 "(2) attempt, and abet, counsel, solicit, procure,
15 or employ another person to excavate, remove,
16 damage, or otherwise alter or deface,

17 an archaeological resource located on public lands or Indian
18 lands unless such activity is pursuant to—

19 "(A) section 106 of the National Historic Preser-
20 vation Act (16 U.S.C. 470f); or

21 "(B) a permit under section 4 of this Act.

22 "(b) It is unlawful to—

23 "(1) sell, purchase, exchange, transport, or re-
24 ceive; or

1 with and certification systems of international, national,
2 State, and local archaeological organizations.

3 “(4) In evaluating qualifications and standards pres-
4 ent to subparagraph (A), the Advisory Council shall consult
5 with the Archaeology Advisory Board, the Society of Profes-
6 sional Archaeologists, the Society for American Archaeology,
7 the Society for Historical Archaeology, the Smithsonian In-
8 stitutions, and other interested parties.

9 SEC. 119. ARCHAEOLOGY ON PRIVATE LAND.

10 The Archaeological Resources Protection Act of 1979
11 (16 U.S.C. 470aa et seq.) is amended by adding at the end
12 thereof the following new section:

13 “ARCHAEOLOGY ON PRIVATE LAND

14 “Sec. 18. In order to promote the preservation of ar-
15 chaeological resources on private land that are eligible for
16 nomination to the National Register, the Advisory Council
17 shall promulgate regulations to ensure that each State histo-
18 ric preservation program required by section 101(b) of the Na-
19 tional Historic Preservation Act (16 U.S.C. 470c(b)) includes
20 a plan to—

21 “(1) identify locations of archaeological resources
22 on private land that have a demonstrated or likely re-
23 search significance;

24 “(2) provide information to the owners of such re-
25 sources about the significance of the archaeological re-

... the and the protection of such resources, and the suitable means for protection.

"(Y) encourage owners to preserve archaeological resources in place, and offer to the owners of such resources information on the tax and grant assistance available for the donation of the resources or of a preservation assessment of the resources; and

"(4) encourage owners who are undertaking excavations to—

10. "(A) conduct excavations and analyses that meet the standards for Federally-sponsored excavations established pursuant to this Act;

11. "(B) register artifacts found within the archaeological resources by the antiquities registration program established by section 90;

12. "(C) donate or lend artifacts with a demonstrated extreme or unique significance in current or likely research to an appropriate research institution; and

13. "(D) allow access to artifacts for research purposes.

FOR THE UNITED STATES AND ASSOCIATED STATES

The Archaeological Resources Protection Act of 1979

... (a) ... (b) ... (c) ... (d) ... (e) ... (f) ... (g) ... (h) ... (i) ... (j) ... (k) ... (l) ... (m) ... (n) ... (o) ... (p) ... (q) ... (r) ... (s) ... (t) ... (u) ... (v) ... (w) ... (x) ... (y) ... (z) ...

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

JOHN WILLIAM WAY
Defendant

CAUSE NO. EV 90-32-CR

ORDER

Comes now before the Court the defendant, John William Way, upon his Motions to File Amended Memorandum and to Dismiss Indictment.

The Court, being duly advised in the premises, GRANTS defendant's Motion to File Amended Memorandum and DENIES defendant's Motion to Dismiss Indictment. A Memorandum explaining the Court's rationale is attached.

IT IS SO ORDERED this 25th day of October, 1990 at Evansville, Indiana.



GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: Distribution to all counsel of record

MEMORANDUM

I. INTRODUCTION

An Indictment was filed against defendant, John William Way, on May 31, 1990. Through that Indictment, defendant is charged with violating the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa et seq.

On July 31, 1990 the defendant filed his Motion to Dismiss Indictment. The defendant also filed a Memorandum in Support of that Motion on the same day. Subsequently, on September 24, 1990, the defendant filed a Motion to File an Amended Memorandum of Law Ab Initio and to withdraw his earlier Memorandum.

The defendant claims that the Indictment should be dismissed for the following reasons:

1. That the ARPA does not apply to artifacts or resources taken from private land. That the Indictment alleges that he took artifacts or resources from private land, not public or Indian land, and as such, he has not violated the ARPA.

2. That the relevant sections of the ARPA are overbroad and vague.

3. That the Indictment does not sufficiently state the offense against the defendant, preventing him from preparing a defense.

All these claims are controverted by the United States. The Court will address these claims individually.

II. PRIVATE LAND v. PUBLIC LANDS

The legislative purpose of ARPA is found at 16 U.S.C. § 470aa, which states:

§4700aa Findings and purpose.

(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 [enacted Oct. 31, 1979]. (Oct. 31, 1979, P.L. 96-95, § 2, 93 Stat. 721).

Section 470ee of ARPA establishes what acts are criminal and what penalties are to be imposed for violation of its prohibitions. That section reads, in relevant part:

§ 470ee. Prohibited acts and criminal penalties

(a) No person may excavate, remove, damage, or otherwise alter or deface, or attempt to 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 [16 USCS § 470cc], a permit referred to in section 4(h)(2) [16 USCS § 470cc(h)(2)], or the exemption contained in section 4(g)(1) [16 USCS § 470cc(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. [Emphasis added by the Court].

Defendant believes that since subsections (a) and (b) apply to only public lands and Indian lands that the same is also true of subsection (c). In support of that position, defendant points to the following language in the legislature's findings and purpose: "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" It is true, that if one reads only §§ 470aa and 470ee(c), the defendant's position is not only plausible, but compelling. However, to reach the defendant's position, the Court would have to ignore the remainder of the statute.

Subsections (a) and (d) deal directly with the sale, transportation, purchase, exchange, etc. of artifacts and resources

which are excavated or removed from public or Indian lands. The United States clearly possesses the authority to control such lands and items, such as archaeological resources, which are discovered or removed from such lands.

Subsection (c) is concerned with those resources which are excavated, removed, etc., in violation of any "provision, rule, regulation, ordinance, or permit in effect under State or local law." However, that provision applies only to such resources after they have entered interstate commerce. Congress clearly intended to include resources which are excavated or removed from non-public and non-Indian lands since subsections (a) and (k) cover the excavation, removal, sale, purchase, exchange, transport, etc. of resources which are derived from public or Indian lands. To construe the statute as the defendant contends would have the effect of rendering subsection (c) superfluous.

The defendant also supports his position by referring to two pending bills, H.R. 3412 and S. 1579. It is the defendant's contention that those Bills seek to add private lands to the grasp of ARPA, and as such, it was not the intent of Congress to include private lands before. The Court has obtained copies of both Bills. The Amendments contained in both Bills, which are relevant herein, are identical. Enumerated as section 115, the Amendment reads:

Sec. 115. PROHIBITION OF UNAUTHORIZED ARCHAEOLOGY AND TRANSACTIONS INVOLVING ARCHAEOLOGICAL RESOURCES AND PENALTIES FOR VIOLATION.

The Archaeological Resources Protection Act of 1979 is amended by striking sections 6, 7, and 8 (16

U.S.C. 470ee, 470ff, and 470gg) and inserting the following new sections: "PROHIBITION OF UNAUTHORIZED ARCHAEOLOGY AND TRANSACTIONS INVOLVING ARCHAEOLOGICAL RESOURCES.

"Sec. 6.(a) It is unlawful to--

"(1) excavate, remove, damage, destroy, or otherwise alter or deface; or

"(2) attempt, and abet, counsel, solicit, procure, or employ another person to excavate, remove, damage, or otherwise alter or deface,

an archaeological resource located on public lands or Indian lands unless such activity is pursuant to--

"(A) section 106 of the National Historic Preservation Act (16 U.S.C. 470f); or

"(B) a permit under section 4 of this Act.

"(b) It is unlawful to--

"(1) sell, purchase, exchange, transport, or receive; or

"(2) offer, attempt, aid, abet, counsel, solicit, procure, or employ another person to sell, purchase, exchange, transport or receive,

an archaeological resource if the archaeological resource was excavated or removed in violation of subsection (a) or any provision, rule, regulation, ordinance, or permit in effect under Federal, State, tribal, or local law. [Emphasis added by the Court].

This Amendment does not change the relevant provision of the statute, except that it has added Federal and tribal law to the permit section and has eliminated the interstate commerce requirement. It appears that the intent is to stretch the reach of ARPA to those artifacts and resources excavated or removed in violation of local law in the same manner as the current statute does. The defendant's claim that the statute does not apply to private lands is without merit when artifacts and resources are

excavated or removed from private lands in violation of State or local law.

III. OVERBREADTH AND VAGUENESS

Defendant's second and third claims are that the statute is both overbroad and vague, in violation of the Fifth Amendment to the Constitution of the United States.

First, defendant contends that the penalty provision of ARPA is silent on mens rea, and for that reason, the statute is unconstitutional. The Court disagrees. Subsection 470ee(d) specifically establishes a mens rea to be applied to subsections (a), (b) and (c). That provision establishes a knowing violation of the statute is criminal.¹

Second, defendant contends that the statute is vague because it doesn't provide adequate notice of what conduct is prohibited.

Criminal statutes must provide people with ordinary intelligence fair notice that certain conduct is prohibited. United States v. Harris, 547 U.S. 612 (1954); see also, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971). Unquestionably, people "are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

ARPA is not vague. Subsection (c) of 470ee clearly states that no person shall sell, purchase, etc. archaeological resour-

¹ Whether this mens rea requirement refers to a nexus between the defendant's state of mind and his alleged acts, or to his knowledge that the artifacts were acquired in violation of ARPA (scienter), or both, need not be resolved at this time.

es excavated, removed, sold, etc. in violation of "ANY provision, rule, regulation, ordinance, or permit in effect under State or local law. The Indictment charges that defendant took Indian artifacts in violation of State theft law, as well as in violation of Indiana Dept. of Highways standard specifications. the Indictment also charges that he put those artifacts into interstate commerce, as required by 470ee(c). Under these facts, the defendant was on notice that the alleged conduct was made criminal by ARPA.

Third, defendant claims that the statute is overbroad. To be overbroad the statute must reach to a substantial amount of Constitutionally protected conduct. U.S. v. Austin, 902 F.2d 743 (1990), citing, Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982). The defendant has made no such showing sub judice.

IV. SUFFICIENCY OF THE INDICTMENT

Defendant's final contention is that the Indictment charging him is insufficient. Fed.R.Crim.P. 7(c)(1) reads, in relevant part:

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for

each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

The Indictment herein complies with that rule. It provides the basic facts, dates and law under which the defendant is charged.

IV. CONCLUSION

Accordingly, defendant's Motion to File Amended Memorandum is GRANTED. Defendant's Motion for Dismissal of the Indictment filed May 31, 1990 is DENIED.

IT IS SO ORDERED this 25th day of October, 1990 at
Evansville, Indiana.



GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: Distribution to all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE 1988 HONDA ACCORD, BEARING
VEHICLE IDENTIFICATION NUMBER
1HGCA5545JA061974,

Defendant.

NO. EV 91- -C

COMPLAINT FOR FORFEITURE IN REM

For its claim of forfeiture against the defendant vehicle, the Plaintiff, United States of America, through its attorneys, Deborah J. Daniels, United States Attorney for the Southern District of Indiana, and Donna R. Eide, Assistant United States Attorney, and Larry A. Mackey, Chief, Criminal Division, alleges on information and belief as follows:

1. This Court has jurisdiction over this cause of action pursuant to Title 28, United States Code, Sections 1345 and 1355.

2. Venue lies in this district pursuant to Title 28, United States Code, Section 1395, because the defendant property is found in this district and the property is now, and during the pendency of this action will be, in this district.

3. The defendant property is one 1988 Honda Accord automobile, bearing vehicle identification number 1HGCA5545JA061974

(hereinafter, "the vehicle"), which was seized pursuant to a seizure warrant duly issued by a United States Magistrate upon a finding of probable cause on July 11, 1991.

4. The vehicle at all times relevant herein was owned by Arthur Joseph Gerber, Jr., of Tell City, Indiana.

AT ALL TIMES RELEVANT TO THIS COMPLAINT:

5. The Archaeological Resources Protection Act of 1979 (hereinafter, "the Act"), codified at Title 16, United States Code, Section 470aa et seq., provided criminal penalties for certain activities involving the trafficking of "archaeological resources," as follows:

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, or received in violation of any provision, rule, regulation, ordinance or permit in effect under State or local law.

Title 16, United States Code, Section 470ee(c).

6. The Act defined an archaeological resource to include "any material remains of past human life or activities which are of archaeological interest . . . [and] at least 100 years of age."

7. The enforcement provision of the Act provided for a forfeiture remedy, in the following terms:

All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of Section 470ee of this title 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) . . . subject to forfeiture to the United States upon --

* * * *

(3) a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation.

Title 16, United States Code, Section 470gg(b) (emphasis added).

8. Indiana law, at Indiana Code Section 35-43-2-2, provided that "[a] person who . . . [k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent . . . commits criminal trespass."

9. Indiana law, at Indiana Code Section 35-43-4-3, further provided that "[a] person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion."

10. The Indiana Department of Highways Standard Specifications in force and effect provided, at Section 104.05, that "[i]f archaeological artifacts are encountered during excavation operations, the Contractor shall cease operations in the immediate vicinity and notify the Engineer. An Archaeologist will be provided by the State and a determination will be made as to the significance and the disposition of such findings. In no event will any employee of the Contractor or the State of Indiana share in such ownership, or profit from any salvaged archaeological findings."

11. GE Plastics Manufacturing Division, Mount Vernon Plant Site (hereinafter, "GE Plastics"), was a facility owned by the General Electric Company, a New York corporation duly licensed and qualified to do business in the State of Indiana. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

12. Indiana Department of Highways Project Number RS-6665() involved the construction of a new County Road 850S running southeast to northwest and connecting Old State Road 69 to New State Road 69 near the entrance to GE Plastics. This project was funded by the Federal Highway Administration and the General Electric Company, and was administered by the Indiana Department of Highways in accordance with Indiana Department of Highways regulations and Standard Specifications.

13. Located directly to the south of, and immediately adjacent to, the intersection of New Highway 69 and County Road 850S, on property owned by the General Electric Company, there existed a prominent knob or ridge. This knob or ridge (hereinafter, "the GE Site") contained, under the surface of the ground, an archaeological resource, specifically: a Hopewell Indian ceremonial and burial site dating from approximately two thousand years ago. The GE Site contained within it thousands of artifacts of the Hopewell civilization, including but not limited to flint tools, chert projectile points, quartz crystal blades, obsidian blades, carved cannel coal, mica, copper axe-heads known

as "celts," copper earspools adorned with silver, copper pins, silver spherical objects, cut copper sheets, freshwater pearls, carved human mandibles, drilled bear canines, shell beads, items of wood and leather, and fragments of each of the foregoing categories of artifacts.

14. Boyd Brothers, Incorporated, of Sesser, Illinois, was an earth-moving contractor, and had been awarded a subcontract to move "borrow" dirt from the knob or ridge (containing the GE Site) in conjunction with the construction of County Road 850S, for use in and around the road construction.

15. As was required by the State of Indiana for borrow excavation in support of federally funded highway construction, Boyd Brothers obtained an archaeological survey before beginning excavation of the ridge. Although the survey did not reveal the presence of an archaeological site at the location, it concluded that "if any concentration of archaeological materials or evidence of subsurface features should be encountered during borrow operations, an archaeologist from the Division of Historic Preservation and Archaeology should be immediately notified for an on-site assessment."

16. John William Way (hereinafter, "Way") was an agent and employee of Boyd Brothers, Inc. assigned as a heavy equipment operator at the earth moving job in connection with the County Road 850S/General Electric project.

17. On or about June 3, 1988, Way knowingly excavated, removed and transported from the GE Site archaeological resources as that term is defined in the Act. Specifically, Way removed numerous Hopewell Indian artifacts, including approximately 700 pieces of carved flint and chert points, twelve copper celts, thirty bear canines, freshwater pearls, and items of cloth and leather.

18. On or about June 3, 1988, Way transported the foregoing archaeological resources from the State of Indiana to his residence in the State of Illinois.

19. On or about June 4, 1988, Way returned to the GE Site, and knowingly excavated and removed further archaeological resources. On the same date, Way transported these archaeological resources from the State of Indiana to his residence in the State of Illinois.

20. At no time did Way, or any other agent of Boyd Brothers or of its general contractor, notify any agent of the State of Indiana of the discovery of a concentration of archaeological materials. At no time did Way or any other agent of Boyd Brothers or of its general contractor obtain consent, permission, or authority of GE Plastics to interfere with its property by removing valuable archaeological resources therefrom.

21. On or about July 21, 1988, Arthur Joseph Gerber, Jr., travelled in the defendant vehicle from the State of Indiana to

the State of Illinois, where he purchased most of the archaeological resources wrongfully excavated by Way for the sum of \$6,000 paid in United States Currency. Arthur Joseph Gerber then and there knew and had reason to believe that the archaeological resources being purchased had been wrongfully removed, without permission, consent, or authority of the owner.

22. On or about July 21, 1988, Arthur Joseph Gerber, Jr., then used the vehicle to transport the wrongfully removed archaeological resources from the State of Illinois to the State of Indiana.

23. As a part of the transaction on July 21, 1988, and in further consideration of the payment of \$6,000 in currency by Arthur Joseph Gerber, Jr., Way agreed to guide Arthur Joseph Gerber, Jr., to the precise location of the GE Site. On July 21, 1988, Arthur Joseph Gerber, Jr., went with Way to the GE Site and noted its location.

24. Thereafter, on or about July 22 and July 23, 1988, Arthur Joseph Gerber, Jr. recruited John David Towery, a resident of the State of Kentucky, and others, to assist him in making further unauthorized excavations and removals of archaeological resources from the GE Site.

25. On July 24, July 26 or 27, and July 31, 1988, Arthur Joseph Gerber was present at the site with John David Towery, and unlawfully excavated and removed further archaeological resources

from the GE Site, including approximately seven copper celts, copper earspools adorned with silver, two copper pins, freshwater pearls, shell beads, half-spherical objects made of silver, and pieces of leather. After agreeing to buy out a third party who assisted in the unlawful excavation of the archaeological resources, Arthur Joseph Gerber, Jr., and John David Towery agreed to divide these items equally between themselves.

26. Thereafter, beginning in August, 1988, and continuing until on or about July 4, 1989, Arthur Joseph Gerber made numerous offers to purchase, and did purchase, from John David Towery, the unlawfully removed archaeological resources remaining in the possession of John David Towery which had previously been divided between the two men. Arthur Joseph Gerber, Jr., paid John David Towery the sum of \$2,000 in United States Currency, and an exchange of unrelated Indian artifacts previously belonging to Arthur Joseph Gerber, Jr., in return for said unlawfully removed archaeological resources.

27. In or about the Spring of 1989, pursuant to the foregoing agreement to purchase archaeological resources, Arthur Joseph Gerber, Jr., travelled in the vehicle from the State of Indiana to the State of Kentucky, where he accepted delivery of the archaeological resources. He then transported the archaeological resources back to the State of Indiana in the vehicle.

28. The acts described above constitute violations of Title 16, United States Code, Section 470ee(c). Based on those

allegations, the vehicle was used in connection with or involved in a violation of such code section, and is therefore subject to forfeiture to the United States pursuant to Title 16, United States Code, Section 470gg(b)(3).

WHEREFORE, the Plaintiff, United States of America, prays that due process issue to enforce the forfeiture of the defendant and that due notice be given to all interested parties to appear and show cause why the forfeiture should not be decreed, and further prays that the defendant be condemned and forfeited to the United States of America and be delivered to the custody of the United States Marshal for disposition according to law, and for such other relief as this Court may deem just and proper in the premises.

Respectfully submitted,

DEBORAH J. DANIELS
United States Attorney

By:

LARRY A. MACKEY
Chief, Criminal Division

By:



DONNA R. EIDE
Assistant United States Attorney

Office of the United States Attorney
5th Floor, United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204
Telephone: 317-226-6333
FTS Telephone: 331-6333

VERIFICATION

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

James A. Beck, being first duly sworn, upon his oath deposes and says that he is a Special Agent with the Federal Bureau of Investigation; that he makes this Affidavit for and on behalf of the United States of America, and that the allegations in the foregoing Complaint for Forfeiture In Rem are true and correct to the best of my knowledge and belief.

JAMES A. BECK, Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me, a Notary Public, this
_____ day of _____, 1991.

Notary Public

My Commission Expires:
My County of Residence:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,)		
)		
Plaintiff,)		
)		
v.)	NO. EV 91-	-C
)		
ONE 1979 CHEVROLET PICKUP TRUCK,)		
BEARING VEHICLE IDENTIFICATION)		
NUMBER CCD149A100994,)		
)		
Defendant.)		

COMPLAINT FOR FORFEITURE IN REM

For its claim of forfeiture against the defendant vehicle, the Plaintiff, United States of America, through its attorneys, Deborah J. Daniels, United States Attorney for the Southern District of Indiana, and Donna R. Eide, Assistant United States Attorney, and Larry A. Mackey, Chief, Criminal Division, alleges on information and belief as follows:

1. This Court has jurisdiction over this cause of action pursuant to Title 28, United States Code, Sections 1345 and 1355.

2. Venue lies in this district pursuant to Title 28, United States Code, Section 1395, because the defendant property is found in this district and the property is now, and during the pendency of this action will be, in this district.

3. The defendant property is one 1979 Chevrolet Pickup Truck, red in color, and bearing vehicle identification number

CCD149A100994, which was seized pursuant to a seizure warrant duly issued by a United States Magistrate upon a finding of probable cause on July 11, 1991.

4. The vehicle at all times relevant herein was owned by Arthur Joseph Gerber, Jr., of Tell City, Indiana.

AT ALL TIMES RELEVANT TO THIS COMPLAINT:

5. The Archaeological Resources Protection Act of 1979 (hereinafter, "the Act"), codified at Title 16, United States Code, Section 470aa et seq., provided criminal penalties for certain activities involving the trafficking of "archaeological resources," as follows:

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, or received in violation of any provision, rule, regulation, ordinance or permit in effect under State or local law.

Title 16, United States Code, Section 470ee(c).

6. The Act defined an archaeological resource to include "any material remains of past human life or activities which are of archaeological interest . . . [and] at least 100 years of age."

7. The enforcement provision of the Act provided for a forfeiture remedy, in the following terms:

All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of Section 470ee of this title 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) . . . subject to forfeiture to the United States upon --

* * * *

(3) a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation.

Title 16; United States Code, Section 470gg(b) (emphasis added).

8. Indiana law, at Indiana Code Section 35-43-2-2, provided that "[a] person who . . . [k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent . . . commits criminal trespass."

9. Indiana law, at Indiana Code Section 35-43-4-3, further provided that "[a] person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion."

10. The Indiana Department of Highways Standard Specifications in force and effect provided, at Section 104.05, that "[i]f archaeological artifacts are encountered during excavation operations, the Contractor shall cease operations in the immediate vicinity and notify the Engineer. An Archaeologist will be provided by the State and a determination will be made as to the significance and the disposition of such findings. In no event will any employee of the Contractor or the State of Indiana share in such ownership, or profit from any salvaged archaeological findings."

11. GE Plastics Manufacturing Division, Mount Vernon Plant Site (hereinafter, "GE Plastics"), was a facility owned by the General Electric Company, a New York corporation duly licensed and qualified to do business in the State of Indiana. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

12. Indiana Department of Highways Project Number RS-6665() involved the construction of a new County Road 850S running southeast to northwest and connecting Old State Road 69 to New State Road 69 near the entrance to GE Plastics. This project was funded by the Federal Highway Administration and the General Electric Company, and was administered by the Indiana Department of Highways in accordance with Indiana Department of Highways regulations and Standard Specifications.

13. Located directly to the south of, and immediately adjacent to, the intersection of New Highway 69 and County Road 850S, on property owned by the General Electric Company, there existed a prominent knob or ridge. This knob or ridge (hereinafter, "the GE Site") contained, under the surface of the ground, an archaeological resource, specifically: a Hopewell Indian ceremonial and burial site dating from approximately two thousand years ago. The GE Site contained within it thousands of artifacts of the Hopewell civilization, including but not limited to flint tools, chert projectile points, quartz crystal blades, obsidian blades, carved cannel coal, mica, copper axe-heads known

as "celts," copper earspools adorned with silver, copper pins, silver spherical objects, cut copper sheets, freshwater pearls, carved human mandibles, drilled bear canines, shell beads, items of wood and leather, and fragments of each of the foregoing categories of artifacts.

14. Boyd Brothers, Incorporated, of Sesser, Illinois, was an earth-moving contractor, and had been awarded a subcontract to move "borrow" dirt from the knob or ridge (containing the GE Site) in conjunction with the construction of County Road 850S, for use in and around the road construction.

15. As was required by the State of Indiana for borrow excavation in support of federally funded highway construction, Boyd Brothers obtained an archaeological survey before beginning excavation of the ridge. Although the survey did not reveal the presence of an archaeological site at the location, it concluded that "if any concentration of archaeological materials or evidence of subsurface features should be encountered during borrow operations, an archaeologist from the Division of Historic Preservation and Archaeology should be immediately notified for an on-site assessment."

16. John William Way (hereinafter, "Way") was an agent and employee of Boyd Brothers, Inc. assigned as a heavy equipment operator at the earth moving job in connection with the County Road 850S/General Electric project.

17. On or about June 3, 1988, Way knowingly excavated, removed and transported from the GE Site archaeological resources as that term is defined in the Act. Specifically, Way removed numerous Hopewell Indian artifacts, including approximately 700 pieces of carved flint and chert points, twelve copper celts, thirty bear canines, freshwater pearls, and items of cloth and leather.

18. On or about June 3, 1988, Way transported the foregoing archaeological resources from the State of Indiana to his residence in the State of Illinois.

19. On or about June 4, 1988, Way returned to the GE Site, and knowingly excavated and removed further archaeological resources. On the same date, Way transported these archaeological resources from the State of Indiana to his residence in the State of Illinois.

20. At no time did Way, or any other agent of Boyd Brothers or of its general contractor, notify any agent of the State of Indiana of the discovery of a concentration of archaeological materials. At no time did Way or any other agent of Boyd Brothers or of its general contractor obtain consent, permission, or authority of GE Plastics to interfere with its property by removing valuable archaeological resources therefrom.

21. On or about July 21, 1988, Arthur Joseph Gerber, Jr., travelled from the State of Indiana to the State of Illinois, where

he purchased most of the archaeological resources wrongfully excavated by Way for the sum of \$6,000 paid in United States Currency. Arthur Joseph Gerber then and there knew and had reason to believe that the archaeological resources being purchased had been wrongfully removed, without permission, consent, or authority of the owner.

22. As a part of the transaction on July 21, 1988, and in further consideration of the payment of \$6,000 in currency by Arthur Joseph Gerber, Jr., Way agreed to guide Arthur Joseph Gerber, Jr., to the precise location of the GE Site. On July 21, 1988, Arthur Joseph Gerber, Jr., went with Way to the GE Site and noted its location.

23. Thereafter, on or about July 22 and July 23, 1988, Arthur Joseph Gerber, Jr. recruited John David Towery, a resident of the State of Kentucky, and others, to assist him in making further unauthorized excavations and removals of archaeological resources from the GE Site.

24. On July 24, July 26 or 27, and July 31, 1988, Arthur Joseph Gerber was present at the site with John David Towery, and unlawfully excavated and removed further archaeological resources from the GE Site, including approximately seven hundred flint and chert blades, seven copper celts, copper earspools adorned with silver, two copper pins, freshwater pearls, shell beads, half-spherical objects made of silver, and pieces of leather.

25. On at least one of the above-described occasions on which Arthur Joseph Gerber, Jr. personally participated in the unlawful removal of archaeological resources at the GE Site, Arthur Joseph Gerber, Jr. used the defendant vehicle to travel to the GE Site, and to transport numerous archaeological resources from the GE Site.

26. On or about August 1, 1988, Arthur Joseph Gerber, Jr., was ejected from the GE Site by agents of GE Plastics. On that occasion, Arthur Joseph Gerber was observed to be driving the defendant vehicle.

27. On or about August 6, 1988, and August 7, 1988, flint and chert blades that had been transported from the GE Site in the defendant vehicle were sold in interstate commerce at an Indian artifacts exhibition organized by Arthur Joseph Gerber, Jr., at Owensboro, in the State of Kentucky.

28. The acts described above constitute violations of Title 16, United States Code, Section 470ee(c). Based on those allegations, the vehicle was used in connection with or involved in a violation of such code section, and is therefore subject to forfeiture to the United States pursuant to Title 16, United States Code, Section 470gg(b)(3).

WHEREFORE, the Plaintiff, United States of America, prays that due process issue to enforce the forfeiture of the defendant and that due notice be given to all interested parties to appear

and show cause why the forfeiture should not be decreed, and further prays that the defendant be condemned and forfeited to the United States of America and be delivered to the custody of the United States Marshal for disposition according to law, and for such other relief as this Court may deem just and proper in the premises.

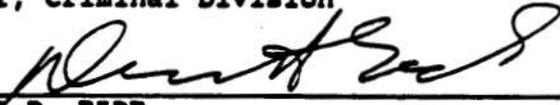
Respectfully submitted,

DEBORAH J. DANIELS
United States Attorney

By:

LARRY A. MACKEY
Chief, Criminal Division

By:


DONNA R. EIDE
Assistant United States Attorney

Office of the United States Attorney
5th Floor, United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204
Telephone: 317-226-6333
FTS Telephone: 331-6333

V E R I F I C A T I O N

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

James A. Beck, being first duly sworn, upon his oath deposes and says that he is a Special Agent with the Federal Bureau of Investigation; that he makes this Affidavit for and on behalf of the United States of America, and that the allegations in the foregoing Complaint for Forfeiture In Rem are true and correct to the best of my knowledge and belief.

JAMES A. BECK, Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me, a Notary Public, this
_____ day of _____, 1991.

Notary Public

My Commission Expires:

My County of Residence:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION



UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 1987 FORD 3/4 TON PICK-UP TRUCK)
 AND IN LIEU THEREOF \$7,500.00,)
)
 Defendant.)

CAUSE NO. EV 91-103 -C

COMPLAINT FOR FORFEITURE

For its claim of forfeiture against the defendant vehicle and in lieu thereof \$7,500.00, the Plaintiff, United States of America, through its attorneys, Deborah J. Daniels, United States Attorney, and Donna R. Eide, Assistant United States Attorney, and Larry A. Mackey, Chief, Criminal Division, alleges on information and belief as follows:

1. This Court has jurisdiction over this cause of action pursuant to Title 28, United States Code, Sections 1345 and 1355.
2. Venue lies in this district pursuant to Title 28, United States Code, Section 1395 because the defendant property is found in this district and the property is now, and during the pendency of this action will be, in this district.
3. The defendant property is one 1987 Ford 3/4 pick-up truck (hereinafter referred to as "the vehicle") which was sold

for the sum of \$7,500.00 (hereinafter referred to as "the defendant") subsequent to the acts alleged herein.

4. The vehicle and the defendant at all times relevant herein were owned by Boyd Brothers Incorporated of Sesser, Illinois.

AT ALL TIMES RELEVANT TO THIS COMPLAINT:

5. GE Plastics Manufacturing Division, Mount Vernon Plant Site (hereinafter "GE Plastics"), was a facility owned by the General Electric Company, a New York corporation duly licensed and qualified to do business in the State of Indiana. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

6. Indiana Department of Highways Project Number RS-6665() involved the construction of a new County Road 850S running southeast to northwest and connecting old State Road 69 to New State Road 69 near the entrance to GE Plastics. Project Number RS-6665() was funded by the Federal Highway Administration and the General Electric Company, and was administered by the Indiana Department of Highways in accordance with Indiana Department of Highways regulations and Standard Specifications.

7. The Indiana Department of Highways Standard Specifications in force and effect at Section 104.06 ("Rights in and Use of Materials Found on the Project") provided that "[i]f

archaeological artifacts are encountered during excavation operations, the Contractor shall cease operations in the immediate vicinity and notify the Engineer. An Archaeologist will be provided by the State and a determination will be made as to the significance and the disposition of such findings. In no event will any employee of the Contractor or the State of Indiana share in such ownership, or profit from any salvaged archaeological findings." The Indiana Department of Highways, Division of Location and Environment, employed an archaeologist on its staff for the purpose of responding to such notifications by contractors that archaeological artifacts had been encountered during highway-related excavations.

8. Located directly to the south of, and immediately adjacent to, the intersection of New Highway 69 and County Road 850S, on property owned by the General Electric Company, there existed a prominent upland knob or ridge. This knob or ridge (hereinafter referred to as "the GE Site") contained, under the surface of the ground, an archaeological resource, specifically, a Hopewell Indian ceremonial site dating from the Middle Woodland Period of the Hopewell civilization, a period corresponding approximately to the first centuries A.D. The GE Site contained within it thousands of artifacts of the Hopewell civilization, including but not limited to flint tools, pottery, chert projectile points, quartz crystal blades, obsidian blades, carved cannel coal, mica, copper axe-heads or "celts," shell beads, freshwater pearls, animal bone, portions of human mandibles,

drilled bear teeth, items of wood and leather, or fragments of each of the foregoing categories of artifacts.

9. J.H. Rudolph & Company, Inc. (hereinafter "J.H. Rudolph"), of Evansville, Indiana, was a general road construction contractor, and had been awarded the general contract for Indiana Department of Highways Project Number RS-6665(), the construction of County Road 850S. Work performed under the contract by J.H. Rudolph, or by any subcontractor retained by J.H. Rudolph, was required to be done in conformity with applicable laws and regulations and with the Standard Specifications of the Indiana Department of Highways.

10. Fluor-Daniel Construction Company, also known as Daniel Construction Company (hereinafter "Fluor-Daniel"), of Mount Vernon, Indiana, was a general construction contractor and had been awarded a contract by the General Electric Company for the grading and reclamation of property of GE Plastics surrounding the construction site of County Road 850S.

11. Boyd Brothers, Incorporated (hereinafter "Boyd Brothers"), of Sesser, Illinois, was an earth moving contractor, and had been awarded subcontracts by both J.H. Rudolph and Fluor-Daniel, for work at and in conjunction with the construction of County Road 850S. Specifically, during August, 1987, Boyd Brothers contracted with J.H. Rudolph for the hauling of "borrow" dirt from the flanks of the upland knob or ridge (the GE Site) for use as fill during the construction of County Road 850S.

During April, 1988, Boyd Brothers contracted with Fluor-Daniel for the grading and reclamation of the "borrow" areas adjacent to the project, including the area of the GE Site.

12. Before beginning work pursuant to its subcontract with Fluor-Daniel, Boyd Brothers was required by the Indiana Department of Highways to obtain an archaeological survey of the area of the GE Site. Boyd Brothers received the required survey on or about April 25, 1988. The survey stated that, based upon a records search, surface observation, and intermittent shovel probing, no archaeological sites were identified. The survey concluded, however, that "if any concentration of archaeological materials or evidence of subsurface features should be encountered during borrow operations, an archaeologist from the Division of Historic Preservation and Archaeology should be immediately notified for an on-site assessment."

13. John William Way (hereinafter referred to as "Way") was an agent and employee of Boyd Brothers assigned as a heavy equipment operator at the earth moving job in connection with the County Road 850S and General Electric Projects.

14. Jay Warren Rhoads (hereinafter referred to as "Rhoads") was an agent and employee of Boyd Brothers, assigned as a foreman at the earth moving job in connection with the County Road 850S and the General Electric Projects.

15. On or about June 3, 1988, Way knowingly excavated removed and transported from the GE Site archaeological resources as that term is defined in Title 16, United States Code, Section 470bb(1). Specifically, the resources Way removed were numerous Hopewell Indian artifacts which had been buried under the surface of the ground, including but not limited to approximately seven hundred (700) pieces of carved flint and chert points, twelve (12) copper axeheads or celts, thirty (30) drilled and undrilled bear teeth, freshwater pearls and items of cloth and leather (hereinafter referred to collectively as "the archaeological resources"). These consisted of the material remains of past human life of activities or activities of archaeological interest and over one hundred years of age, the resources having a commercial or archaeological value, in addition to the cost or restoration or repair of such resources, in excess of \$5,000.

16. On or about June 3, 1988 Rhoads was present at the GE Site and observed and had knowledge of the activities of Way described in paragraph 15 above. Rhoads permitted the activities to continue despite Rhoads' knowledge that Way's activities constituted a violation of applicable laws or regulations.

17. Rhoads failed to inform the Indiana Department of Highways, the project engineer, and his superiors at Boyd Brothers of the unlawful conduct of Way.

18. On or about June 3, 1988, the vehicle was driven to the GE Site by Rhoads. With the knowledge of both Way and Rhoads,

the defendant was used to remove the archaeological resources from the GE Site by transporting them away from the site to Way's personal .

19. The archaeological resources were placed in Way's and then transported by Way to the State of Illinois where the majority of the archaeological resources were sold in interstate commerce for a price in excess of \$5,000.

20. All of the foregoing archaeological resources were excavated, removed and transported in violation of a provision, rule, regulation, ordinance or permit in effect under Indiana State or local law.

21. Specifically, the excavation, removal and transportation of the archaeological resources by Way violated the following laws or provisions:

a. Indiana Code, Section 35-43-2-2(4) (criminal trespass) in that Way knowingly or intentionally interfered with the possession and use of the property of another person, that is the property known as the GE Site, that property being owned by the General Electric Company, by excavating and removing items of property without the consent of the General Electric Company.

b. Indiana Code, Section 35-43-4-3 (criminal conversion) in that Way knowingly exerted unauthorized control over property, that is Indian artifacts of historical and economic value, said property being the property of the General Electric Company, by

obtaining, taking and carrying away said property in a manner and to an extent other than that to which the General Electric Company had consented.

c. The provisions of the Indiana Department of Highways Standard Specifications then in force and effect, which specifications applied to the work being performed by Boyd Brothers and its agents. Specifically, in about June, 1988, upon encountering archaeological resources at the GE Site, neither Way nor Rhoads nor any agent of Boyd Brothers ceased operation in the immediate vicinity and notified a state highway engineer or archaeologist.

22. The acts described in paragraphs 15 through 19 above constitute a violation of Title 16, United States Code, Section 470ee(c) which prohibits the sale, purchase, exchange transportation, receipt, or offer to sell, purchase or exchanged of archaeological resources that have been excavated or removed in violation of any provision, rule, regulation or ordinance in effect under State or local law.

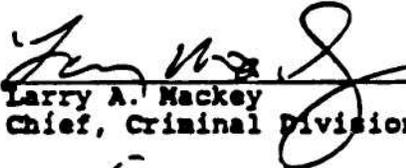
23. Based on the allegations in paragraphs 5 through 22 above, the vehicle which is now the defendant \$7,500.00 was used in connection with or involved in a violation of Title 16, United States Code, Section 470ee(c) and is therefore subject to forfeiture to the United States pursuant to Title 16, United States Code, Section 470gg(b)(3).

WHEREFORE, the Plaintiff, United States of America, prays that due process issue to enforce the forfeiture of the defendant and that due notice be given to all interested parties to appear and show cause why the forfeiture should not be decreed, and further prays that the defendant be condemned and forfeited to the United States of America and be delivered to the custody of the United States Marshal for disposition according to law and for such other relief as this Court may deem just and proper.

Respectfully submitted,

DEBORAH J. DANIELS
United States Attorney

By:


Larry A. Mackey
Chief, Criminal Division

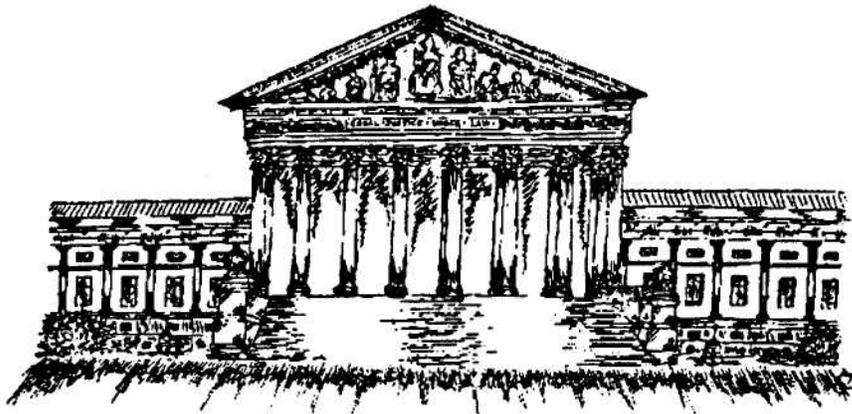

Donna R. Eide
Assistant United States Attorney

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46 East Ohio Street
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Telephone: 317-226-6333
FTS Telephone: 331-6333

U.S. Department of Justice
Criminal Division
Office of Professional Development and Training

Archeological Resources Protection Federal Prosecution Sourcebook

July 1992



PREPARED BY

General Litigation and Legal Advice Section
Criminal Division
United States Department of Justice

Department Consulting Archeologist
Archeological Assistance Division
National Park Service
United States Department of the Interior

Volume II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 03 1990
J. T. NOBLIN, CLERK
BY _____ DEPUTY

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. W90-00017 (L)

ALVIN D. RANDO and
NELSON A. DUPUY, JR.

16 U.S.C. §470ee
18 U.S.C. §2
18 U.S.C. §641 and 2
18 U.S.C. §1361 and 2
36 C.F.R. §2.1(a)(7)

The Grand Jury Charges:

COUNT I

That on or about the 27th day of May, 1990, in Warren County, in the Western Division of the Southern District of Mississippi, ALVIN D. RANDO and NELSON A. DUPUY, JR., defendants herein, did knowingly excavate, remove, damage and otherwise alter and deface archaeological resources which were located on designated historic and public lands in the Vicksburg National Military Park, without having a permit to do so, and did aid and abet each other in doing same, and the archaeological value of the resources and the cost of restoration and repair of the same resources exceeds the sum of \$500.00 in violation of Section 470ee, Title 16, United States Code, and Section 2, Title 18, United States Code.

Furthermore, the following vehicle was used in connection with the above violation and is thereby subject to forfeiture to the United States pursuant to Section 470gg of Title 16 United States Code, that is, one 1988 Eddie Bauer Ford 4X4 Bronco, V.I.N. Number 1FMEU15HXJLA88677, Louisiana license number R531039, registered to United Crafts, Inc., 1556 Perkins Rd., Baton Rouge Louisiana.

(Penalty: 2 years and/or \$20,000)

COUNT II

That on or about the 27th day of May, 1990, in Warren County, in the Western Division of the Southern District of Mississippi, ALVIN D. RANDO and NELSON A. DUPUY, JR., defendants herein, aided and abetted by each other, did receive, conceal and retain with the intent to convert to their own use and gain, knowing the same to have been stolen, embezzled, purloined and converted, a record, voucher, money and thing of value, in the amount of more than One Hundred Dollars (\$100.00) of the United States and a department and agency thereof, to-wit: Civil War archaeological artifacts obtained from public lands, to-wit: the Vicksburg National Military Park and the Department of the Interior, in violation of Sections 641 and 2, Title 18 United States Code.

(Penalty: 10 years and/or \$250,000)

COUNT III

That on or about the 27th day of May, 1990, in Warren County in the Western Division of the Southern District of Mississippi, ALVIN D. RANDO and NELSON A. DUPUY, JR., defendants herein, aided and abetted by each other, did willfully, by means of digging, excavating, removing, damaging, altering and defacing, injure property of the United States, that is, the site of a Civil War battlefield in the Vicksburg National Military Park, the damage to said property exceeding the sum of One Hundred Dollars (\$100.00) in violation of Sections 1361 and 2, Title 18, United States Code.

(Penalty: 10 years and/or \$250,000)

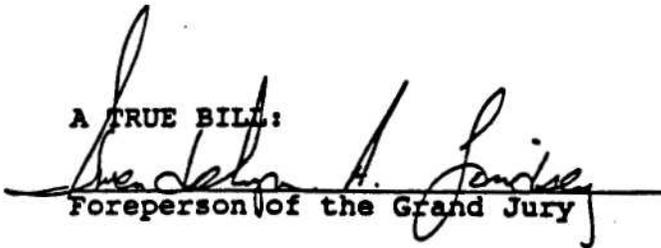
COUNT IV

That on or about the 27th day of May, 1990 in Warren County, in the Western Division of the Southern District of Mississippi, ALVIN D. RANDO and NELSON A. DUPUY, JR., defendants herein, did each possess and use a metal detecting device within and on public lands, to-wit: the Vicksburg National Military Park, in violation of 36 C.F.R. Section 2.1 (a) (7).

(Penalty: 3 months and/or \$100)


UNITED STATES ATTORNEY

A TRUE BILL:


Foreperson of the Grand Jury

A TRUE COPY, I HEREBY CERTIFY.

J.T. Noble, CLERK

BY:


Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN District of **MISSISSIPPI**

WESTERN Division

THE UNITED STATES OF AMERICA

vs.

ALVIN D. RANDO and

NELSON A. DUPUY, JR.

INDICTMENT

**COUNT I: 16 U.S.C. Section 470ee and 18 U.S.C. Section 2
Unauthorized Excavation of Archaeological Resources**

**COUNT II: 18 U.S.C. Sections 641 and 2
Receipt of Stolen Government Property**

COUNT III: 18 U.S.C. Sections 1361 and 2 - Destruction of Government Property.

**COUNT IV: 36 C.F.R. Section 2.1(a)(7) - Possession of Metal Detector within National
Park Area.**

A true bill.

Wendell A. Pridley
Foreman

SOUTHERN DISTRICT OF MISSISSIPPI	
Filed in open court by	day,
of DEC 6 3 1990 A.D. 19	
J. T. NOBLIN, CLERK	
BY _____ DEPUTY	Clerk

Bail, \$ _____

Memorandum



Subject U. S. v. Alvin D. Rando Criminal No. W90-00017(L)	Date May 17, 1991
--	-----------------------------

To Zeb Jones
Attorney at Law

From Joe M. Hollomon
Assistant U. S. Attorney
Southern District of MS

Alvin D. Rando, and his attorney, Zeb Jones, have been notified that:

1. If Rando cooperates fully with the government concerning all information and knowledge that he has regarding the subject matter and events described in the indictment and other matters relative thereto, and any other illegal activities of which he has knowledge:

2. Thereafter, the United States Attorney will do the following:

Upon a tender of a plea of guilty to the indictment charging the defendant with Unauthorized Excavation of Archaeological Resources in violation of Section 470ee, Title 16, United States Code, [misdemeanor] and Section 2, Title 18 United States Code, the United States Attorney will recommend that the Court accept Rando's plea of guilty and will inform the Court of the extent and effect of his cooperation and request that such cooperation be considered in determining his sentence. As to the sentence to be imposed, the government will recommend the following: that the Court impose a sentence within the lowest 50% of the applicable guideline range; a \$5,000 fine; the forfeiture of all items seized in connection with this matter including a 1988 Eddie Bauer Ford 4X4 Bronco, V.I.N. 1FMEU15HXJLA88677; that the defendant remain out of all civil war battlefield state and federal parks for a period of two years; and complete at least 200 hours of community service.

3. It is understood and specifically agreed to by Rando that at the time of sentencing he will then and there pay over to a representative of the United States Attorney's Office the special assessment of \$25 as required by Section 3013, Title 18, United States Code.

4. It is understood that, as of the date of this memorandum, Rando has indicated that he desires to plead guilty as described above.

5. It is further understood that the Court, in accord with the principles of Rule 11(e)(1)(B), Federal Rules of Criminal Procedure, is not required to accept the recommendation aforescribed, and the United States Attorney has no other obligation in regard to sentencing than as stated in Paragraph No. 2.

6. It is understood that the Court may, in its discretion, sentence Alvin D. Rando, pursuant to the provisions of Rule 11(e)(1)(b) of the Federal Rules of Criminal Procedure and impose whatever fine and sentence, if any, it deems appropriate up to the maximum provided by law for the offense charged and the United States Attorney has no other obligation in regard to sentencing than as stated in Paragraph No. 2. It is understood by Rando that the potential maximum sentence that could be imposed for violation of Section 470ee, Title 16, United States Code, is imprisonment for up to 1 year, and a \$100,000 fine.

Rando specifically acknowledges that he is not relying upon anyone's calculation of a particular guideline range for this offense in entering this plea; and recognizes that he may be subject to the maximum penalty set forth herein.

7. It is further understood that Rando will truthfully and completely reveal to the government all incidents and circumstances relating to the matters described in Paragraph No. 1. Furthermore, Rando's complete cooperation as indicated in Paragraph No. 1, includes: (1) Immediate disclosure of the matters to agents of the United States; (2) Testimony before a grand jury, if necessary, in any district deemed appropriate by the government; and (3) Testimony at any trial, in this district or any other district, if necessary, involving any matter the government deems pertinent.

8. It is further understood that the United States Attorney, Southern District of Mississippi, will seek no further prosecutions of Rando for any acts or conduct arising out of any event covered by Paragraph No. 1 if Rando voluntarily and completely discloses all information and knowledge that he has. Should he not voluntarily and completely disclose, then as to that matter, the government is free to seek prosecution of him.

9. It is further understood that should Rando commit any further crimes, this Memorandum shall be deemed violated and he shall be subject to prosecution for any federal criminal violation of which this office has knowledge, and that any information provided by him may, if appropriate, be used against him.

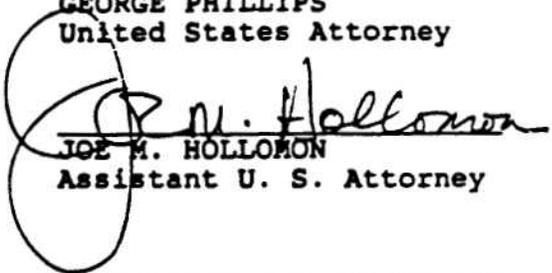
10. It is further understood that this Memorandum does not bind any state or local prosecuting authorities or any other federal district, except as to the use of Rando's statement voluntarily given hereunder; further, this agreement does not bind the Attorney General of the United States in regard to any

matter, civil or criminal, involving the tax statutes of the United States.

11. It is further understood that this Memorandum completely reflects all promises, agreements and conditions made by and between the United States Attorney for the Southern District of Mississippi and Alvin D. Rando.

WITNESS OUR SIGNATURES this the _____ day of May, 1991.

GEORGE PHILLIPS
United States Attorney



JOE M. HOLLOMON
Assistant U. S. Attorney

ALVIN D. RANDO
Defendant

ZEB JONES
Attorney for Defendant

Memorandum



Subject U. S. v. Nelson A. Dupuy, Jr. Criminal No. W90-00017(L)	Date May 17, 1991
--	-----------------------------

To Tom Royals
Attorney at Law

From Joe M. Hollomon
Assistant U. S. Attorney
Southern District of MS

Nelson A. Dupuy, Jr., and his attorney, Tom Royals, have been notified that:

1. If Dupuy cooperates fully with the government concerning all information and knowledge that he has regarding the subject matter and events described in the indictment and other matters relative thereto, and any other illegal activities of which he has knowledge:

2. Thereafter, the United States Attorney will do the following:

Upon a tender of a plea of guilty to the indictment charging the defendant with Unauthorized Excavation of Archaeological Resources in violation of Section 470ee, Title 16, United States Code, [misdemeanor] and Section 2, Title 18 United States Code, the United States Attorney will recommend that the Court accept Dupuy's plea of guilty and will inform the Court of the extent and effect of his cooperation and request that such cooperation be considered in determining his sentence. As to the sentence to be imposed, the government will recommend the following: that the Court impose a sentence within the lowest 50% of the applicable guideline range; a \$5,000 fine; the forfeiture of all items seized in connection with this matter including a 1988 Eddie Bauer Ford 4X4 Bronco, V.I.N. 1FMEU15HXJLA88677; that the defendant remain out of all civil war battlefield state and federal parks for a period of two years; and complete at least 200 hours of community service.

3. It is understood and specifically agreed to by Dupuy that at the time of sentencing he will then and there pay over to a representative of the United States Attorney's Office the special assessment of \$25 as required by Section 3013, Title 18, United States Code.

4. It is understood that, as of the date of this memorandum, Dupuy has indicated that he desires to plead guilty as described above.

5. It is further understood that the Court, in accord with the principles of Rule 11(e)(1)(B), Federal Rules of Criminal Procedure, is not required to accept the recommendation aforescribed, and the United States Attorney has no other obligation in regard to sentencing than as stated in Paragraph No. 2.

6. It is understood that the Court may, in its discretion, sentence Nelson A. Dupuy, Jr., pursuant to the provisions of Rule 11(e)(1)(b) of the Federal Rules of Criminal Procedure and impose whatever fine and sentence, if any, it deems appropriate up to the maximum provided by law for the offense charged and the United States Attorney has no other obligation in regard to sentencing than as stated in Paragraph No. 2. It is understood by Dupuy that the potential maximum sentence that could be imposed for violation of Section 470ee, Title 16, United States Code, is imprisonment for up to 1 year, and a \$100,000 fine.

Dupuy specifically acknowledges that he is not relying upon anyone's calculation of a particular guideline range for this offense in entering this plea; and recognizes that he may be subject to the maximum penalty set forth herein.

7. It is further understood that Dupuy will truthfully and completely reveal to the government all incidents and circumstances relating to the matters described in Paragraph No. 1. Furthermore, Dupuy's complete cooperation as indicated in Paragraph No. 1, includes: (1) Immediate disclosure of the matters to agents of the United States; (2) Testimony before a grand jury, if necessary, in any district deemed appropriate by the government; and (3) Testimony at any trial, in this district or any other district, if necessary, involving any matter the government deems pertinent.

8. It is further understood that the United States Attorney, Southern District of Mississippi, will seek no further prosecutions of Dupuy for any acts or conduct arising out of any event covered by Paragraph No. 1 if Dupuy voluntarily and completely discloses all information and knowledge that he has. Should he not voluntarily and completely disclose, then as to that matter, the government is free to seek prosecution of him.

9. It is further understood that should Dupuy commit any further crimes, this Memorandum shall be deemed violated and he shall be subject to prosecution for any federal criminal violation of which this office has knowledge, and that any information provided by him may, if appropriate, be used against him.

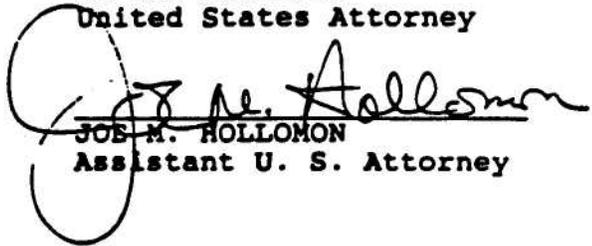
10. It is further understood that this Memorandum does not bind any state or local prosecuting authorities or any other federal district, except as to the use of Dupuy's statement voluntarily given hereunder; further, this agreement does not bind the Attorney General of the United States in regard to any

matter, civil or criminal, involving the tax statutes of the United States.

11. It is further understood that this Memorandum completely reflects all promises, agreements and conditions made by and between the United States Attorney for the Southern District of Mississippi and Nelson A. Dupuy, Jr.

WITNESS OUR SIGNATURES this the _____ day of May, 1991.

GEORGE PHILLIPS
United States Attorney



~~JOE M. HOLLOMON~~
Assistant U. S. Attorney

NELSON A. DUPUY, JR.
Defendant

TOM ROYALS
Attorney for Defendant

1 did wilfully and knowingly steal, purloin, and unlawfully convert property of
2 the United States having a value in excess of \$100, to wit: archaeological
3 resources, including obsidian weapon projectile points and tools such as
4 scrapers and knives;

5 In violation of Title 18, United States Code, Section 641.

6 COUNT 3

7 In or about the Summer of 1986 in the Deschutes National Forest in the
8 vicinity of Lava Pass in the District of Oregon, defendant BRADLEY OWEN AUSTIN
9 did wilfully injure and commit a depredation against property of the United
10 States, to wit: an archaeological site containing archaeological resources,
11 including obsidian weapon projectile points and tools such as scrapers and
12 knives, in that defendant removed these archaeological resources from this
13 archaeological site and the damage to this site and these resources exceeded
14 the sum of \$100;

15 In violation of Title 18, United States Code, Section 1361.

16 COUNT 4

17 In or about the Summer of 1986, in the Deschutes National Forest in the
18 vicinity of Buzzard Rock in the District of Oregon, defendant BRADLEY OWEN
19 AUSTIN did wilfully and knowingly and without a permit excavate, remove,
20 damage, and otherwise alter or deface archaeological resources in an
21 archaeological site, including obsidian weapon projectile points and tools
22 such as knife blades having a commercial and archaeological value and a cost
of restoration and repair in excess of \$5,000;

23 In violation of Title 16, United States Code, Section 470ee(a) and (d).
24
25
26

COUNT 5

1
2 In or about the Summer of 1986, in the Deschutes National Forest in the
3 vicinity of Buzzard Rock in the District of Oregon, defendant BRADLEY OWEN
4 AUSTIN did wilfully and knowingly steal, purloin, and unlawfully convert
5 property of the United States having a value in excess of \$100, to wit:
6 archaeological resources, including obsidian weapon projectile points and
7 tools such as knife blades;

8 In violation of Title 18, United States Code, Section 641.

COUNT 6

9
10 In or about the Summer of 1986 in Deschutes National Forest in the
11 vicinity of Buzzard Rock in the District of Oregon, defendant BRADLEY OWEN
12 AUSTIN did wilfully injure and commit a depredation against property of the
13 United States, to wit: an archaeological site containing archaeological
14 resources, including obsidian weapon projectile points and tools such as knife
15 blades, in that defendant removed these archaeological resources from this
16 archaeological site and the damage to this site and these resources exceeded
17 the sum of \$100;

18 In violation of Title 18, United States Code, Section 1361.

COUNT 7

19
20 In or about the Summer of 1987, in the Deschutes National Forest in the
21 vicinity of Arnold Ice Caves in the District of Oregon, defendant BRADLEY OWEN
22 AUSTIN did wilfully and knowingly and without a permit excavate, remove,
23 damage, and otherwise alter or deface archaeological resources in an
24 archaeological site, including obsidian weapon projectile points, having a
25 commercial and archaeological value and a cost of restoration and repair in
26 excess of \$5,000;

In violation of Title 16, United States Code, Section 470ee(a) and (d).

COUNT 8

1
2 In or about the Summer of 1987, in the Deschutes National Forest in the
3 vicinity of Arnold Ice Caves in the District of Oregon, defendant BRADLEY OWEN
4 AUSTIN did wilfully and knowingly steal, purloin, and unlawfully convert
5 property of the United States having a value in excess of \$100, to wit:
6 archaeological resources, including obsidian weapon projectile points;

7 In violation of Title 18, United States Code, Section 641.

8 COUNT 9

9 In or about the Summer of 1987 in Deschutes National Forest in the
10 vicinity of Arnold Ice Caves in the District of Oregon, defendant BRADLEY OWEN
11 AUSTIN did wilfully injure and commit a depredation against property of the
12 United States, to wit: an archaeological site containing archaeological
13 resources, including obsidian weapon projectile points, in that defendant
14 removed these archaeological resources from this archaeological site and the
15 damage to this site and these resources exceeded the sum of \$100;

16 In violation of Title 18, United States Code, Section 1361.

17 COUNT 10

18 In or about the Summer of 1987, in the Deschutes National Forest in the
19 vicinity of Lava Butte in the District of Oregon, defendant BRADLEY OWEN
20 AUSTIN did wilfully and knowingly and without a permit excavate, remove,
21 damage, and otherwise alter or deface archaeological resources in an
22 archaeological site, including obsidian weapon projectile points having a
23 commercial and archaeological value and a cost of restoration and repair in
24 excess of \$5,000;

25 In violation of Title 16, United States Code, Section 470ee(a) and (d).
26

COUNT 11

1
2 In or about the Summer of 1987, in the Deschutes National Forest in the
3 vicinity of Lava Butte in the District of Oregon, defendant BRADLEY OWEN
4 AUSTIN did wilfully and knowingly steal, purloin, and unlawfully convert
5 property of the United States having a value in excess of \$100, to wit:
6 archaeological resources, including obsidian weapon projectile points;

7 In violation of Title 18, United States Code, Section 641.

COUNT 12

8
9 In or about the Summer of 1987, in the Deschutes National Forest in the
10 vicinity of Lava Butte in the District of Oregon, defendant BRADLEY OWEN
11 AUSTIN did wilfully injure and commit a depredation against property of the
12 United States, to wit: an archaeological site containing archaeological
13 resources, including obsidian weapon projectile points, in that defendant
14 removed these archaeological resources from this archaeological site and the
15 damage to this site and these resources exceeded the sum of \$100;

16 In violation of Title 18, United States Code, Section 1361.

COUNT 13

17
18 In or about August and September, 1987, in the Deschutes National Forest
19 in the vicinity of Luna Lava Butte in the District of Oregon, defendant
20 BRADLEY OWEN AUSTIN did wilfully and knowingly and without a permit excavate,
21 remove, damage, and otherwise alter or deface archaeological resources in an
22 archaeological site, including obsidian weapon projectile points and tools
23 such as scrapers having a commercial and archaeological value and a cost of
24 restoration and repair in excess of \$5,000;

25 In violation of Title 16, United States Code, Section 470ee(a) and (d).
26

COUNT 14

1
2 In or about August and September, 1987, in the Deschutes National Forest
3 in the vicinity of Luna Lava Butte in the District of Oregon, defendant
4 BRADLEY OWEN AUSTIN did wilfully and knowingly steal, purloin, and unlawfully
5 convert property of the United States having a value in excess of \$100, to
6 wit: archaeological resources, including obsidian weapon projectile points
7 and tools such as scrapers;

8 In violation of Title 18, United States Code, Section 641.

COUNT 15

9
10 In or about August and September, 1987 in Deschutes National Forest in
11 the vicinity of Luna Lava Butte in the District of Oregon, defendant BRADLEY
12 OWEN AUSTIN did wilfully injure and commit a depredation against property of
13 the United States, to wit: an archaeological site containing archaeological
14 resources, including obsidian weapon projectile points and tools such as
15 scrapers, in that defendant removed these archaeological resources from this
16 archaeological site and the damage to this site and these resources exceeded
17 the sum of \$100;

18 In violation of Title 18, United States Code, Section 1361.

COUNT 16

19
20 In or about the Summer of 1985, in the Ochoco National Forest in the
21 vicinity of Squaw Creek in the District of Oregon, defendant BRADLEY OWEN
22 AUSTIN did wilfully and knowingly and without a permit excavate, remove,
23 damage, and otherwise alter or deface archaeological resources in an
24 archaeological site, including obsidian weapon projectile points;

25 In violation of Title 16, United States Code, Section 470ee(a) and (d).
26

COUNT 17

1
2 In or about the Summer of 1985, in the Ochoco National Forest in the
3 vicinity of Squaw Creek in the District of Oregon, defendant BRADLEY OWEN
4 AUSTIN did wilfully and knowingly steal, purloin, and unlawfully convert
5 property of the United States having a value in excess of \$100, to wit:
6 archaeological resources, including obsidian weapon projectile points;

7 In violation of Title 18, United States Code, Section 641.

COUNT 18

8
9 In or about the Summer of 1985 in the Ochoco National Forest in the
10 vicinity of Squaw Creek in the District of Oregon, defendant BRADLEY OWEN
11 AUSTIN did wilfully injure and commit a depredation against property of the
12 United States, to wit: an archaeological site containing archaeological
13 resources, including obsidian weapon projectile points, in that defendant
14 removed these archaeological resources from this archaeological site and the
15 damage to this site and these resources exceeded the sum of \$100;

16 In violation of Title 18, United States Code, Section 1361.

COUNT 19

17
18 In or about the Summer of 1986, on federal lands under the management of
19 the Bureau of Land Management, Prineville District, in the vicinity of Deep
20 Canyon in the District of Oregon, defendant BRADLEY OWEN AUSTIN did wilfully
21 and knowingly and without a permit excavate, remove, damage, and otherwise
22 alter or deface archaeological resources in an archaeological site, including
23 obsidian weapon projectile points;

24 In violation of Title 16, United States Code, Section 470ee(a) and (d).
25
26

COUNT 20

1
2 In or about the Summer of 1986, on federal lands under the management of
3 the Bureau of Land Management, Prineville District, in the vicinity of Deep
4 Canyon in the District of Oregon, defendant BRADLEY OWEN AUSTIN did wilfully
5 and knowingly steal, purloin, and unlawfully convert property of the United
6 States having a value in excess of \$100, to wit: archaeological resources,
7 including obsidian weapon projectile points;

8 In violation of Title 18, United States Code, Section 641.

COUNT 21

9
10 In or about the Summer of 1986, on federal lands under the management of
11 the Bureau of Land Management, Prineville District, in the vicinity of Deep
12 Canyon in the District of Oregon, defendant BRADLEY OWEN AUSTIN did wilfully
13 injure and commit a depredation against property of the United States, to wit:
14 an archaeological site containing archaeological resources, including obsidian
15 weapon projectile points, in that defendant removed these archaeological
16 resources from this archaeological site and the damage to this site and these
17 resources exceeded the sum of \$100;

18 In violation of Title 18, United States Code, Section 1361.

COUNT 22

19
20 In or about the Summer of 1986, in the Deschutes National Forest in the
21 vicinity of Lava Butte in the District of Oregon, defendant BRADLEY OWEN
22 AUSTIN did wilfully and knowingly and without a permit excavate, remove,
23 damage, and otherwise alter or deface archaeological resources in an
24 archaeological site, including obsidian weapon projectile points;

25 In violation of Title 16, United States Code, Section 470ee(a) and (d).
26

COUNT 23

1
2 In or about the Summer of 1986, in the Deschutes National Forest in the
3 vicinity of Lava Butte in the District of Oregon, defendant BRADLEY OWEN
4 AUSTIN did wilfully and knowingly steal, purloin, and unlawfully convert
5 property of the United States having a value in excess of \$100, to wit:
6 archaeological resources, including obsidian weapon projectile points;

7 In violation of Title 18, United States Code, Section 641.

COUNT 24

8
9 In or about the Summer of 1986, in the Deschutes National Forest in the
10 vicinity of Lava Butte in the District of Oregon, defendant BRADLEY OWEN
11 AUSTIN did wilfully injure and commit a depredation against property of the
12 United States, to wit: an archaeological site containing archaeological
13 resources, including obsidian weapon projectile points, in that defendant
14 removed these archaeological resources from this archaeological site and the
15 damage to this site and these resources exceeded the sum of \$100;

16 In violation of Title 18, United States Code, Section 1361.

COUNT 25

17
18 In or about the spring of 1986, in the Deschutes National Forest in the
19 vicinity of ^{Lava Butte} Butte, near Benham Falls, in the District of Oregon, defendant
20 BRADLEY OWEN AUSTIN did wilfully and knowingly and without a permit excavate,
21 remove, damage, and otherwise alter or deface archaeological resources in an
22 archaeological site, having a commercial and archaeological value and a cost
23 of restoration and repair in excess of \$5,000;

24 In violation of Title 16, United States Code, Section 470ee(a) and (d).
25
26

COUNT 26

1
2 In or about the spring of 1986, in the Deschutes National Forest in the
3 vicinity of Lava Butte near Benham Falls in the District of Oregon, defendant
4 BRADLEY OWEN AUSTIN did wilfully and knowingly steal, purloin and unlawfully
5 convert property of the United States having a value in excess of \$100, to
6 wit: archaeological resources;

7 In violation of Title 18, United States Code, Section 641.

COUNT 27

8
9 In or about the spring of 1986, in the Deschutes National Forest in the
10 vicinity of Lava Butte near Benham Falls in the District of Oregon, defendant
11 BRADLEY OWEN AUSTIN did wilfully injure and commit a depredation against
12 property of the United States, to wit: an archaeological site containing
13 archaeological resources, in that the defendant removed these archaeological
14 resources from this archaeological site and the damage to this site and these
15 resources exceeded the sum of \$100;

16 In violation of Title 18, United States Code, Section 1361.

COUNT 28

17
18 In or about the summer of 1987, in the Deschutes National Forest in the
19 vicinity of Paulina Creek in the District of Oregon, defendant BRADLEY OWEN
20 AUSTIN did wilfully and knowingly and without a permit excavate, remove,
21 damage and otherwise alter or deface archaeological resources in an
22 archaeological site, having a commercial and archaeological value and a cost
23 of restoration and repair in excess of \$5,000;

24 In violation of Title 16, United States Code, Section 470ee(a) and (d).
25
26

COUNT 29

1
2 In or about the summer of 1987, in the Deschutes National Forest in the
3 vicinity of Paulina Creek in the District of Oregon, defendant BRADLEY OWEN
4 AUSTIN did wilfully and knowingly steal, purloin, and unlawfully convert
5 property of the United States having a value in excess of \$100, to wit:
6 archaeological resources;

7 In violation of Title 18, United States Code, Section 641.

COUNT 30

8
9 In or about the summer of 1987 in the Deschutes National Forest in the
10 vicinity of Paulina Creek in the District of Oregon, defendant BRADLEY OWEN
11 AUSTIN did wilfully injure and commit a depredation against property of the
12 United States, to wit: an archaeological site containing archaeological
13 resources, in that the defendant removed these archaeological resources from
14 this archaeological site and the damage to this site and these resources
15 exceeded the sum of \$100;

16 In violation of Title 18, United States Code, Section 1361.

17 DATED this 9th day of June, 1988.

18 A TRUE BILL.

19
20 /s/ DONALD E. EASTMAN

21 Fore per son

22 CHARLES H. TURNER
23 United States Attorney

24 /s/ JEFFREY J. KENT
25 JEFFREY J. KENT
26 Assistant U.S. Attorney

1 CHARLES H. TURNER
2 United States Attorney
3 District of Oregon
4 JEFFREY J. KENT
5 Assistant United States Attorney
6 438 Federal Building
7 211 East 7th Avenue
8 Eugene, OR 97401
9 (503) 687-6473
Attorneys for Plaintiff

6 Andrew Bates
7 Assistant Federal Public Defender
8 44 W. Broadway, Suite 406
9 Eugene, OR 97401
10 (503) 687-6937
11 Attorney for Defendant

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF OREGON

12 UNITED STATES OF AMERICA,)
13)
14 Plaintiff,) No. CR 88-60004
15 v.) STIPULATED FACTS TRIAL
16 BRADLEY OWEN AUSTIN,) REGARDING COUNT 13 OF
17) SECOND SUPERSEDING INDICTMENT
18 Defendant.) (ARPA - LUNA LAVA BUTTE)

17 Defendant, Bradley Owen Austin, and his attorney, Andrew Bates, Assistant
18 Federal Defender; the United States of America, and Jeffrey J. Kent, Assistant
19 United States Attorney, and Robert Goodwin, Law Clerk, agree that if Austin
20 were to stand trial on Count 13 of the second superseding indictment alleging
21 a violation of the Archaeological Resources Protection Act (ARPA):

22 1. Tom Russell would be called to testify that:

- 23 a) He has been a Special Agent assigned to the Deschutes National
24 Forest (DNF) for approximately three years, and has been involved in Forest
25 Service law enforcement functions for approximately eight years;
26 b) He has participated in a number of archaeological theft and

1 site destruction investigations;

2 c) In March, 1987 and August, 1987 he participated in the
3 surveillance of a Schultz house trailer located at two different sites on
4 national forest land, specifically near Skeleton Caves and Sugar Pine Butte in
5 the DNF;

6 e) On March 18, 1987 during an investigative visit to the site of
7 the trailer, he observed near the front door of the house trailer a screen,
8 which he recognized as used to separate artifacts from soil;

9 f) In June, 1987 he observed a number of times a gold 1964 Chevrolet
10 four door sedan, later registered to defendant Bradley Austin, which was
11 parked near an area of archaeological interest, specifically the Rocky Top
12 area in the DNF;

13 g) On September 8, 1987 he executed a search warrant for the
14 previously mentioned house trailer, while it was situated in the area of Sugar
15 Pine Butte while Austin was present;

16 h) The search of the house trailer led to the seizure of

17 i) approximately 2,800 artifacts, including projectile points,
18 tools, and pottery, many labeled with alpha/numeric symbols (Government Group
19 Exhibit 1 - sample photographs) and many stored in cabinet drawers by
20 geographical area including "Luna Butte";

21 ii) implements used in the excavation and processing of
22 artifacts (Government Group Exhibit 2 - photos);

23 iii) documents relating to such activity, including a
24 handwritten field log book (Government Exhibits 3A - photo and 3B - book) and
25 DNF Soils Resource Inventory Maps with handwritten markings (Government
26 Exhibits 4A - photo and 4B - maps);

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1 iv) a ~~stolen~~ Forest Service sign prohibiting archaeological
2 activity under the ~~prior~~ Antiquities Act of 1906 (Government Exhibit 5 -
3 photo);

4 v) a number of books relating to archaeological activity and the
5 laws governing such activity (Government Exhibits 6A - photos and 6B - one of
6 books);

7 vi) a number of items of personal identification (Government
8 Exhibit 7A - sample photo) and receipts indicating Austin's payments on a
9 Schultz house trailer (Government Exhibit 7B - photo);

10 vii) a number of photographs, including ~~photographs~~ showing
11 Austin excavating ~~ground~~ and using archaeological implements (Government Group
12 Exhibit 8 photos);

13 j) He also inventoried the artifacts, which were located in specific
14 cabinet drawers by geographical area and from display cases, for further
15 inspection by himself and archaeologists (Government Exhibits 9A - photo of
16 cabinet, 9B - photo of "Luna Butte" drawer, 9C - the Luna Lava Butte drawer,
17 9D - thirty-nine artifacts from that drawer, including two labeled artifacts
18 linked to Luna Lava Butte, 9E - four labeled artifacts from display cases
19 linked to Luna Lava Butte).

20 k) Assisted by Forest Service archaeologists, he later compared the
21 labeled artifacts from Government Group Exhibit 9D and 9E, sections of the
22 field log book (Government Exhibit 10 and Government Group Exhibit 10A -
23 photos of matchups), and a section of the soil resource maps (Government
24 Exhibit 11), and determined that a number of the artifacts had been logged as
25 coming from the Luna Lava Butte area of the DNF;

26 l) He requested Forest Service archaeological personnel to examine

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1 the sites which had been identified in the documents, including the Luna Lava
2 Butte area, to determine whether there were indications of archaeological
3 activity at those sites;

4 m) On April 14, 1988 he compared Government Exhibit 8A (a photograph
5 showing defendant Austin driving a pick into the ground) to an area located at
6 Lava Butte in the DNF (Government Exhibit 12) and found based upon stump
7 comparisons and other features that the area in the photograph of Austin was
8 the same as an area within Lava Butte.

9 n) On February 8, 1988 he took handwriting and handprinting
10 exemplars of defendant Bradley Austin (Government Exhibit 13) for the purpose
11 of having these exemplars compared to the handwritten markings on the field
12 log books and the field soil resource maps seized from Austin's trailer.

13 2. Dennis Shrader would be called to testify that:

14 a) He has been a Forest Service Special Agent assigned to the
15 DNF for the past five years and has been a Forest Service Special Agent for
16 approximately eight years;

17 b) He has participated in a number of archaeological theft and site
18 destruction investigations;

19 c) In March, 1987 he observed a gold 1964 Chevrolet four door sedan,
20 later registered to Bradley Austin, which was parked near an area of
21 archaeological interest, specifically the Rocky Top area in the DNF;

22 d) On July 31, 1987 he again observed this vehicle, by then
23 registered to Bradley Austin, apparently abandoned in the Sunriver area of the
24 DNF;

25 e) Later that day he received from Deschutes County Deputy Sheriff
26 Dan Swearingen the results of an inventory search of the abandoned vehicle

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1 which included artifacts, among them labeled projectile points, tools, and
2 fossilized bones (Government Exhibit 14 - photo);

3 f) On September 8, 1987 he participated in the execution of a search
4 warrant on defendant Austin's house trailer and assisted in the collection and
5 inventorying of evidence, as described in Agent Russells testimony above.

6 3. Dan Swearingen would be called to testify that:

7 a) He is a deputy sheriff assigned to Deschutes County, Oregon and
8 has been a deputy sheriff for approximately eight years;

9 b) On July 31, 1987 he located a gold Chevrolet four door sedan
10 registered to Bradley Austin, which was apparently abandoned in the DNF in the
11 vicinity of Sunriver;

12 c) He impounded the vehicle;

13 d) He conducted an inventory search of the vehicle, which yielded a
14 number of artifacts, some of which were labeled with alpha/numeric symbols,
15 including projectile points, tools, and fossilized bones. (Government Exhibit
16 14 - photo)

17 4. Roger Crisafi would be called to testify that:

18 a) He was a Forest Service law enforcement officer assigned to the
19 DNF during 1987 and had been involved in Forest Service law enforcement
20 functions for approximately five years;

21 b) He received forty hours of special training in ARPA
22 investigations during 1987;

23 c) On March 21, 1987 he observed a house trailer, later identified
24 as the residence of Bradley Austin, while it was located near Skeleton Caves
25 in the DNF;

26 d) While conducting surveillance of this trailer, he could hear

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1 pounding sounds from within the trailer;

2 e) Periodically, he observed a subject he believed to be Bradley
3 Austin exit the house trailer to empty the contents of a pan onto the ground.

4 5. Richard Johnson would be called to testify that:

5 a) He is a law enforcement officer assigned to the Ochoco National
6 Forest and has been so for approximately five years;

7 b) In August and September, 1987 he was assigned to observe a house
8 trailer, later identified as the residence of Bradley Austin, while it was
9 located near Sugar Pine Butte in the DNF;

10 c) During this surveillance in the late evening and early morning
11 hours, he could hear pounding sounds from within the trailer;

12 d) Periodically, he observed Bradley Austin exit the trailer to
13 empty the contents of a pan onto the ground;

14 e) He also observed a dug-out hole and what appeared to be artifact
15 chips around a tree stump in the vicinity of the trailer;

16 f) He also observed through windows of the trailer a screen later
17 identified as used in the processing of artifacts.

18 6-7. Jill Osborn and Carl Davis would be called to testify that she is
19 an archaeologist assigned to the DNF and has worked in the field of
20 archaeology for approximately ten years (Exhibit 15A - curriculum vitae), and
21 he would testify that he is an archaeologist currently assigned to the
22 Willamette National Forest and has worked in the field of archaeology for
23 approximately ten years (Exhibit 15B - curriculum vitae), and they would
24 further testify that:

25 a) They are qualified to determine whether artifacts are
26 "archaeological resources" within the meaning of ARPA and its regulations;

PAGE 6 - STIPULATED FACTS TRIAL

1 See 16 U.S.C. § 470bb(1); 43 C.F.R. § 7.3(a);

2 b) They are qualified to determine whether a site has been excavated
3 in the nature of an archaeological dig;

4 c) They are qualified to determine the commercial or archaeological
5 value of archaeological resources and to determine the cost of restoration and
6 repair of such resources as set forth in ARPA and its regulations; 16 U.S.C.
7 §§ 470ee(d) and 470ff; 43 C.F.R. § 7.14(a) ("Archaeological value" includes
8 "costs of the retrieval of the scientific information which would have been
9 obtainable prior to the violation");

10 d) They inspected the previously mentioned field log book, soil
11 resource maps, and artifacts seized from the trailer, and they were able to
12 utilize the logs, the maps, and labeled artifacts with activity at some ten
13 sites which exhibited surface disturbance and subsurface excavation, including
14 the Luna Lava Butte area of the DNF;

15 e) Through a review of these logs, maps, and seven labeled
16 artifacts from the "Luna Butte" drawer they were able to link these seven
17 artifacts as coming from the Luna Lava Butte site;

18 f) They also evaluated two labeled artifacts and thirty-seven other
19 artifacts from the "Luna Butte" drawer and four labeled artifacts from display
20 cases linked to Luna Lava Butte and concluded that they are "archaeological
21 resources" within the meaning of ARPA and its regulations, and that at least
22 twelve of these archaeological resources were other than arrowheads or
23 projectile points, including tools such as knives and scrapers, dating 2,000
24 to 7,000 years ago;

25 g) They also evaluated the some 2,800 artifacts seized from the
26 defendant's house trailer and vehicle and concluded that the overwhelming

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1 number are "archaeological resources" within the meaning of ARPA and its
2 regulations;

3 h) They specifically located an archaeological site in the area
4 known as Luna Lava Butte in the DNF in the precise area handwritten in the DNF
5 soil resource map recovered from Austin's trailer;

6 i) They evaluated this area of Luna Lava Butte, indicated on the
7 maps seized from Austin's trailer home, and they observed there very recent
8 substantial subsurface excavation in the nature of an archaeological dig
9 (Government Group Exhibit 16 - photos and Government Exhibit 16A - Luna Lava
10 Butte Field Notes of Archaeologists);

11 j) Based upon an evaluation of this site and the archaeological
12 resources linked to this site, they are of the opinion that at least the great
13 majority of these resources were retrieved from below the surface of the
14 ground.

15 k) They evaluated the Luna Lava Butte site for "archaeological
16 value" within the meaning of the regulations and concluded that it would have
17 cost \$26,667 to have properly retrieved the scientific information which would
18 have been obtainable prior to the excavation.

19 l) they would further testify consistently with their January, 1988
20 Report (Government Exhibit 17);

21 8. William C. Greig would be called to testify that:

22 a) He is a Lieutenant with the Oregon State Police Laboratory in
23 Bend, Oregon with an expertise in handwriting and handprinting comparisons
24 (Exhibit 18);

25 b) He compared the exemplars of defendant Bradley Austin given to
26 Agent Tom Russell to the written and printed entries in the field log book and

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1 in the DNF soil resource maps seized from defendant Austin's trailer and is of
2 the opinion that Austin was the author of these written and printed entries.

3 9. James Torrance would testify that he is the Regional Forester for the
4 Forest Service area, including DNF and Luna Lava Butte, and is responsible for
5 the maintenance of records pertaining to permits for the excavation and
6 removal of archaeological resources under 16 U.S.C. § 470cc of ARPA and 43
7 C.F.R. §§ 7.5-7.11, and no such permit was issued to a Bradley Austin at any
8 time.

9 10. Kenneth R. Meyer would testify that he is the land staff officer for
10 the DNF, responsible for determining and identifying the boundaries and
11 location of the DNF, and based upon a review of the land records of the DNF,
12 including the soil resource maps, he is of the opinion that the Luna Lava
13 Butte area, noted on the soil resource map recovered from Austin's trailer and
14 examined by the archaeologists, is and has been since 1934 clearly within the
15 DNF and is further of the opinion that this site is "public land" owned and
16 administered by the United States as part of the national forest system within
17 the meaning of 16 U.S.C. § 470bb(3)(A)(iii).

18 11. A certified copy of an Oregon vehicle registration, showing a gold
19 1964 Chevrolet four door sedan to be registered to Bradley Austin as of July,
20 1987. (Exhibit 19)

21 CHARLES H. TURNER
22 United States Attorney

23 _____
24 BRADLEY OWEN AUSTIN
25 Defendant

Date

23 Jeffrey J. Kent
24 JEFFREY J. KENT
25 Assistant U.S. Attorney

9/13/88
Date

26 _____
ANDREW BATES
Attorney for Defendant

Date

26 Robert Goodwin
ROBERT GOODWIN
Law Clerk

9/13/88
Date

PAGE 9 - STIPULATED FACTS TRIAL

1 CHARLES H. TURNER
 2 United States Attorney
 District of Oregon
 3 JEFFREY J. KENT
 Assistant United States Attorney
 4 438 Federal Building
 211 East 7th Avenue
 5 Eugene, OR 97401
 (503) 687-6473

6
 7
 8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE DISTRICT OF OREGON

10 UNITED STATES OF AMERICA,)
 11 Plaintiff,) No. CR 88-60004
 12 v.) EXHIBIT LIST
 13 BRADLEY OWEN AUSTIN,)
 14 Defendant.)

15	<u>No.</u>	<u>Description</u>
16	Group 1A-1D	Photos of some of the artifacts seized from Austin's trailer on 9/8/87
17	Group 2A-2C	Photos of some of the artifact tools seized from Austin's trailer on 9/8/87
19	3A	Photo of handwritten field log book seized from Austin's trailer on 9/8/87
20	3B	Handwritten field log book seized from Austin's trailer on 9/8/87
22	4A	Photo of DNF Soil Resource Inventory Maps seized from Austin's trailer on 9/8/87
23	4B	DNF Soil Resource Maps seized from Austin's trailer on 9/8/87
25	5	Photo of FS sign prohibiting archaeological activity seized from Austin's trailer on 9/8/87

1	6A	Photo of archaeological books seized from Austin's trailer on 9/8/87
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3	6B	One of those archaeological books seized from Austin's trailer on 9/8/87
4	7A	Photo of sample item of Austin's personal identification seized from Austin's trailer on 9/8/87
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6	7B	Photo of receipts showing Austin's payments on house trailer seized from Austin's trailer on 9/8/87
7	Group 8A-8G	Photos showing Austin excavating seized from Austin's trailer on 9/8/87
8		
9	9A	Photo of cabinet containing numerous artifacts by geographical area seized from Austin's trailer on 9/8/87
10	9B	Photo of cabinet drawer labeled "Luna Butte" from 9A cabinet
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12	9C	Cabinet drawer labeled "Luna Butte" from 9A cabinet
13	9D	Thirty-nine artifacts in "Luna Butte" cabinet drawer, including two labeled artifacts
14	Group 9E-1 and 9E-2	Four labeled artifacts from display cases linked to Luna Lava Butte
15		
16	10	Section of field log book pertaining to Luna Lava Butte
17	10A1-2	Photos of match-ups of artifacts with artifact sketches in the log books
18	11	Section of soil resource inventory maps pertaining to Luna Lava Butte
19		
20	12	Photo of area in Lava Butte compared to area depicted in Government Exhibit 8A
21	13	Handwriting and handprinting exemplars of Austin
22	14	Photo of artifacts seized from Austin's vehicle during inventory search conducted on July 31, 1987
23		
24	15A	Curriculum vitae of FS Archaeologist Jill Osborn
25	15B	Curriculum vitae of FS Archaeologist Carl Davis
26	Group 16	Photos of archaeological excavation at Luna Lava Butte, taken by FS archaeologists

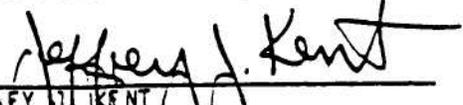
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- 16A Luna Lava Butte Field Notes of FS Archaeologists
- 17 January 1988 Archaeological Report of Jill Osborn and Carl Davis
- 18 Curriculum vitae of OSP Lt. William Greig, handwriting expert
- 19 Certified copy of Oregon vehicle registration, showing Bradley Austin to be owner of 1964 Chevrolet four door sedan

Dated this 13th day of September, 1988.

CHARLES H. TURNER
United States Attorney



JEFFREY J. KENT
Assistant United States Attorney



U.S. Department of Justice

United States Attorney
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October 28, 1988

Honorable James M. Burns
United States District Judge
702 U.S. Courthouse
620 S.W. Main
Portland, OR 97205

Re: November 14, 1988 Sentencing of Bradley Austin
in Archaeological Devastation and Theft Case

Dear Judge Burns:

This letter shall serve to bring to the court's attention certain matters pertinent to the November 14, 1988 sentencing of defendant Bradley Austin for violations of the Archaeological Resources and Protection Act (ARPA) passed by Congress in 1979 to strengthen the preservation of archaeologically significant sites on federal lands.

First, while Austin pleaded guilty to one count of an ARPA violation, the plea agreement contemplated that the full dimensions of the devastation of other sites would be brought to the attention of the court at the time of sentencing. In addition to the count and site, on which Austin agreed to be found guilty by stipulated facts (see attached stipulated facts trial - Exhibit A), investigators from the Forest Service (FS) and Bureau of Land Management (BLM) determined that there were at least nine other public lands sites identified from records seized from Austin's trailer pursuant to the September 8, 1987 search warrant, which were later identified as excavated by Austin. The cache of over 2,500 artifacts seized and the number of sites identified make this one of the most significant archaeological site devastations and thefts ever investigated and prosecuted. The total damage, based strictly upon the costs to have properly excavated these sites, without any consideration of black market and commercial value of these artifacts, has been placed at over \$100,000.

Secondly, there is reason to believe that Austin obtained confidential FS data relating to the location of archaeologically significant sites from a former FS employee, who previously worked with FS archaeologists and is now an associate of Austin's. The investigation established that this individual was residing at

¹ Evidence similar to the stipulated facts trial support this conclusion, including FS maps and tagged artifacts seized from Austin's trailer, and an inspection of the sites themselves.

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Austin's trailer during a portion of this investigation and was a partner in a jewelry and arrowhead business with Austin. Many of the sites excavated by Austin had been confidentially identified by the FS for future professional excavation pursuant to 16 U.S.C. § 470hh and 36 C.F.R. 296.18 (Exhs. B and B-1). We have sought Austin's cooperation regarding this matter to no avail.

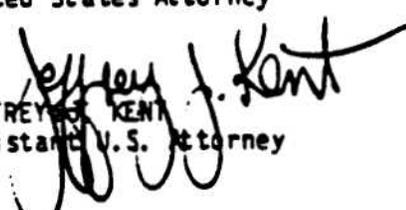
Thirdly, the court and hopefully the public should understand that this statute is oriented toward significant archaeological devastation activity and not the casual surface arrowhead collector. In fact, the latter act specifically exempts such activity. 16 U.S.C. § 470ee(g) (Exh. C).²

Fourth, there is evidence of pre-meditated wilfulness on the part of Austin in this case. One of the items seized from Austin's trailer was a FS sign, which stated that it was a crime to excavate ruins and objects of antiquity under the American Antiquities Act of 1906. Furthermore, there was evidence of the influence of drugs in the conduct of Austin. White powder seized from the trailer was analyzed as methamphetamine and syringes similar to those seized from Austin's trailer were located at certain other devastated sites.³

Fifth, and probably most significant, is the impact of this conduct and similar conduct on the archaeological history of our country and man's occupation of North America. Some of these sites and artifacts date back over 10,000 years to the early years of man's inhabitation of this continent. Excerpts from an October, 1988 National Geographic article highlight the significance of such sites when the best estimate places man's occupation of North America a mere 12,000 years ago (Exh. E). Also attached is a letter from the two FS archaeologists who helped to investigate this case, which letter sets forth the irretrievable damage caused by Austin's conduct and the importance of this prosecution to the broader and more serious problem of archaeological devastation and theft (Exh. F).

Very truly yours,

CHARLES H. TURNER
United States Attorney


JEFFREY J. KENT
Assistant U.S. Attorney

cc: Members of the Sentencing Council
A. Bates, Counsel for Austin
R. Oldham, Probation Office

² While surface arrowhead collection remains unlawful as a petty offense, 36 C.F.R. § 261.9(h) (Exh. D), this statute focuses its much more significant penalties on subsurface excavation and removal of arrowheads and removal of other significant artifacts such as tools and pottery.

³ It should be noted that Judge Marsh dismissed a methamphetamine possession charge against Austin when all of the powder was consumed in the government's laboratory analysis.

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November 7, 1988

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The Honorable James M. Burns
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620 SW Main
Portland, OR 97205

RECEIVED
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Re: United States v. Bradley Owen Austin
CR No. 88-60004

U.S. ATTORNEY
EUGENE, ORE.

Dear Judge Burns:

I am writing this letter on behalf of Mr. Bradley Owen Austin who is scheduled to appear before you for sentencing on November 14, 1988. Mr. Austin was found guilty of one count alleging violation of the Archaeological Resource Protection Act (ARPA) in a stipulated facts trial on September 13, 1988, before the Honorable Judge Malcolm F. Marsh.

Having just received Mr. Kent's letter to you dated October 28, 1988, concerning Mr. Austin's case, I feel compelled to respond to the allegations contained within that letter. I emphatically disagree with Mr. Kent's characterization of Mr. Austin. His letter contains several significant omissions and unfair assertions.

While it is true that numerous other sites were the subject of indictment, it is unfair to attribute the wholesale devastation and thefts from these various archaeological sites to Mr. Austin. These sites have been excavated over many years by many people. The vast majority of Mr. Austin's collection was from surface hunting as was evidenced in his notebook submitted in the stipulated facts trial. He freely admits that some of the arrowheads were discovered beneath the surface as a result of his utilizing a "digging tool", which, technically, put him in violation of ARPA. Mr. Austin went to great pains to carefully label all of his finds and document where those finds occurred, often making the notation of "surface hunted" in his notebook. Mr. Kent's assertion that Mr. Austin had caused over \$100,000 of damage is total speculation and exaggeration.

Regarding Mr. Kent's belief that Mr. Austin obtained confidential Forest Service data relating to the location of the

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archaeologically significant sites from a Former Service employee, there is simply no basis in fact for this. Mr. Austin has been collecting artifacts for approximately ten years prior to his being charged in this matter. His unique and intimate knowledge of this area of our state had led him to the discovery of many fertile areas for surface hunting the arrowheads. The person to whom Mr. Kent refers was a friend of Mr. Austin's and had no independent knowledge of these sites by reason of his previous employment with the Forest Service. To assert that Mr. Austin has not been cooperative in this matter is simply untrue. Mr. Austin had absolutely no information to give the Forest Service about this other person in that his collecting was of a personal and independent nature and not the result of any "inside information." I have no doubt about Mr. Austin's sincerity in this matter.

Mr. Kent's character assassination of Mr. Austin as a drug addict and a thief is without merit. The trace amount of alleged methamphetamine was so insignificant as to be completely consumed in testing. Mr. Austin has no history of drug abuse. The Forest Service sign was abandoned property found by Mr. Austin at a dump site. The word "stolen" used in referring to this sign was specifically stricken by Judge Marsh by agreement of the parties at the time of the stipulation. These allegations are red herrings designed to paint Mr. Austin as a "bad" person.

The forest archaeologist's letter dated October 14, 1988, stating that "the goal of illegal artifact collecting and digging is not to acquire information about American Indians: the goal is to acquire artifacts for personal collections or for monetary gain" attempts to portray Mr. Austin in a fashion totally at odds with reality. Quite to the contrary, Mr. Austin has never gained in any pecuniary fashion through his collection over this past decade. He considers it an appalling crime for anyone to take an original Indian artifact and sell it for a profit. Even own his mother reports that he would not give her one authentic arrowhead. His sole purpose in gathering these arrowheads over the years was to eventually open a small museum for the public to view these artifacts which he so loved. He simply cannot be placed in the same category as someone who would rape the landscape for personal profit or gain.

Mr. Kent's final assertion regarding the negative influence of this type of conduct on our archaeological history is something with which both I and Mr. Austin can agree. When Mr. Austin first contacted me concerning this matter, I found him to be a most unusual candidate for this type of conduct given his complete devotion to and respect for the American Indian culture. At our

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initial interview, when I asked Brad how he was supporting himself, he indicated that he made his own arrowheads and sold them as trinkets to the tourists in Bend, Oregon. He then proceeded, while sitting in my office, to chip out several beautifully handcrafted arrowheads from raw pieces of obsidian with a piece of antler as his only tool. He spoke with a great deal of knowledge and passion for the preservation of the Indian culture. I was truly impressed not only by his artistic abilities, but also by his obviously sincere dedication to the pursuit of knowledge and preservation of the Indian way of life. It was difficult for me to understand how this man who so loved the archaeological resources left by the Indians could be portrayed as a looter and destroyer of those same resources.

After many hours of investigating Brad's case and circumstances, I am convinced that my initial impression of him was correct. His mistake in collecting these artifacts was one of judgment and misunderstanding of the law rather than any malicious or bad intent to violate ARPA. His sole motivation here was to preserve these artifacts for future generations' enjoyment.

Subsequent to Brad's arrest in this matter, he has undergone many months of self-evaluation concerning his own activities. It is readily apparent from his letter to the Court, which is attached for the Court's consideration, that he sincerely regrets any potential harm he may have caused to the understanding of these resources. Brad wants to do anything possible to gain a better understanding of the harm amateur archaeologists can unwittingly cause.

There has been a great outpouring of support from the Bend community on Brad's behalf. I have been contacted by many people wishing to know what they could do in support of Brad. I am also submitting for your consideration a sampling of the many letters of support I received on his behalf. Some of these letters are from people, who like Brad, are amateur archaeologists in need of a more clear understanding of ARPA in order to know what is prohibited and what is not prohibited. Others are from family members and friends who can attest to Brad's overall good character and sincere remorse.

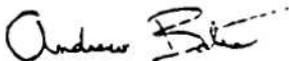
Brad Austin is a very unique individual whose talents and resources can be utilized in a positive fashion. His willingness to learn from his mistakes and communicate that understanding to others would greatly benefit the community on the problems and conflicts surrounding the taking of arrowheads and other archaeological resources. I believe that any incarcerative sentence, particularly ..

The Honorable James M. Burns
Re: United States v. Austin
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in light of his record, his character, and the circumstances of this case would be most unjust and counterproductive.

Education and rehabilitation rather than punishment and retribution are the key to changing peoples' attitudes in this type of case. Mr. Austin is not a profiteer or a person with little regard for history and scientific knowledge who deserves to be incarcerated. Putting him in jail to serve as "an example" will divide the community and drive a wedge between the government and the hundreds of other amateur archaeologists. Having Brad perform a substantial amount of community service work for the High Desert Museum in Bend, Oregon, the U.S. Forest Service, or other similar organizations promoting ARPA and educating people as to the real harm caused by the taking of artifacts would bring forth a greater appreciation and understanding of this law. Such a sentence would focus the public's attention in a constructive, positive manner and best serve the interest of justice.

Sincerely,



Andrew Bates
Assistant Federal Defender

cc: The Honorable Owen M. Panner
The Honorable James A. Redden
The Honorable Malcolm F. Marsh
The Honorable Helen J. Frye
The Honorable Robert C. Belloni
Jeffrey Kent, Assistant U.S. Attorney
Ronald Oldham, U.S. Probation Officer

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