

6
7
8 UNITED STATES DISTRICT COURT

9 DISTRICT OF ARIZONA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 KYLE R. JONES, THAYDE L. JONES,
14 and ROBERT E. GEVARA,

15 Defendants.

16 INDICTMENT

17 NO. CR 78-29

PHX *WPC*

18 VIO: 18 U.S.C. §641
19 (Theft of Government Property)
20 18 U.S.C. §1361
21 (Depredation of Government Property)
22 18 U.S.C. §2
23 (Aiding and Abetting)

24 THE GRAND JURY CHARGES:

25 COUNT I

26 On or about the 22nd day of December, 1977, in
27 the District of Arizona, on lands of the United States of the Cave Creek
28 Range District, of the Tonto National Forest, KYLE R. JONES, THAYDE L.
29 JONES, and ROBERT E. GEVARA, each did wilfully and knowingly steal and
30 purloin Indian artifacts consisting of a quantity of clay pots, bone awls,
31 and stone matates and monos and human skeletal remains, property of the
32 United States, of a value in excess of \$100.

In violation of Title 18, United States Code,
Section 641, and 2.

33 COUNT II

34 On or about the 22nd day of December, 1977, in
35 the District of Arizona, on KYLE R. JONES, THAYDE L. JONES, and ROBERT E.
36 GEVARA wilfully and by means of a pick and shovel did injure property of
37 the United States, that is, Indian ruins located in Brooklyn Basin of the
38 Cave Creek Range District of the Tonto National Forest, thereby causing

FORM 600-01
(5-7)
Formally 100-01

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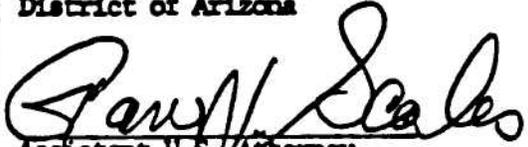
damage to such property in excess of \$100.

In violation of Title 18, United States Code,
Section 1361 and 2.

A TRUE BILL


FOREMAN OF THE GRAND JURY
January 18, 1978

MICHAEL D. HAWKINS
United States Attorney
District of Arizona


Assistant U.S. Attorney

UNITED STATES of America, Plaintiff,

v.

Kyle R. JONES, Thayde L. Jones and
Robert E. Gevara, Defendants.

No. CR-78-29 Phx WPC.

United States District Court,
D. Arizona.

April 12, 1978.

Defendants who were allegedly seen digging within Indian ruins located in national forest were charged with theft and depredation of government property. On motion to dismiss, the District Court, Cople, J., held that the Antiquities Act was the exclusive means by which the government could prosecute defendants' alleged conduct, and they could not be charged under theft and malicious mischief statutes even though the penal provision of the Antiquities Act had been held fatally vague.

Motion granted.

1. Criminal Law ⇐29

Generally, where act violates more than one statute, the government may elect to prosecute under either unless the congressional history indicates that Congress intended to disallow the use of the more general statute.

2. Malicious Mischief ⇐1

Within statute prohibiting "willful" injury to government property, statutory requirement of willfulness requires the accused to act intentionally, with knowledge that he is violating the statute. 18 U.S.C.A. § 1361.

3. Larceny — 3(1)

Theft requires intent to appropriate property to a use inconsistent with the owner's rights and benefits. 18 U.S.C.A. § 641.

4. Public Lands — 8

The Antiquities Act was conceived as a comprehensive plan to deal with preservation of ruins on public lands, and thus was the exclusive means by which the government could prosecute alleged conduct of defendants in digging within Indian ruins located in national forest, and they could not be charged under statutes proscribing theft and willful injury to government property, even though the penal provision of the Antiquities Act had been held to be fatally vague. 16 U.S.C.A. §§ 431-433; 18 U.S.C.A. §§ 641, 1361.

Daniel R. Drake, Asst. U. S. Atty., Phoenix, Ariz., for plaintiff.

David M. Heller, Asst. Federal Public Defender, Phoenix, Ariz., for defendant Kyle R. Jones.

Jay M. Martinez, Phoenix, Ariz., for defendant Thayde L. Jones.

Hermilio Iniguez, Phoenix, Ariz., for defendant Robert E. Gevara.

MEMORANDUM AND ORDER

COPPLE, District Judge.

On December 22, 1977, the defendants allegedly were seen digging within Indian ruins located on the Tonto National Forest. They were arrested by Forest Service officers, and charged with the theft and destruction of Indian relics. Count One of the indictment alleges that the defendants stole government property valued in excess of \$100.00. 18 U.S.C. § 641. The government property consists of clay pots, bone awls, stone matates, and other Indian artifacts located at the ruins. Count Two alleges depredation of government property, the Indian ruins located within the national forest. 18 U.S.C. § 1361. Conviction on either count can lead to a fine not more than \$10,000, or imprisonment for not more than ten years, or both.

The alleged conduct, if true, also violates the Antiquities Act of 1906, which states:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Act of June 8, 1906, 34 Stat. 225 (codified at 16 U.S.C. § 433). This action raises the issue whether the government can choose to prosecute under either the theft and malicious mischief statutes, 18 U.S.C. §§ 641 and 1361, or the Antiquities Act. The resolution of this question affects more than the range of penalties that can be imposed upon the defendants. In *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), the Court of Appeals held that the penal provision of the Antiquities Act was fatally vague in violation of the due process clause of the Constitution. Therefore, if the government cannot elect to prosecute under the theft and malicious mischief statutes, rather than the Antiquities Act, then this action must be dismissed.

[1] In *United States v. Castillo-Felix*, the Court of Appeals stated "the general rule that, where an act violates more than one statute, the Government may elect to prosecute under either unless the congressional history indicates that Congress intended to disallow the use of the more general statute." 539 F.2d 9, 14 (9th Cir. 1976). The analysis required is demonstrated by *Kniess v. United States*, 413 F.2d 752 (9th Cir. 1969). In *Kniess*, the defendant had passed a series of bogus postal orders in several states. He was indicted for having unlawfully passed counterfeit "securities," 18 U.S.C. § 472, and for unlawfully passing forged "postal money orders." 18 U.S.C. § 500. The defendant was convicted upon a

plea of guilty and sentenced upon each count. The defendant then moved to vacate his sentences under 18 U.S.C. § 472. The Court of Appeals granted the motion. "The Government's argument in support of Knies' indictment, conviction, and sentence under section 472 rests upon one theory: If a single act violates two statutes, the Government may elect to prosecute under either one. . . . [O]ur review of the relevant legislative history convinces us that this interpretation would be improper" *Id.* at 753-54. The Court of Appeals concluded that a bogus postal money order was not a counterfeit "security" under section 472.

It is all too obvious that reasonable interpretation often cannot depend upon a process of careful literalism. Words, phrases, and sentences of particular statutes derive their meaning from their particular contexts. This is the case here. The historical developments of the two statutes, despite the Government's fine literalism to the contrary, persuades us that section 472 does not govern money order fraud.

All of the foregoing leads to the conclusion that Congress has consistently treated money order forgery as a distinct crime. The most salient feature of this separate treatment is the fact that money order forgery has always been controlled by legislation specifying less severe penalties for money order fraud than those prescribed for fraud relating to other Government securities.

Id. at 754-59.

When the Antiquities Act was promulgated in 1906, it was meant to protect historic ruins and monuments on public lands from destruction "by parties who are gathering them as relics and for the use of museums and colleges." S.Rep. No. 3797, 59th Cong., 1st Sess. (1906); see also H.R. Rep. No. 2224, 59th Cong., 1st Sess. (1906). The Act authorized the President to declare by proclamation national monuments and reserve lands for their preservation, allowed permits for the examination and excavation

of ruins, and put teeth into the permit requirement by imposing a fine or imprisonment for failure to comply. Act of June 8, 1906, 34 Stat. 225 (codified at 16 U.S.C. §§ 431 to 433). These provisions set out a comprehensive "method for protecting remains that are still upon the public domain or in Indian reservations." H.R.Rep. No. 2224, 59th Cong., 1st Sess. (1906).

The present theft and malicious mischief statutes, 18 U.S.C. §§ 641 and 1361, are consolidations of criminal statutes originating in the Act of March 4, 1909, ch. 321, §§ 35, 36, 47, 48, 35 Stat. 1095, 1096-98, and subsequently amended. See H.R.Rep. No. 304, 80th Cong., 1st Sess. at A54, A100 (1947). Neither party addresses whether any of these earlier statutes, passed within three years of the Antiquities Act, apply to the digging and excavation of Indian artifacts. Sections 35 and 36 of the Act of March 4, 1909, 35 Stat. 1095-96, prohibited the making of false claims against the government and the theft of military property. Sections 47 and 48 of the Act of March 4, 1909, 35 Stat. 1097-98, prohibited the theft of government property and punished receivers of stolen property. Only section 47 could arguably apply to the conduct alleged in this action:

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Section 47 differs little, however, from the theft statute existing when the Antiquities Act was passed in 1906. See Act of March 3, 1875, 18 Stat. 479 ("any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be guilty of a felony . . ."). The 1875 theft statute also imposed a harsh punishment of up to five years imprisonment and a fine of \$5,000. Presumably, when Congress promulgated the Antiquities Act in 1906, Congress either assumed that

historic ruins and Indian artifacts were not "property" protected by the theft statutes, or concluded that five years imprisonment was too harsh a punishment for excavating Indian relics. There is nothing within the text of the Act of March 4, 1909, that indicates that Congress changed its mind three years later.

Section 35 of the Act of March 4, 1909, 35 Stat. 1095, originally punished the making of false claims against the government. In 1918, section 35 was amended, in part, to prohibit the purloining of "any personal property" of the government, and to increase the penalty to a fine not more than \$10,000 and imprisonment not more than ten years. Act of Oct. 23, 1918, 40 Stat. 1015. In 1934, section 35 was expanded to penalize anyone who willfully injures "any property" of the United States. Act of June 18, 1934, 48 Stat. 996. A letter from the Attorney General, incorporated into the House and Senate reports, explained the amendment.

The bill proposes to amend section 35 of the Criminal Code so as to prohibit injury to and depredations against Government property wherever situated. Present law provides a penalty for the theft of Government property, but there are no Federal statutes under which prosecutions may be had for willful injury to property of the United States. The need for such legislation has arisen in the work of several departments of the Government. Airway beacons . . . have been installed upon leased lands and there are reports of considerable difficulty by reason of depredations committed at these beacons. A water supply line . . . has also suffered from vandalism Another occasion when the need for legislation of this nature was felt, was when the U.S.S. Akron was under construction for the Navy Department at Akron, Ohio. Acts of syndicalism were committed on the ship, which if not discovered, might have caused a serious disaster.

S.Rep. No. 1202, 73d Cong., 2d Sess. (1934); H.R.Rep. No. 1463, 73d Cong., 2d Sess. (1934). Finally, section 35 was amended in

1938 to allow a gradation in penalties depending upon the value of the property stolen or injured. Act of April 4, 1938, 52 Stat. 197; S.Rep. No. 1497, 75th Cong., 3d Sess. (1938); cf. Act of Nov. 22, 1943, 57 Stat. 591; S.Rep. No. 505, 78th Cong., 1st Sess. (1943), reprinted at 1943 U.S. Code Cong. Serv., p. 2275. The Court concludes that amended section 35 does not extend beyond property already protected by the theft prohibition of section 47; and, section 47 does not apply to Indian artifacts regulated by the Antiquities Act.

[2-4] A colorable argument can be made that differences between the Antiquities Act and the theft and malicious mischief statutes evidence a legislative intent to allow prosecution under either. For example, 18 U.S.C. § 1361 prohibits "willful" injury to government property. The statutory requirement of willfulness requires the accused to act intentionally, "with knowledge that he was [breaking] the statute." *United States v. Berrigan*, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970). 18 U.S.C. § 641 prohibits theft of government property. Theft requires an "intent to appropriate [property] . . . to a use inconsistent with the owner's rights and benefits." *Ailsworth v. United States*, 448 F.2d 439, 442 (9th Cir. 1971); see *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). The Antiquities Act can be read to impose a lesser punishment upon a person whose guilty knowledge does not fall within the theft and malicious mischief statutes. The Court will not draw these conclusions, however.

Inferences as to possible legislative intent drawn from such variations in statutory terminology are of questionable validity. The phrases employed by one legislative draftsman are an unreliable clue as to that which another writer, at a different point in time, but seeking similar results, may have intended by the use of slightly different terms.

Kniess v. United States, supra at 754. In 1906, the Antiquities Act was conceived as a comprehensive plan to deal with the preser-

vation of ruins on the public lands. See H.R.Rep. No. 2224, 59th Cong., 1st Seas. at 2-8 (memorandum concerning the historic ruins of Arizona, New Mexico, Colorado, and Utah, and their preservation). Indeed, the departments of government have promulgated rules and regulations, consistent with the intent of Congress, to preserve American antiquities. See 25 C.F.R. pt. 132 (1977); 36 C.F.R. § 261.9 (1977); 43 C.F.R. pt. 3 (1976). The Antiquities Act is thereby the exclusive means by which the government could prosecute the conduct alleged in this action. The holding in *Diaz, supra*, leaves a hiatus which the Congress should correct by appropriate legislation.

IT IS ORDERED:

The motion to dismiss is granted and the indictment herein is dismissed with prejudice as to all defendants.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KYLE R. JONES & THYDE J. JONES
vs
ROBERT A. SEVARI
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLANTS

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Walter Hough, "Notes and News," <u>American Anthropologist</u> , N.S., III (1901), 590- - - - -	23
House Report No. 2224, 59th Cong., 1st Sess. (1906)- -	25, 26, App. 16
Ronald F. Lee, <u>The Antiquities Act of 1906</u> (1970)- - -	23, 24, App. 33
T. Mitchell Pruden, "The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado and New Mexico," <u>American Anthropologist</u> , N.S., V (1903), 237, 288 - - - - -	23
Senate Report No. 3797, 59th Cong., 1st Sess. 1 (1906) - - - - -	25, App. 24

ISSUE PRESENTED

Whether the government was entitled to charge appellees under the theft and malicious mischief provisions of 18 U.S.C. 641 and 1361, even though their conduct may also have violated the Antiquities Act, 16 U.S.C. 433.

STATUTES INVOLVED

16 U.S.C. § 433 provides as follows:

American antiquities

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

18 U.S.C. § 641 provides as follows:

Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted -

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

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

18 U.S.C. § 1361 provides as follows:

Government property or contracts

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

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

STATEMENT

On January 18, 1978, a Federal grand jury for the District of Arizona returned a two count indictment charging appellees with violating 18 U.S.C. 641, 1361 and 2. Count I charged that on December 22, 1977, appellees stole Indian artifacts consisting of clay pots, bone awls, and stone metates, plus manos and human skeletal remains, all property of the United States exceeding \$100 in value. Count II charged appellees with willfully injuring property of the United States, that is, Indian ruins located in the Brooklyn Basin of the Cave Creek Range District of the Tonto National Forest, thereby causing damage to that property in excess of \$100. (R.A. 24-25) 1/

In March and April, 1978, the district court held hearings on appellees' motion to dismiss the indictment and various other pre-trial motions. On April 12, 1978, the court entered a Memorandum and Order dismissing the indictment with prejudice. (R.A. 179-187; 449 F. Supp. 42 (D. Ariz., 1978)) 2/ This appeal by the United States followed.

1/ "R.A." refers to the one volume Clerk's Record on Appeal; "H" refers to the one volume transcript of motion hearings held on March 6, March 31, April 3, and April 10, 1978; "GX" refers to government exhibits; "Pr.H." refers to the transcript of the January 12, 1978 preliminary hearing; "App." refers to the one volume Appendix of the Appellant United States.

2/ We have reproduced the Court's decision in the attached Appendix. See App. 1-9.

1. The nature of the charges

On December 20, 1977 two Forest Service officers overflew the Brooklyn Basin region of the Tonto National Forest, some 60 miles north of Phoenix, Arizona. (Pr.H. 5, 13-14; H. 19-20) 3/ These officers observed a yellow pickup with attached camper parked adjacent to a known Indian ruin. There were no private lands in the immediate vicinity. The site of the ruin can only be reached by driving past a National Forest boundary marker (R.A. 131; Pr.H. 5, 11-12; H. 22) and a Forest Service Antiquities Notice sign (App. 29; H. 13, 23-24, 33, 129; Pr.H. 5-6, 17; R.A. 131, 138) posted in the immediate vicinity of the Indian ruins where the appellees were observed digging. 4/

On the morning of December 22, 1977, a number of Forest Service officers and archeologists, accompanied by local deputy

3/ The forest rangers were flying over this particular area as a result of the Forest Service receiving a report from a hunter, Mr. Kirby, that on December 18, 1977, he was hunting in the Brooklyn Basin area when he came across two men who were at a ruin. After Mr. Kirby informed the men that what they were doing was wrong and was quite serious, the men accosted him, and threatened to throw him down a mine shaft, and kill him. Mr. Kirby was finally able to disarm the two men, escape, and telephonically contact a Forest Service officer with the above information. (H. 17-18; Pr.H. 14-15)

4/ The Antiquities Notice sign states, inter alia, that "Any person who without official permission, injures, destroys, excavates, or appropriates any historic or prehistoric ruin, artifact or object of antiquity on the public lands of the United States is subject to arrest and penalty of law." (App. 29)

sheriffs, entered the Brooklyn Basin area and established physical surveillance of the campground and ruin sites.

(H. 27-28; Pr.H. 6, 16-17) They saw the yellow pickup with the camper 5/ leave the campsite at approximately 8:30 a.m., and subsequently, at approximately 10:00 a.m., appellees were observed by Forest Service personnel excavating at a ruin site with shovels and picks. (H. 29-31, 47-48, 64-65, 82, 88, 130-131; Pr.H. 6-7, 18, 19-20, 25, 26)

Physical surveillance was continued until about noon, when all officers, with the exception of the three archeologists who remained on the stakeout, approached the ruin site in vehicles. As the officers neared the ruins, the archeologists observed appellees run from the ruins and hide objects on a hillside across the road. Two of the appellees then entered the yellow pickup and drove down the road about one-quarter of a mile to a windmill. The officers immediately approached the windmill where they found and arrested appellees Thayde L. Jones and Robert E. Gevara standing on a water storage tank. They initially denied that there was a third person with them, but

5/ Subsequently an automobile registration check determined that the observed pickup was registered to Thayde Jones. (Pr.H. 18)

eventually Thayde Jones acknowledged that his brother, Kyle Jones, had gone off and he was not sure where Kyle was now. 6/ (Pr.H. 7-8; H. 32-33)

Thayde Jones and Gevara were then advised of their Miranda rights, after which they at first denied digging in the ruins. When told that they had been seen digging there, they admitted it. (Pr.H. 7-8; H. 33-35, 70-71, 91-92)

Subsequently, Forest Service officers and archeologists recovered a number of artifacts from appellees' campsite, at the ruin site where they had observed them excavating earlier that day, and in the brush near the ruin, where they found a hidden cardboard box that contained plastic bags full of shards. (Pr.H. 9) Included in the materials seized were the following: 18 reconstructable pottery vessels, a large number of unreconstructable pottery shards, one pot shard pendant, 3 stone axes, 12 stone manos, 5 bone awls, 1 deer bone fragment, and one stalagmite, (App. 32) 7/ along with some tools, a shovel, and some skulls and other bones. (H. 36-37, 45, 55, 127-128)

6/ All three appellees are from Utah. (R.A. 4, 9, 12; H. 142, 176) Appellee Thayde Jones had previously been found guilty in a Utah state court for excavating prehistoric ruins on or about February 5, 1972. (R.A. 66, 133, 140; H. 13)

7/ The exact number and description of the excavated items are set forth in the affidavit of Forest Service archeologist Martin McAllister. (App. 32) We have moved the district court to supplement the record with McAllister's affidavit, which was not included in the original record because of the pre-trial dismissal of the indictment.

Appellee Kyle Jones was arrested on December 22, 1977 in the Brooklyn Basin area. A search of Jones' knapsack disclosed a number of Polaroid photographs of appellees posing in a ruin with human skulls. (Pr.H. 10, 21-22; H. 35, 38, 96-99, 116-117, 123-124)

The dollar value of the recovered artifacts has been estimated as low as \$1,217, and as much as \$5,000 to \$6,000 or more. (App. 32; Pr.H. 10) The damage to the Indian site has been estimated to be about \$10,000. (Pr.H. 10) The age of the artifactual materials recovered at the site has been estimated to be 1000 A.D., which is the estimated age of the site itself.

2. The district court's opinion

On April 12, 1978, United States District Court Judge William I. Copple issued a Memorandum and Order dismissing with prejudice the indictment against appellees. (R.A. 179-187; App. 1-9)

The court held that the government could not elect to prosecute under 18 U.S.C. §§ 641 and 1361, because the legislative history of the Antiquities Act (16 U.S.C. 433) established that that statute was the exclusive means of prosecuting the conduct alleged in this case. (App. 8) The court noted, but

did not accept, the "colorable argument" that the admitted differences in the elements necessary for a conviction under the Antiquities Act and the theft and malicious provision "evidence a legislative intent to allow prosecution under either." (App. 7) Instead, the court apparently believed that the different elements required to be proved under the more general theft statute reflected merely "variations in statutory terminology." (App. 8)

The court acknowledged that the combined effect of its ruling, taken together with the holding of United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) that the Antiquities Act is unconstitutionally vague, left the government with no means to prosecute thefts from Indian ruins. It suggested that Congress correct this "hiatus" in the law with appropriate legislation.

ARGUMENT

THE GOVERNMENT WAS ENTITLED TO CHARGE APPELLEES UNDER THE THEFT AND MALICIOUS MISCHIEF PROVISIONS OF 18 U.S.C. 641 AND 1361, EVEN THOUGH THEIR CONDUCT MAY ALSO HAVE VIOLATED THE ANTIQUITIES ACT, 16 U.S.C. 433

1. Where A Single Act Violates Two Criminal Statutes, the Government May Prosecute Under Either Absent Proof That Congress Intended To Disallow Use of The More General Statute

It is by now well-established that where a single act violates two criminal statutes, the government may elect to

prosecute under either. United States v. Gilliland, 312 U.S. 86 (1941); United States v. Castillo-Felix, 539 F.2d 9, 14 (9th Cir. 1976); United States v. Brown, 482 F.2d 1359, 1360 (9th Cir. 1973). See United States v. Beacon Brass Co., 344 U.S. 43, 45 (1952). It makes no difference whether one statute provides a harsher penalty than the other or whether one provision more specifically proscribes the conduct in question; ^{8/} only if the legislative history indicates that Congress intended to disallow the use of one of the statutes is the general rule of prosecutorial discretion inapplicable. United States v. Gilliland, *supra*; United States v. Castillo-Felix, *supra*; United States v. Brown, *supra*. See also United States v. Moore, 423 U.S. 122, 138 (1975).

This Court has consistently followed these principles. Indeed, the Court has specifically approved the government's use of a general statute when a more specific one might have been available, and of prosecutions under statutes bearing harsh penalties when more lenient alternatives were at hand.

^{8/} Nor is it necessary that the appellees know which particular sanctions will be invoked, so long as they know that the conduct is prohibited. United States ex rel. Shell Oil Co. v. Barco Corp., 430 F.2d 998, 1001 (8th Cir. 1970).

A leading case in this circuit establishing the government's authority to prosecute under the more general statute is United States v. Burnett, 505 F.2d 815, 816 (1974), cert. denied sub. nom., Lyon v. United States, 420 U.S. 966 (1975), where the Court rejected a claim that a false representation to secure unemployment compensation must be prosecuted under the statute addressed to that subject (18 U.S.C. 1919) rather than under the general statute prohibiting false statements in matters before a federal agency (18 U.S.C. 1001). The decision there noted (id.):

"Defendants admit that the terms of both statutes apply to their conduct. Their claim that Section 1919 precludes application of Section 1001 to their conduct rests on three proffered rules of statutory construction: (1) that the specific statute takes precedence over the more general one * * * (2) that the more recent statute has priority over the earlier one, * * * and (3) that any conflicts in statutory interpretation are resolved in favor of the defendant * * * . Defendant's principles of statutory construction are inapplicable * * * . As rules of construction they would only be useful in resolving legitimate doubts about Congress' intent in passing overlapping statutes. They may not be used to create doubts * * * . There is no indication in the legislative history that Congress intended to bar application of Section 1001 to conduct also punished by Section 1919 * * * . Repeals by implication are not favored; effect should be given to overlapping statutes if possible * * * .

See United States v. Brown, supra, 482 F.2d 1359, 1360 (9th Cir. 1973) ("where a single act violates more than one statute, the government may elect to prosecute under either"); Morgan v. United States, 380 F.2d 686, 703 (9th Cir. 1967), cert. denied, 390 U.S. 962, reh. denied, 390 U.S. 1008 (1968) ("the government has the right to sue under any statute under which it thinks it can secure a conviction"); United States v. Castillo-Felix, supra, 539 F.2d 9, 14 (9th Cir., 1976) ("We find without merit the contention that since 8 U.S.C. § 1306(a) is specific as to the counterfeiting of alien registration receipt cards, the prosecution should have been under it rather than under the more general provisions of 18 U.S.C. 1426(a). It is the general rule that, where an act violates more than one statute, the government may elect to prosecute under either unless the Congressional history indicates that Congress intended to disallow the use of the more general statute.") 9/

9/ Other circuits follow the same rule. See United States v. Hamel, 551 F.2d 107, 113 (6th Cir. 1977) ("when the same conduct is prohibited by two penal statutes, the government may proceed under either and the defendant may not complain if the government elects to proceed under the harsher one") (33 U.S.C. § 1319(c)(1) and 33 U.S.C. § 407); United States v. Liddy, 542 F.2d 76, 82 (D.C. Cir. 1976) (defendant who might be subject to prosecution under two differing criminal provisions does not have the constitutional right to demand prosecution exclusively under the statute prescribing the lesser penalties particularly where different elements of proof are required for each offense) (18 U.S.C. §§ 371 and 241). See also United States v. Brewer, (Cont'd on next page)

The rule allowing government election of statutes is especially apt where — as in this case — the statute employed requires proof of elements the alternative law does not. This is well illustrated by the decision in United States v. Lamb, 150 F. Supp. 310 (N.D. Calif. 1957), aff'd. sub. nom. Magnolia Motor and Logging Company v. United States, 264 F.2d 950 (9th Cir.), cert. denied, 361 U.S. 815 (1959). There, the defendants were indicted for cutting down timber growing on public lands. The indictment was brought under the same general statutes used in the indictment in the instant case, 18 U.S.C. 641 and 1361. The Lamb defendants moved to dismiss the indictment on the ground that their alleged offense could only be prosecuted under two specific misdemeanor statutes covering the destruction of timber located on federal lands, 18 U.S.C. 1852 and 1853.

(Footnote 9 cont'd) 528 F.2d 492, 498 (4th Cir. 1975) (18 U.S.C. § 1341 and 15 U.S.C. § 376); United States v. Librach, 520 F.2d 550, 556 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976) (§ 1001 and § 1012); United States v. Zouras, 497 F.2d 1115, 1121 (7th Cir. 1974) (18 U.S.C. §§ 876 and 1503, 1510).

To like effect are United States v. Eisenman, 396 F.2d 565, 568 (2d Cir. 1968); United States v. Baumgarten, 300 F.2d 807, 808 (2d Cir.) cert. denied, 370 U.S. 317 (1962) (18 U.S.C. §§ 1001 and 1723); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.) cert. denied, 412 U.S. 939 (1973) (18 U.S.C. §§ 1621 and 1623); Erlich v. United States, 238 F.2d 481, 485 (5th Cir. 1956) (18 U.S.C. §§ 1001 and 1012); Mauney v. United States, 454 F.2d 273, 274 (6th Cir. 1972) (18 U.S.C. §§ 922(g) and App. 1202(a)); United States v. Chakmakis, 449 F.2d 315, 316 (5th Cir. 1971) (42 U.S.C. § 408(c) and 18 U.S.C. § 1001); Hutcherson v. United States, 345 F.2d 964, 967 (D.C. Cir.) cert. denied, 382 U.S. 894 (1965) (§ 33-402 D. C. Code 1961 and 21 U.S.C. §§ 174 and 4704(a)).

The district court denied the motion and this court affirmed. It held that "Section 641 * * * applies to the theft or knowing conversion of any thing of value of the United States, meaning, in essence, any personal property of the United States" (150 F. Supp. at 312) and that it was "apparent that where § 1852 overlaps § 641, i.e., when it applies to severed timber (personality) and the removal thereof * * * it does not require all the attributes of criminal intent, indeed, the intent need not be wrongful at all." (Id. at 313). Accord, United States v. Gemmill, 535 F.2d 1145, 1150 (9th Cir.), cert. denied sub. nom. Wilson v. United States, 429 U.S. 982 (1976) (18 U.S.C. § 641 and §§ 1852 and 1853); United States v. Cedar, 437 F.2d 1033, 1035-1036 (9th Cir. 1971) (18 U.S.C. §§ 641 and 1853); United States v. Manes, 420 F. Supp. 1013, 1019-1020 (D. Ore. 1976), aff'd, 549 F.2d 809 (9th Cir. 1977) (table) (18 U.S.C. §§ 641 and 1852).

Likewise in this case, a conviction under 18 U.S.C. 641 and 1361 would require proof of specific intent, 10/ while a

10/ Ailsworth v. United States, 448 F.2d 439, 441-442 (9th Cir. 1971) (§ 641); United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972) (§ 1361); United States v. Moylan, 417 F.2d 1002, 1004-1005 (4th Cir. 1969) (§ 1361); United States v. Fine, 413 F. Supp. 728, 736 (W.D. Wis. 1976) (§ 1361).

conviction under the Antiquities Act would not. 11/ Thus, while the Antiquities Act is more specific as regards the actus component of the thefts it proscribes, it is less specific as regards the scienter component. That the government must prove under sections 641 and 1361 that a defendant acted with specific criminal intent justifies both the harsher penalties those statutes provide and the government's prerogative to employ them in preference to other laws designed for curbing anti-social

11/ United States v. Fine, supra, 413 F. Supp. at 733.

It has also been held that in a prosecution under 18 U.S.C. § 641 a defendant's knowledge that certain property belonged to the Federal Government is not an essential element of proof, as long as the defendant was aware of the risk that the property was not his. United States v. Howey, 427 F.2d 1017, 1018 (9th Cir. 1970); United States v. Crutchley, 502 F.2d 1195 (3rd Cir. 1974); United States v. Boyd, 446 F.2d 1267 (5th Cir. 1971); Baker v. United States, 429 F.2d 1278, 1279 (9th Cir.), cert. denied, 400 U.S. 957 (1970); United States v. Smith, 489 F.2d 1330, 1332 (7th Cir. 1973), cert. denied, 416 U.S. 994 (1974) ("[under Morissette v. United States, it is clear] * * * that the intent element found to be required in § 641 was the criminal intent to steal and not the intent to steal property known to be government property.") Cf. United States v. Feola, 420 U.S. 671 (1975); United States v. Hobson, 519 F.2d 765, 769 (9th Cir.), cert. denied, 423 U.S. 931 (1975); Barnes v. United States, 412 U.S. 837, 847-848 (1973) (Under 18 U.S.C. § 1708 it was not necessary for the defendant to know that the checks were stolen from the mails, but only that he knew they were stolen.)

action undertaken without such intent.^{12/} This distinction is especially apt here, where the government has charged not that appellees were vacationing souvenir hunters or local residents peddling an occasional pilfered clay pot or arrowhead, but has charged essentially that appellees mounted a well-organized and well-financed campaign to systematically plunder an irreplaceable national treasure. Clearly then, the decision to prosecute appellees under the only available felony provisions — those of sections 641 and 1361 — was not gratuitous or random, but a deliberate choice based on the seriousness of appellees' conduct and the government's belief that criminal scienter can be proved.

In sum, the law in this circuit is clear that the government was entitled to prosecute under sections 641 and 1361, rather than under the Antiquities Act, absent legislative history demonstrating that Congress intended to prohibit use of

^{12/} Sections 641 and 1361 require that the objects taken have a value in excess of \$100 and that the damage done to the federal property be in excess of \$100 in order to make their violations felonies punishable by fines not exceeding \$10,000 or imprisonment for not more than ten years, or both. The Antiquities Act does not contain any valuation requirement, and provides that all violations shall be misdemeanors punishable by a fine of not more than \$500, or imprisonment for not more than ninety days or both.

the more general statutes. In our view, elaborated in the discussion to which we now turn, the legislative history demonstrates no such thing.

2. The Legislative History of the Antiquities Act Does Not Establish That The Act Was Conceived As An Exclusive Plan For The Preservation Of Indian Ruins Located On Public Lands

We do not disagree with the district court's view that the Antiquities Act was designed to protect Indian ruins; the legislative history of the Act, which we have set out at length in an addendum to the brief, 13/ fully supports this view. Indeed, based on our reading of the legislative reports and their historical context, we have no quarrel with the court's conclusion that the "Act was conceived as a comprehensive plan" to deal with the preservation of Indian ruins. In our view, however, neither of these facts warrants the court's ultimate conclusion that appellees' conduct could not be prosecuted under the general theft and malicious mischief statutes.

The fact that the Antiquities Act is "comprehensive" simply cannot support the court's action. Any criminal statute is "comprehensive" in the tautological sense that it "comprehends" the acts it describes. Accordingly, nothing is added to the primacy of a statute by saying that it is comprehensive.

13/ Infra, at pp. 23 et seq.

Certainly the false unemployment claims statute in Burnett, and the counterfeit alien registration statute in Castillo-Felix, and the unlawful timber cutting statute in Lamb, were all just as "comprehensive" as regards their subject matters as the Antiquities Act is as regards objects of antiquity, including Indian ruins. But the dispositive question in those cases, as in this one, was not whether the statutes were "comprehensive" in the sense that the acts covered were covered fully, but whether Congress intended for that coverage, however detailed, to exclude application of every other statute.

At no point in the legislative history of the Antiquities Act is there any indication that Congress either expressly or impliedly intended the Act to be the exclusive means of prosecuting the theft of "objects of antiquity" or the depredation of government property. 14/ Similarly, neither does the

14/ The lower court's reliance on Kniess v. United States, 413 F.2d 752 (9th Cir. 1968), is misplaced. Kniess held that negotiation of forged postal orders should be prosecuted under 18 U.S.C. § 500, and not under 18 U.S.C. § 472, the general criminal provision relating to forged securities. The court's decision was based solely on an exhaustive analysis of the relevant legislative history, and not on any variant view of the election of statutes doctrine. (413 F.2d at 754-759). Indeed, the Ninth Circuit has cited Kniess on three occasions, and in those three cases they have applied the general rule allowing election of statutes. See United States v. Burnett, supra; United States v. Brown, supra; and United States v. Castillo-Felix, supra.

legislative history of Sections 641 and 1361 provide support for the district court's view that "Presumably, when Congress promulgated the Antiquities Act in 1906, Congress either assumed that historic ruins and Indian artifacts were not 'property' protected by the theft statutes, or concluded that five years' imprisonment was too harsh a punishment for excavating Indian relics." (App. 5-6)

Both 18 U.S.C. 641 and 18 U.S.C. 1361 were ultimately derived from Rev. Stat. §§ 5438-5439. The Supreme Court, after reviewing the legislative history of 18 U.S.C. 641 15/ noted that

It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. * * * The codifiers wanted to reach all such instances. Morissette v. United States, supra, 342 U.S. at 271.

Concur: Ailsworth v. United States, 448 F.2d 439, 441 (9th Cir. 1971) ("Section 641 was a consolidation of four former larceny-type

15/ Morissette v. United States, 342 U.S. 246, 266-270 n.28 (1952); also see Morissette v. United States, 187 F.2d 427, 437-438 (6th Cir. 1951) (McAllister, J., dissenting).

The same analysis applies to section 1361, which is based on the 1940 version of 18 U.S.C. 82.

offenses scattered through Title 18, before its 1948 revision. The history of section 641 and its antecedents demonstrates that Congress intended the section to codify the common law crimes of larceny and embezzlement, together with those other acts which shade into those common law offenses, yet fail to fit precisely within their definitions," citing United States v. Howey, 427 F.2d 1017, 1018 (9th Cir. 1970)); United States v. Di Gilio, 538 F.2d 972, 978 (3rd Cir. 1976), cert. denied sub. nom. Lupo v. United States, 429 U.S. 1038 (1977).

In other words, to the extent the legislative history of section 641 illuminates the matter, that provision was designed to expand the reach of prior laws covering deprecations of government property, not further fragment them and widen the gaps in their coverage. 16/ Accordingly, the legislative

16/ Even if the Antiquities Act were designed to bar prosecutions under any other law for the kinds of theft at issue in this case, we believe that, since the Antiquities Act has been effectively nullified in this circuit by Diaz, supra, it would be erroneous, if not Kafkaesque, to rely upon the asserted design of the Act to prohibit the government from prosecuting under another law which indisputably covers appellees' alleged conduct, albeit in more general terms. In other words, we do not believe that the Antiquities Act can be viable for purposes of squelching prosecutions under otherwise applicable statutes while simultaneously being void for its own purposes. No case of which we are aware has reached such a result.

At the same time, we note our view that the Antiquities Act is not unconstitutional, and accordingly that the court may wish to reconsider Diaz in an appropriate case. Diaz itself was (Cont'd on next page)

history of both the Antiquities Act and the theft statute supports, rather than opposes, our view that Congress did not intend, by adopting the former statute, to prohibit use of the latter.

(Footnote 16 cont'd) decided on unusual and difficult facts (i.e., the "antiquities" taken were no more than four years old), and it has not been followed in cases outside this circuit. See United States v. Quarrell, Cr. No. 76-4 (D.N.M., June 1, 1976) (unreported); see especially United States v. Smyer, et al., Cr. No. 77-284 (D.N.M., December 28, 1977) appeal pending Nos. 78-1134 and 78-1135 (App. 10-15); also see R. Collins and D. Green, "Constitutionality of the 1906 American Antiquities Act," Science (1978) (forthcoming).

However that may be, Diaz is at present the law of this circuit. Accordingly, we believe that the district court was incorrect in selectively resurrecting the Antiquities Act in its consideration of the present case.

CONCLUSION

It is therefore respectfully submitted that the order of the district court dismissing the indictment be reversed and that the case be remanded to the district court for trial.

DATED this 13 day of July, 1978.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing BRIEF and one (1) copy of the APPENDIX of appellant United States were served upon counsel for appellees by depositing the same in the United States mail at the United States Department of Justice, Washington, D. C., and addressed to:

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Dated this 13 day of July, 1978.

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ADDENDUM ON LEGISLATIVE HISTORY
OF THE ANTIQUITIES ACT

The Antiquities Act 17/ was drafted and presented to the American Anthropological Association and the Archaeological Institute of America by a prominent archaeologist, Edgar Lee Hewett. 18/ Professor Hewett's draft bill was adopted by

17/ Act for Preservation of American Antiquities, Act of June 8, 1906, 34 Stat. 225 (1906) (Codified at 16 U.S.C. 431-433).

18/ Also see, e.g., W. H. Holmes, "Debasement of Pueblo Art," American Anthropologist, III (1889), 320; Walter Hough, "Notes and News," American Anthropologist, N.S., III. (1901), 590; T. Mitchell Pruden, "The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado and New Mexico," American Anthropologist, N.S., V (1903), 237, 288; Edgar L. Hewett, "Preservation of American Antiquities; Progress during the Past Year; Needed Legislation," American Anthropologist, N.S. VIII (1906), 109-114; Edgar L. Hewett, "Government Supervision of Historic and Prehistoric Ruins," Science, N.S., XX (1904), 723.

Before the successful passage of the Antiquities Act in 1906 there had been two concerted, but unsuccessful attempts by professional anthropology associations to obtain passage of protective legislation. The first effort, 1899 to 1900, was by the American Association for the Advancement of Science "Committee on the Protection and Preservation of Objects of Archeological Interest" (Lee, infra, App. 33-47 to 33-57), and the second effort, 1902-1905, was by the Records of the Past Exploration Society (Lee, infra, App. 33-57 to 33-67).

Before the passage of the Act there were no State or Federal laws prohibiting conduct covered by the Act; the primary weapon available to the United States for protecting antiquities on public land was to withdraw specific tracts of land from sale or entry for a temporary period. Lee, infra, App. 33-39.

See, generally, Ronald F. Lee, The Antiquities Act of 1906 (Office of History and Historic Architecture, National Park Service, U. S. Department of the Interior, 1970), especially chapters I-IV. (App. 33-1 to 33-38) (hereinafter cited as Lee).

Congressman John Lacey of Iowa, a conservation leader in Congress, and was introduced in the House of Representatives as H. R. 11016 on January 9, 1906, and was referred to the House Committee on Public Lands. (40 Cong. Rec. 883) On February 26, 1906 Senator Thomas Patterson of Colorado introduced a companion bill, S. 4698, in the Senate, which bill was referred to the Senate Committee on Public Lands. (40 Cong. Rec. 2972) 19/

The Senate reported back S. 4698 without amendments on May 24, 1906, and unanimously passed the legislation on that day. (40 Cong. Rec. 7331) (App. 25) In its report accompanying the legislation the Senate Committee on Public Lands indicated that the preservation of relics was the purpose of the bill:

This measure has the hearty support of the Archaeological Institute of America, the American Anthropological Association, the Smithsonian Institution, and numerous museums throughout the country, and in view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties

19/ Lee, supra, App. 33-67 to 33-77.

The reason that the Hewett drafted bill was enacted in 1906 while the two earlier attempts in 1899 and 1902 were defeated was that Hewett's bill took care of six important points not adequately covered by the previous proposals. See Lee, supra, App. 33-74 to 33-76.

who are gathering them as relics and for the use of museums and colleges, etc., your committee are of the opinion that their preservation is of great importance.

The bill is carefully drawn, and the committee are unanimously in favor of its passage. (Senate Report 3797, 59th Cong., 1st Sess. 1) (1906) (App. 24)

In the House H. R. 11016 was reported back from the Committee on the Public Lands on March 12, 1906 with minor amendments 20/ (40 Cong. Rec. 3709), accompanied by a report (H. R. Rep. 2224, 59th Cong., 1st Sess.) (1906) (App. 16-23) which recommended passage of the legislation.

The House Report indicated that the purpose of the legislation was to preserve our historic past:

There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so

20/ The three proposed amendments were insignificant except for the amendment that would make 16 U.S.C. § 433 a specific intent crime by inserting the words "willfully or wantonly" after the word "shall" in the first sentence of the Act, thus making the statute read: "Any person who shall willfully or wantonly appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity * * * ."

However, as we discuss in the text, the House eventually accepted the Senate version of the Act, thereby excluding any intention of making the Act a specific intent crime. This specific legislative history establishes that 16 U.S.C. § 433 has no element of criminal intent. See United States v. Behrman, 258 U.S. 280 (1922); United States v. Balint, 258 U.S. 250 (1922); cf. Morissette v. United States, 187 F.2d 427, 430 (6th Cir., 1952), rev'd, 342 U.S. 246, 250 (1952).

much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.

Practically every civilized government in the world has enacted laws for the preservation of the remains of the historic past, and has provided that excavations and explorations shall be conducted in some systematic way so as not to needlessly destroy buildings and other objects of interest.

The United States should adopt some method of protecting these remains that are still upon the public domain or in Indian reservations. (H. R. Rep. 2224, supra, at 1-2) (App. 16-17).

The remainder of the eight page House Committee Report on the Act consists of a memorandum prepared and presented to the House Committee on Public Lands by Professor Hewett. This memorandum, which was specifically incorporated as part of the Committee Report, presented an historical and archaeological justification of the importance of preserving the historic and prehistoric ruins located in the American West (see H. R. Rep. 2224, supra, at 2-8; App. 17-23).

Subsequently, on May 25, 1906 the Senate passed version of the Act (S. 4698) was referred to the House Committee on the Public Lands (40 Cong. Rec. 7434), which Committee on June 5, 1906 favorable reported the Senate version. (40 Cong. Rec. 7888) During House debate on the Senate version of the Act on June 5, 1906, Representative Lacey indicated that

[The object of the bill] is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest * * * .

The House, after brief debate, passed S. 4698 (40 Cong. Rec. 7888) (App. 26) and the Antiquities Act was signed into law by the President on June 8, 1906. (40 Cong. Rec. 8038, 8042, and 8240) 21/

21/ Section 1 of the Act become 16 U.S.C. § 433; Sections 3 and 4 of the Act become 16 U.S.C. § 432 (authorizing permits for the examination of ruins, excavations, and gathering of objects — and authorizing the promulgations of implementing regulations); Section 2 of the Act become 16 U.S.C. § 431 (authorizing the establishment of national historic landmarks).

Two Code of Federal Regulation regulations have been issued by the Government under the authority of 16 U.S.C. § 432: 43 C.F.R. Part 3 (1977) (App. 27) and 25 C.F.R. Part 132 (1977) (App. 28).

The Department of Agriculture has issued its own regulation prohibiting conduct covered by 16 U.S.C. § 433, on the basis of the authority it is given by 16 U.S.C. § 551. See 36 C.F.R. 261.9 (1977) (App. 27). This regulation, covering property within the National Forest Service, provides for a penalty of a fine of \$500, or imprisonment not more than six months, or both. Similarly, the National Park Service, Department of the Interior, has issued its own regulation prohibiting conduct covered by 16 U.S.C. § 433, on the basis of the authority it is given by 16 U.S.C. § 3. See 36 C.F.R. §§ 1.3(a) and 2.20(a)(1) (1977) (App. 28). This regulation provides the same penalty as the Agriculture regulation.

In addition to the above regulations, the Department of the Interior has issued a notice of proposed rulemaking in the April 10, 1978 issue of the Federal Register, which notice circulated for public comment a proposed definition of the phrase "object of antiquity." The proposed definition would be added as 43 C.F.R. § 3.18, and would require that any artifact to be considered an "object of antiquity" would have to be at least
(Cont'd on next page)

(Footnote 21 cont'd) 100 years old, in addition to having other, enumerated qualities. The public commenting period closed on May 25, 1978, and the comments received by the Department of the Interior are now being considered with representatives of the Departments of Agriculture and Defense, in an effort to prepare a final regulatory package. See 43 Fed. Reg. 14975-14976 (April 10, 1978) (App. 30-31).

The initial regulations implemented by the Secretaries of the Interior, Agriculture, and War on December 28, 1906 to carry out the provisions of the Antiquity Act are given in Lee, supra, App. 33-118 to 33-120.

In Cappaert v. United States, 426 U.S. 128, 141-142 (1976), the Supreme Court upheld the President's authority under 16 U.S.C. § 431 to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government" on the basis of its reading of the statute and on the authority of Cameron v. United States, 252 U.S. 450, 451-456 (1920). Also see United States v. California, 98 S. Ct. 1662 (1978).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

KYLE R. JONES, THAYDE L. JONES
and ROBERT E. GEVARA,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPENDIX FOR APPELLANT

MICHAEL D. HAWKINS,
United States Attorney,
District of Arizona.

DANIEL R. DRAKE,
Assistant United States Attorney,
District of Arizona.

WILLIAM G. OTIS,
DANIEL E. FROMSTEIN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

APPENDIX

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7. 36 C.F.R. § 261.9 (1977). Property [within the National Forest Service, Department of Agriculture]

The following are prohibited:

(a) Mutilating, defacing, removing, disturbing, injuring or destroying any natural feature or any property of the United States.

* * * *

(e) Digging in, excavating, disturbing, injuring, or destroying any archeological, paleontological, or historical site, or removing, disturbing, injuring, or destroying an archeological, paleontological, or historical object [which is located within the National Forest System; see 36 C.F.R. § 261.1(a)(1977)]

[Violation is penalized by a fine of \$500, or imprisonment for not more than six months, or both. See 16 U.S.C. § 551.]

[Issued under the authority of 16 U.S.C. § 551; 42 FR 2957, Jan. 14, 1977, as amended at 42 FR 24739, May 16, 1977]

8. 43 C.F.R. Part 3 (1977) - Preservation of American Antiquities

§ 3.1 Jurisdiction

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

(a) By the Secretary of Agriculture over lands within the exterior limits of forest reserves;

(b) By the Secretary of the Army over lands within the exterior limits of military reservations;

(c) By the Secretary of the Interior over all other lands owned or controlled by the Government of the United States * * * .

[Issued under authority of 16 U.S.C. § 432, 19 FR 8838, Dec. 23, 1954]

9. 25 C.F.R. Part 132 (1977) - Preservation of Antiquities

§ 132.1 Penalty

The appropriation, excavation, injury or destruction of any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the Government of the United States, by any person or persons, without the permission of the Secretary of the department having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, subject said person or persons to be fined not to exceed \$500 or imprisoned for not to exceed 90 days, or both.

[Issued under authority of 16 U.S.C. § 432; 22 FR 10570, Dec. 24, 1954]

10. 36 C.F.R. § 1.3 Penalties (1977)

(a) Any person convicted of violating any provision of the regulations contained in Parts 1 through 7 of this chapter; or as the same may be amended or supplemented, within any park area not embraced in paragraphs (b) or (c) of this section, shall be punished by a fine not exceeding \$500 or by imprisonment not exceeding 6 months, or both, and shall be adjudged to pay all costs of the proceedings. (16 U.S.C. 3)

11. 36 C.F.R. § 2.20 Preservation of public property, natural features, curiosities, and resources. (1977)

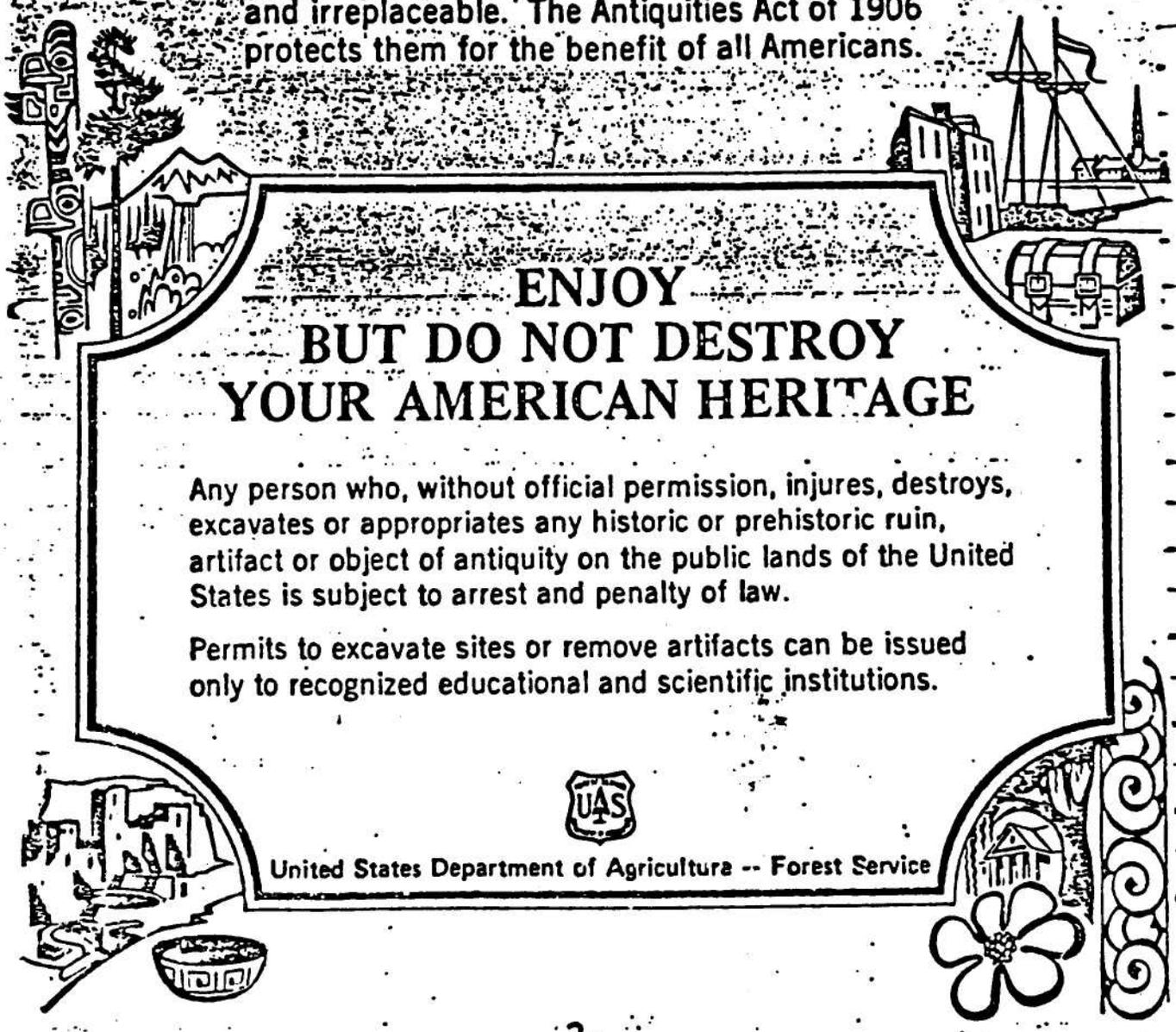
(a) In natural and historic areas

(1) The possession, destruction, injury, defacement, removal or disturbance in any manner of any building, sign, equipment, monument, statue, marker, or other structure, or of any animal or plant matter and direct or indirect products thereof, including but not limited to petrified wood, flower, cone or other fruit, egg, nest, or nesting site, or of any soil, rock, mineral formation, phenomenon of crystallization, artifact, relic, historic or prehistoric feature, or of any other public property of any kind, is prohibited, except as otherwise provided in this section or in special regulations for a park area.

* * *

NOTICE

Ancient ruins, artifacts, fossils and historical remnants in the vicinity of this notice are fragile and irreplaceable. The Antiquities Act of 1906 protects them for the benefit of all Americans.



**ENJOY
BUT DO NOT DESTROY
YOUR AMERICAN HERITAGE**

Any person who, without official permission, injures, destroys, excavates or appropriates any historic or prehistoric ruin, artifact or object of antiquity on the public lands of the United States is subject to arrest and penalty of law.

Permits to excavate sites or remove artifacts can be issued only to recognized educational and scientific institutions.



United States Department of Agriculture -- Forest Service

...tain the information required by subpara-
 graph B. of this paragraph.
 4. Within thirty (30) days of approval by
 the Administrator and information
 of the monitoring and information
 system proposed under subpara-
 graph A.3 of this paragraph, the Company
 shall implement such system as may be
 modified by the Director, Air and Hazard-
 ous Materials Division, EPA Region III in
 its approval.
 5. Within sixty (60) days of commencing
 use of coal in the Company's boiler
 number eight (8), the Company shall per-
 form source testing for particulate emis-
 sions using EPA method five (5) as specified
 in appendix A of part 60, title 40 of the
 Code of Federal Regulations, as amended.
 The Company shall perform such tests in a
 manner approved in writing by EPA Region
 III and shall provide to the EPA Region III
 Regional Energy Coordinator a minimum of
 fifteen (15) days written notice prior to con-
 ducting such tests. The Company shall pro-
 vide to said Regional Energy Coordinator a
 complete report containing all information
 pertinent to the performance and results of
 said stack tests within thirty (30) days of
 completing such tests.
 6. Within sixty (60) days of installation of
 the continuous capacity monitor required
 under subparagraph B.1. of this paragraph,
 the Company shall conduct a Performance
 Specification Test (PST) in accordance with
 Performance Specification 1, appendix B of
 part 60, title 40 of the Code of Federal Reg-
 ulations. The Company shall notify the Re-
 gional Energy Coordinator, EPA Region III,
 of the date on which the PST will be con-
 ducted at least thirty (30) days prior to such
 date.
 7. Within forty-five (45) days of the PST
 required under subparagraph A.6. of this
 paragraph, the Company shall submit a
 complete report containing all information
 pertinent to the PST to the Regional
 Energy Coordinator, EPA Region III.
 B. Recordkeeping and reporting. 1. The
 Company shall keep monthly records both
 of air quality monitoring data and of air
 pollutant emissions, of which records the
 Company shall submit copies to the EPA
 Region III Regional Energy Coordinator
 within fifteen (15) days of the end of each
 calendar month. Said air pollutant emission
 records shall detail, daily emission in
 combustion units of the company and shall
 at a minimum include:
 (a) For each steam generating unit, a
 breakdown of the fuel consumed each day
 of the preceding month;
 (b) For each steam generating unit an
 analysis of the fuel consumed each week to
 include sulfur content, ash content, and
 high heating value; and
 (c) For the stacks serving boiler numbers
 eight (8) only, a record of the hourly mea-
 surement of opacity, acquired by means of a
 continuous opacity monitoring device. Such
 device shall be installed, calibrated, and
 maintained in accordance with Performance
 Specification 1, of appendix B, part 60, title
 40 of the Code of Federal Regulations.
 2. If, for any reason, the Company does
 not comply or will be unable to comply, with
 the requirements of this order, the Com-
 pany shall provide in writing to the Director,
 Air and Hazardous Materials Division, EPA
 Region III, within five (5) days of becoming
 aware of such situation.
 (a) A description of the violation and its
 cause; and
 (b) The period during which noncompli-
 ance has occurred and/or is expected to

...and the steps taken to reduce, elimi-
 nate and prevent recurrence of the viola-
 tion.
 3. If the air quality monitoring data col-
 lected by the Company pursuant to section
 A of this paragraph indicates that the Na-
 tional Primary Ambient Air Quality
 Standards for particulates are being exceed-
 ed in the area, the Company shall notify
 the Director, Air and Hazardous Materials
 Division, EPA Region III of such occurrence
 by telephone or letter or other means,
 within seventy-two (72) hours of the collec-
 tion of such data.
 4. The requirement of subparagraph three
 (3) hereinabove shall apply with respect to
 monitoring data and the National Ambient
 Air Quality Standards for Sulfur Dioxide. If
 such monitoring requirements are imposed
 pursuant to section A. of this paragraph.
 VII. Nothing herein shall affect the res-
 ponsibility of Chesapeake Corp. to comply
 with State, local or other Federal regula-
 tions.
 VIII. Chesapeake Corp. is hereby notified
 that its failure to achieve final compliance
 at its boiler number eight (8) with the ap-
 plicable particulate emission regulations of the
 Virginia SIP by June 30, 1980, or such other
 date as may be specified in a second order
 pursuant to subsection 113(d) of the Act, if
 issued, may result in a requirement to pay a
 noncompliance penalty under section 120 of
 the Act. Such requirement may be imposed
 at an earlier date, which is subsequent to
 July 1, 1978, as provided by subsection
 113(d) and section 120 of the Act, either in
 the event that this order is terminated as
 provided in paragraph IX, below, or in the
 event that any requirement of this order is
 violated as provided in paragraph X, below.
 In any event, the Company will be formally
 notified, pursuant to subsection 120(b)(3)
 and any regulations promulgated thereun-
 der, of its noncompliance.
 IX. This order shall be terminated in ac-
 cordance with subsection 113(d)(8) of the
 Act if the Administrator or his delegatee de-
 termines, on the record, after notice and
 hearing, that an inability of the Company
 to comply with Rules EX-2 and EX-3, Part
 IV of the Virginia Regulations for the Con-
 trol and Abatement of Air Pollution, as ap-
 proved by EPA, no longer exists with re-
 spect to its boiler number eight (8).
 X. Violation of any requirement of this
 order shall result in one or more of the fol-
 lowing actions:
 A. Enforcement of such requirement pur-
 suant to subsection 113 (a), (b), or (c) of the
 Act, including possible judicial action for an
 injunction and/or penalties and in appropri-
 ate cases, criminal prosecution.
 B. Revocation of this order, after notice
 and opportunity for a public hearing, and
 subsequent enforcement of the Virginia SIP
 in accordance with the preceding para-
 graph.
 C. If such violation occurs on or after July
 1, 1978, notice of noncompliance and subse-
 quent action pursuant to section 120 of Act.
 XI. This order is effective upon promulga-
 tion in the Federal Register and after
 having received concurrence from the Gov-
 ernor of the Commonwealth of Virginia.

Date: _____
 Administrator or Delegatee,
 U.S. Environmental Protection
 Agency.
 Waiver of Rights to Challenge Order
 The Chesapeake Corp., by the duly autho-
 rized undersigned, hereby consents to the
 terms of this order and waives any and all
 rights under any provision of law to chal-
 lenge this order.
 Date: _____
 (Authority: 42 U.S.C. 7413(d).)
 Dated: March 13, 1978.
 JACK J. SCHRAMM,
 Regional Administrator.
 (PR Doc. 78-9234 Filed 4-7-78; 8:45 am)

[1505-01]
**GENERAL SERVICES
 ADMINISTRATION**
 National Archives and Records Service
 [41 CFR Part 101-11]
RECORDS MANAGEMENT
 Micrographs Management
 Correction
 In PR Doc. 78-7953 appearing at
 page 12731 in the issue for Monday,
 March 27, 1978, in §101-11.506-3
 (e)(2), in the table which appears on
 page 12734, the "Background Density"
 for the classification "Group 5" was
 omitted and should have read as fol-
 low: "1.50-1.80".

[4310-70]
DEPARTMENT OF THE INTERIOR
 Office of the Secretary
 [43 CFR Part 2]
PRESERVATION OF AMERICAN ANTIQUITIES
 Definition of "Object of Antiquity"
AGENCY: Heritage Conservation and
 Recreation Service.
ACTION: Notice of proposed rulemak-
 ing.

SUMMARY: This document is in fur-
 therance of the Department of the In-
 terior's responsibilities in the adminis-
 tration of the American Antiquities
 Act of 1906, for the preservation and
 protection of archeological, historic
 and paleontological resources located
 on federally owned or controlled lands
 administered by this Department. Spec-
 ifically, the Department proposes a
 definition of the phrase "object of an-
 tiquity" as used in the act for the pur-
 pose of providing notice to the public
 of those objects subject to the prohibi-
 tions of the Act.

FEDERAL REGISTER, VOL. 43, NO. 69, MONDAY, APRIL 16, 1978

DATE: Comments must be received on or before May 25, 1978. It is the policy of the Department of the Interior to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comment, suggestions or objections regarding the proposed regulations to the Heritage Conservation and Recreation Service.

ADDRESS: Comments should be submitted to the Director, Heritage Conservation and Recreation Service, Department of the Interior, 1951 Constitution Avenue, Washington, D.C. 20240. Attention: Code 780.

FOR FURTHER INFORMATION CONTACT:

Departmental Consulting Archeologist, Attention: Charles M. McKinney, Office of Archeology & Historic Preservation, Heritage Conservation and Recreation Service, Department of the Interior, Telephone Number: 202-923-5454.

SUPPLEMENTAL INFORMATION:

The proposed definition of "object of antiquity" is designed to provide understanding as to the objects covered by the American Antiquities Act of 1906, 43 Stat. 225), which provides criminal penalties for the violation of its provisions. To this end, "object of antiquity" is defined by four subsections that attempt to describe, in lay terms, objects that are of archeological, anthropological, paleontological, or historic interest.

This definition is intended to eliminate the infirmities in the act found by the Ninth Circuit Court of Appeals in *United States v. Diaz*, 499 F. 2d 113 (9th Cir. 1974). In that case, the court held that because the act used undefined terms of uncommon usage, it was unconstitutionally vague. Of specific concern to the court was that the Government sued not only age, but also the use to which an object was put in determining which objects were protected by the act. This proposed definition addresses both of those problems by providing notice, in lay terms, of what it is to be protected and by making age and not use, the most significant factor.

Artifacts (or objects made or modified by man for his use) are protected by paragraph (a). The involvement of man in making or modifying the object with a view toward subsequent use is the attribute that makes the object valuable to the fields of archeology and anthropology. While the list in paragraph (a) of types of objects covered is intended to be exemplary, not inclusive, it should give the average person adequate notice of what is meant by the word "artifact."

Skeletal remains are covered by paragraph (b). Bones are generally not artifacts, but are of great importance to archeology and anthropology when

they occur in a cultural context. This point is obvious for human skeletal remains. Faunal (animal) skeletal materials are also important because they often yield human behavioral data of great value to the study of man.

The third paragraph (c) gives land managers the option of protecting any object, natural or man-made, located in or associated with a site of archeological, prehistoric, or historic significance by taking an official action to notify the public that the site is protected. Such notification could occur either by the inclusion of the site on the National Register of Historic Places (constructive notice), or through fencing, discretionary posting, or some other onsite designation (factual notice).

The fourth paragraph (d) provides protection for vertebrate paleontological specimens under the authority of this act, other than those specimens located in a cultural context referenced in paragraph (b). This subsection pertains specifically to fossil materials important to the study of vertebrate paleontology.

It should be noted that this definition will apply only to lands administered by the Department of the Interior. Those other Departments to which this act grants regulatory authority, Defense and Agriculture, are considering similar action.

It is hereby determined that the publication of this proposed regulation would not constitute a major Federal action significantly affecting the quality of the human environment and that no environmental impact statement pursuant to section 102(X)(c) of the National Environmental Policy Act, 43 U.S.C. 433(c) is required. For specific proposals requiring the Department of the Interior to carry out its cultural resource management responsibilities under the Antiquities Act, or other historic preservation legislation, compliance with the National Environmental Policy Act will be accomplished on an individual basis.

The following persons participated in the writing of this regulation: Charles M. McKinney, Manager, Federal Antiquities Program, Office of Archeology and Historic Preservation, Department of the Interior, Washington, D.C. and John G. DeKoster, Attorney, Office of the Solicitor, Department of the Interior, Washington, D.C.

Note.—The Department of the Interior has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11625 and Office of Management and Budget (OMB) Circular A-101.

Dated: March 31, 1978.

Robert L. Etkorn,
Assistant Secretary for Fish and
Wildlife and Parks

Pursuant to the authority of the Secretary of the Interior contained in Section 4 of the American Antiquities Act of 1906, 34 Stat. 225 (16 U.S.C. 431, 432 and 433), it is hereby proposed to add § 3.18 to Part 3 of Title 43 of the Code of Federal Regulations, to read as follows:

§ 3.18 Definition.

Object of antiquity as used in the American Antiquities Act of 1906, 34 Stat. 225 (16 U.S.C. 431, 432 and 433) and in this Part, means—

(a) Any artifact that is at least 100 years of age, including but not limited to petroglyphs, pictographs (prehistoric and historic rock art), inscriptions, rock art, ornaments, paintings, pottery (ceramics), tools, implements, ornaments, jewelry, coins, fabrics, clothing, containers, ceremonial objects (items of socio-religious or political significance), vessels, ship ornaments, vehicles, structures (or remains thereof), and buildings.

(b) When found within a cultural context, any skeletal remains of humans or other vertebrate animals (including fossils), that are at least 100 years of age.

(c) Any object that is at least 100 years of age and is located in or associated with an archeological, historic, or paleontological site, if the site has been physically posted or marked by the land manager as protected, or has been listed in the National Register of Historic Places or

(d) Any remains of extinct fossil vertebrate species.

Note.—The Department is presently considering various alternatives for paleontological specimens as "objects of scientific interest" aside from "objects of antiquity" and for future consideration under the authority of the American Antiquities Act of 1906. Until further notice of either separate protective legislation or administrative actions under the existing statute, vertebrate specimens will continue to receive full protection under the act.

By Departmental administrative decision, vertebrate and paleontological specimens have not received protection under the permit authority of this statute in the past. However, should a land managing bureau through documented coordination with the paleontological professional community determine certain species to be rare and endangered, specific localities may be designated and subject to the permit provisions of the Act at the discretion of the Secretary. Such localities would receive protection referred to in subsection (c) above and be subject to conservation measures as directed by the Secretary of the Interior.

DFR Doc. 78-0477 Filed 4-1-78; 8:46 am

A F F I D A V I T

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

The archaeological site on Tonto National Forest Land designated AR-03-12-01-44 is a prehistoric habitation site of considerable age. On the basis of the artifactual material observed at the site, it is estimated to have a date of 1,000 A.D. The cultural affiliation of the site is uncertain. It may be either a Hohokam, Sinagua or Salado site.

The uncertainty concerning the age and cultural affiliation of the site is indicative of its significance. Questions of these kind cannot be answered without extensive investigation by professional archaeologists. Unfortunately, due to limitations beyond our control, the area in which this site is located has received virtually no attention of this type. The lack of knowledge concerning this area heightens the scientific importance of sites located there. The potential for loss of highly valuable scientific information is very great when such sites are vandalized. Professional and scientific excavation of even this one site could help us answer many now unanswered questions about the past.

The scientific value as well as the cultural heritage value of this site are impossible to quantify. The only value figure which can be given is the cost for professional archaeological data recovery from the areas vandalized. Dr. David Doyel, Arizona State Museum, University of Arizona, estimates that this cost would be \$22,515.34 based on his examination of the site.

The prehistoric artifactual materials recovered as the result of the vandalism of this site are of the same estimated date as the site itself (1,000 A.D.). They include 18 reconstructable pottery vessels, a large number of unreconstructable pottery shards, one pot shard pendant, 3 stone axes, 12 stone manos, 5 bone awls, 1 deer bone fragment and one stalagmite. Dr. Emil Haury, University of Arizona, estimated the control value of these artifacts to be \$1,217. I feel that the value of these artifacts on the open market could be considerably more than this; probably as much as \$5,000 to \$6,000.


MARTIN E. McALLISTER
Affiant

21st day of June, 1978.

SUBSCRIBED AND SWORN before me this


Notary Public

My Commission expires: My Commission Expires Oct. 13, 1978

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Appellant,)
)
 -v-) NO. CA-78-2005
)
 KYLE R. JONES, THAYDE L.)
 JONES, ROBERT E. GEVARA,)
)
 Appellees.)
 _____)

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEES

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DATE MAILED: August 30, 1978

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Appellant,)
)
 -vs-) NO. CA-78-2005
)
 KYLE R. JONES, THAYDE L.)
 JONES, ROBERT E. GEVARA,)
)
 Appellees.)
 _____)

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN
FINDING AS A MATTER OF LAW THAT
CONGRESS DID NOT INTEND THE PROVISIONS
AND PENALTIES OF Title 18 U.S.C. §641
AND §1361 TO APPLY TO THE SPECIFIC
CONDUCT AND PROPERTY ALLEGED IN THE
INDICTMENT.

STATEMENT OF FACTS

On January 18, 1978, a federal grand jury for the District of Arizona returned a two count indictment charging the appellees with violations of Title 18 U.S.C. §641 and §1361. Count I charged that on December 22, 1977, the appellees stole Indian artifacts consisting of clay pots, bone awls, and stone metates, plus manos and human skeletal remains, all property of the United States exceeding \$100 in value, in violation of Title 18 U.S.C. §641. Count II charged the appellees with willfully injuring property of the United States, that is, Indian ruins located in the Brooklyn Basin of the Cave Creek District of the Tonto National Forest, thereby causing damage to that property in excess of \$100, in violation of Title 18 U.S.C. §1361. (T.R. 24-25)

In March and April, 1978, the District Court held hearings on the appellees' motion to dismiss the indictment and various other pre-trial motions. On April 12, 1978, the Court entered a Memorandum and Order dismissing the indictment with prejudice. (T.R. 179-187; 449 F.Supp. 42 (D.C. Ariz., 1978)). In essence, the District Court held, based upon an analysis of the legislative history of the statutes involved, that when Congress promulgated the Antiquities Act it either ... "assumed that historic ruins and Indian artifacts were not 'property' protected by the theft statutes, or ... that five years imprisonment was too harsh a punishment for excavating Indian relics..." Id., 44-45. This appeal by the United States followed.

Pages 4-7 of the government's brief present facts which are immaterial to a decision of the issue presented by this appeal. The issue is legal in nature and not factual. Counsel questions the government's motives for elaborating in this manner. Material is presented by the government which in no way deals with these defendants, but which nevertheless leaves the distinct impression that they are the persons responsible for these actions. (P. 4, fn. 3; Government's reference to prior of Thayde Jones, p. 6, fn. 6)

ARGUMENT

THE DISTRICT COURT DID NOT ERRE IN FINDING AS A MATTER OF LAW THAT CONGRESS DID NOT INTEND THE PROVISIONS AND PENALTIES OF TITLE 18 U.S.C. §641 and §1361 TO APPLY TO THE SPECIFIC CONDUCT AND PROPERTY ALLEGED IN THE INDICTMENT.

Introduction:

In United States v. Burnett, 505 F.2d 815, 816 (9th Cir., 1974), cert. denied sub nom, Lyon v. United States, 420 U.S. 966 (1975), this Court stated:

"...that to assume that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it, is, in effect, to accomplish a partial repeal of the general statute." Id., 816 (Emphasis added)

As repeals by implication are not favored, this Court has also held that effect will be given to the general overlapping statute

unless appropriate legislative history indicates that (1) Congress never intended the general statute to regulate the questioned conduct, or (2) Congress, through subsequent passage of the more specific statute, intended to disallow the use of the more general statute. Kneiss v. United States, 413 F.2d 752 (9th Cir., 1969); United States v. Castillo-Felix, 539 F.2d 9, 14 (9th Cir., 1976).

A. Appropriate legislative history clearly establishes that Congress did not intend the general theft of government property (Title 18 U.S.C. §641) and depredation of government property statutes (Title 18 U.S.C. §1361) to apply to historic ruins and Indian artifacts.

In the present case, the District Court, after conducting a thorough chronological and substantive analysis of the legislative history of Title 18 U.S.C. §641 and §1361, and Title 16 U.S.C. §433 (hereinafter referred to as the Antiquities Act) correctly concluded that Congress never considered Indian ruins and artifacts property protected by the former general statutes. (R.T. 179-187)

The language of §641 as it exists today differs little from the Act of March 3, 1875, 18 Stat. 479, a general theft statute, which provided:

"Any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the monies, goods, chattels, records, or property of the United States, shall be guilty of a felony..."

This statute, in existence 31 years prior to Congress' adoption of the Antiquities Act, carried a harsh penalty of up to five

years imprisonment and a fine of \$5,000.

On June 8, 1906, Congress enacted the Antiquities Act, which has remained unchanged since its initial passage, and provides:

"Any person who shall appropriate, excavate, injure, or destroy any prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in the sum of not more than \$500 or be imprisoned for a period of not more than 90 days, or shall suffer both fine and imprisonment, in the discretion of the court." (Emphasis added)

The trial court's determination that the general theft statute was never considered by Congress to encompass historic ruins and artifacts is clearly supported by the history surrounding the passage of the Antiquities Act.

House Report No. 2224, 59th Cong., 1st Sess., 1906, stated the necessity for passage of the Antiquities Act:

"The United States should adopt some method of protecting these remains that are still upon the public domain or on Indian reservations." (Appendix I attached hereto, pp. 1-2)

Included in House Report No. 2224, was a memoranda prepared by Professor Edgar L. Hewett concerning the "historic and prehistoric ruins of Arizona, New Mexico, Colorado and Utah, and their preservation". Professor Hewett informed Congress:

"The question of the preservation of this vast treasury of information relative to our prehistoric tribes has come to be a

matter of much concern to the American people ... general legislation providing for the creation and administration of such parks in providing for the excavation of ruins in the interest of science only is urgently needed. It is well known that during recent years an extensive traffic has arisen in relics from these ruins. In securing these, buildings, mounds, etc., have been destroyed. These relics are priceless when secured by proper scientific methods, and of comparatively little value when scattered about either in museums or private collections without accompanying records. No scientific man is true to the highest ideals of science who does not protest against the outrageous traffic, and it will be a lasting reproach upon our government if it does not use its powers to restrain it." (Appendix I, pp. 2-3) (Emphasis added)

Ronald F. Lee, Special Assistant to the Director, National Park Service, in his article "The Antiquities Act of 1906", November 16, 1970 (Appendix II attached hereto), states several times, that prior to the passage of the Antiquities Act in 1906, no law was thought by Congress to protect historic ruins and artifacts. According to Lee, Marshall P. Wilder, President of the New England Historic Genealogical Society raised "in the Congress of the United States for the first time the whole question of legislation to protect American antiquities on federal lands". (Appendix II, p. 9) On May 10, 1882, Senator George Frisby Hoar of Massachusetts presented a petition on the floor of the Senate requesting:

"That at least some of these extinct cities or pueblos, carefully selected, with the land reservations attached ... may be withheld from public sale and their antiquities and ruins be preserved..." (Appendix II, p. 10; Cong. Rec., 47th Cong., 1st Sess., 1882, p. 3777)

According to Lee, the petition died in the Senate Committee on Public Lands:

"Many years were to pass, and much more vandalism and pot hunting were to occur, before Congress was ready to act to stop it. But the preservation issue had been officially raised, and this was a significant first step." (Appendix II, p. 12)

Dr. J. Walter Fewkes, in an article printed in the American Anthropologist, IX, 1896, stated:

"[U]nless laws are enacted, either by states or by the general government, for their protection, at the close of the Twentieth Century many of the most interesting monuments of the prehistoric peoples of our southwest will be little more than mounds of debris at the bases of our cliffs." (Appendix II, p. 32)

In an article from Science, November 25, 1904 (Appendix III attached hereto), W.A. Richards, Commissioner of the General Land Office, in a letter dated October 5, 1904, stated:

"This office fully appreciates the necessity for protecting these ruins ... and relics on the public land from ruthless violation by parties applying a trade in such matters The need for adequate legislation on this subject has, accordingly, been called to the attention of Congress by this department for a number of years, but as yet without avail." (Appendix III, p. 723) (Emphasis added)

Apparently, prior to the passage of the Antiquities Act in 1906, the government attempted to protect Indian ruins by removing certain lands from public access and then civilly prosecuting pot hunters as trespassers. (Appendix III, p. 724) This circuitous method of protection clearly demonstrates

that the government was using all possible means for preserving the ruins and artifacts prior to 1906.

Prosecutions under the general theft statute, in existence since 1875, were never discussed or apparently considered as an alternative means for enforcement. The legislative and general history surrounding the passage of the Antiquities Act in 1906 clearly indicates that neither Congress nor the Department of the Interior considered the forerunner of §641 to be applicable to the protection of Indian ruins or artifacts. To fill that legal void which jeopardized the preservation of Indian relics, Congress, in 1906, passed the Antiquities Act. Congress dictated that the spoliation of historic ruins and objects of antiquity would be punishable by a fine up to \$500 and/or imprisonment of up to 90 days. Neither the proscriptions of the Act nor the penalties provided have been altered since 1906.

As stated by the trial court:

"Presumably when Congress promulgated the Antiquities Act in 1906, Congress either assumed that historical ruins and Indian artifacts were not 'property' protected by the theft statutes [in existence since 1875], or concluded that five years imprisonment was too harsh a punishment for excavating Indian relics." (T.R. 183-184)

Three years after passage of the Antiquities Act, Congress enacted various statutes prohibiting theft of government property. The Act of March 4, 1909, Chapter 321, §§35, 36, 47, 48, 35 Stat. 1095, 1096-1098. Section 35 and §36 of the Act of 1909 prohibited the making of false claims against the

government and the theft of military property. Sections 47 and 48 of the Act prohibited theft of government property and punished receivers of stolen property. Section 47 contained language similar to that found in the Theft Act of 1875 (presently existing in §641):

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the monies, goods, chattels, records, property of the United States, shall be fined not more than \$5,000, or imprisoned not more than five years, or both." (35 Stat. 1097-98) (Emphasis added)

There is no indication that within three years subsequent to passage of the Antiquities Act Congress found it necessary or desirable to increase the penalty for misappropriation of historic artifacts from a fine of \$500 and/or imprisonment of 90 days, to a fine of \$5,000 and/or imprisonment of five years.

In 1918, Congress amended §35 of the Act of 1909 to prohibit the purloining of "any personal property" of the government, and to increase the penalty to a fine of not more than \$10,000 and imprisonment not more than ten years. (Act of October 23, 1918, 40 Stat. 1015) In 1934, §35 was expanded to penalize anyone who willfully injures "any property" of the United States. (Act of June 18, 1934, 48 Stat. 996). Senate Report No. 1202, 73d Cong., 2d Sess., 1934 (Appendix IV attached hereto) and H.R. Rep. No. 1463, 73d Cong., 2d Sess., 1934 (Appendix V attached hereto) indicates that the amendments to §35 were primarily intended as protection for hardware owned by the United States.

During congressional debates over the amendment, Congressman Miller, a supporter of the measure, stated:

"[T]here is only a very small change in existing law ... the primary purpose is to give protection and to provide a penalty for the destruction of property, particularly property like beacon lights on airway lines. This is about the only change in existing law, and if the gentlemen will look at the report [House Report on the Bill] you will find this is the purpose of the bill." (Cong. Rec., 2d Sess, 43d Cong., at 8137.)

In 1938, §35 was amended to allow a gradation in penalties depending upon the value of the property destroyed or injured. (Act of April 4, 1938, 52 Stat. 197; S.Rep. No. 1497, 75th Cong., 3d Sess. (1938); Cf. Act of Nov. 22, 1943, 57 Stat. 591; S.Rep. No. 505, 78th Cong., 1st Sess. (1943), reprinted at 1943 U.S. Code Cong. Serv. 2.275.) The evolution of §35, the forerunner of the present §1361, demonstrates that it was intended to protect government property already covered by the theft prohibition of §47. As stated above, §47 (Act of March 4, 1909), was never intended or considered by Congress to apply to Indian ruins or artifacts which had previously been regulated by the Antiquities Act.

It is clear from the legislative history of the Antiquities Act and the forerunners of §641 and §1361 that Congress has consistently treated the theft, injury or destruction of historic ruins or objects of antiquity as a distinct crime. The most salient feature of this separate treatment is the fact that antiquities violations have always been controlled by legislation specifying less severe penalties than those

proscribed for general theft and depredation of government property under §641 and §1361. Indeed, since 1906, the proscribed maximum penalty of \$500 and/or 90 days imprisonment for violations of the Antiquities law has never changed. Conversely, the general theft and depredation of government property statutes have, since 1875, been considered felony offenses with penalties ranging from five years and/or \$5,000 through ten years and/or \$10,000. ^{1/}

This court was presented with a similar issue of statutory construction and application in Kneiss v. United States, 413 F.2d 752 (9th Cir., 1969). In Kneiss, the defendant was charged with passing a series of bogus postal money orders in various states including Washington. In Washington he was federally indicted for having unlawfully passed counterfeit "securities" of the United States, in violation of Title 18 U.S.C. §472. Federal grand juries in all other affected jurisdictions rendered indictments against Kneiss for unlawfully passing "postal money orders", in violation of Title 18 U.S.C. §500. Kneiss ultimately pleaded guilty to all charges. Subsequently Kneiss moved to vacate his sentences under Title 18 U.S.C. §472. Kneiss contended that §472 did not proscribe the activities for which he was sentenced: passing and uttering forged postal money orders. He did not challenge the propriety of the sentences imposed on the offenses charged under §500.

^{1/} §1361 provides for a penalty of \$1,000 and/or one year in prison if the property jeopardized does not exceed \$100 in value.

While §500 specifically proscribed the fraudulent passage of "postal money orders", §472 generally prohibited the fraudulent passage of "securities". As argued by the government and conceded by this Court, Title 18 U.S.C. §8's definition of "securities" literally included "postal money orders".

The government's argument in Kneiss, as in the present case, was centered solely upon the general principal of law that if a single act violates two statutes, the government may elect to prosecute under either one. While this Court acceded to that proposition as a general principal of law, the court stated:

"However, our review of the relevant legislative history convinces us that this interpretation would be improper, that section 500, not section 472, governs, and hence, that the federal authorities in Washington did not have the choice which the government claims." Id., 754 (Emphasis added)

After tracing the evolution of §500 and §472, this Court concluded that Congress has consistently treated money order forgery as a distinct crime. Of particular importance to the court in its analysis of the legislative history was the fact that general legislation dealing with counterfeit "securities" (§472) dated back to the Act of March 3, 1825, 4 Stat. 115, 119, Ch. 65, §17. The terms in the Act of 1825 would have literally included postal money orders which were subsequently covered by a specific statute passed by Congress on May 17, 1864, 13 Stat. 76, Ch. 87. Both the general counterfeit "securities" act and the specific money order forgery act, have remained in two separate statues since 1864.

This Court reasoned:

"[T]here are but two explanations why Congress decided to include specific provisions applicable to postal money order fraud in its 1864 legislation. First, since money orders were a new concept to the lawmakers, they might have considered them to be somewhat different from the 'securities' which their previous legislation was concerned.... Alternatively, Congress may have believed that money order fraud presented problems different from those then arising from the forgery of other forms of United States 'securities' and therefore determined that these problems required separate attention. The second explanation is the more plausible." Id., 756.

The Court stressed that Congress consistently provided disparate sentences for violations of the general counterfeit securities statute (maximum imprisonment of 15 years), as compared to the more specific money order fraud statute (maximum penalty of five years):

"The most salient feature of this separate treatment is the fact that money order forgery has always been controlled by legislation specifying less severe penalties for money order fraud than those prescribed for fraud relating to other government securities. Indeed, since 1872, the prescribed maximum penalty of five years confinement for such fraud has never changed." Id., 759.

This Court concluded that the general principle (as relied upon by the government in the present case) that, "if a single act violates two statutes, the government may elect to prosecute under either one", although sound in the abstract, was not applicable to the facts in Kneiss as Congress never intended the general counterfeit "securities" act to

apply to conduct involving money order forgery.

Following the procedure applied by this Court in Kneiss v. United States, supra, the trial court in the present case carefully examined the legislative history of the general theft and depredation of government property statutes as well as the specific Antiquities Act. The Court correctly concluded that the chronological history surrounding passage of the general and specific statutes, the express concerns raised in debates prior to the passage of the Antiquities Act, as well as the disparate penalties contained in the statutes, clearly indicated that Congress never intended the general theft and depredation statutes to cover historic ruins and artifacts. Therefore, the government in this specific case could not elect to prosecute under either statute and a concern of repeal by implication was unfounded.

The government, in its opening brief, cites a plethora of cases for the general proposition that where Congress passes two statutes intending to regulate specific conduct the government may elect to prosecute under either of the appropriate statutes. As the legislative history concerning §641 and §1361 and the Antiquities Act clearly demonstrates that Congress never intended the former statutes to apply to historic ruins and artifacts the cases relied upon by the government are therefore inapplicable. ^{2/}

^{2/} In United States v. Burnett, supra, the defendants were charged with giving false statements to secure unemployment benefits. The defendants were convicted under Title 18 U.S.C. §1001 which generally forbids false statements

before a federal agency. The defendants claimed that they should have been tried for violating Title 18 U.S.C. §1919 which forbids giving false statements in order to obtain credit for federal employment to obtain unemployment insurance. This Court reviewed the legislative history of §1919 and concluded that Congress did not intend that statute to be the exclusive remedy for that type of violation. Section 1919 was originally enacted in 1954 as part of the Unemployment Act. The following statement was the complete congressional record of intent as reflected in S.Rep. No. 1794, at 11, and House Rep. No. 2001, 83d Cong.:

"This section prescribes a penalty of a fine of not more than \$1,000 or imprisonment for not more than one year or both for knowingly making a false statement of a material fact or failing to disclose a fact to obtain or increase benefits under the title for oneself or for another."

Significantly, this legislative history differs from that of the Antiquities Act in that no mention is made that the United States "should adopt some measure" to protect against a particular illegality, nor is there any other indication that absent the passage of §1919 no other legislation existed to protect against the particular conduct in issue.

In United States v. Castillo-Felix, *supra*, the defendant was convicted of violating Title 18 U.S.C. §1426(a) which proscribes counterfeiting, etc., naturalization or citizenship papers or alien registration papers. The defendant contended he should have been prosecuted under Title 18 U.S.C. §1306(d) which specifically proscribes counterfeiting alien registration cards. Reviewing the legislative history, this Court found no congressional intent that §1306(d) be the exclusive remedy for such violation. In United States v. Librach, 520 F.2d 550 (8th Cir., 1973), *cert. denied*, 429 U.S. 939 (1976), the defendant was convicted under Title 18 U.S.C. §1001, the general felony fraud statute for making a false statement, to the Department of Housing and Urban Development (HUD) to obtain a profit. The defendant claimed he should have been sentenced under the misdemeanor statute, Title 18 U.S.C. §1012, which prohibited his specific conduct. In reviewing the legislative history of §1012 the court found no indication by Congress that §1012 was to be the exclusive statute regulating such conduct. Section 1012 was originally passed as part of a bill creating the Department of Housing and Welfare (Senate Bill, 1684, 75th Cong., 1st Sess.). All that is stated in S.Rep. No. 933, 75th Cong., 1st Sess. about the part of the bill

(footnote 2 cont'd)

that eventually became §1012 is: "Section 23-27, Penalties; these sections prescribe the penalties for dealing illegally or criminally with the authority".

In United States v. Ruggiero, 474 F.2d 599 (2nd Cir., 1973), the defendant was convicted under Title 18 U.S.C. §1623 of uttering false declarations before a grand jury. The defendant claimed he should have been convicted under §1621, the general perjury provision which authorizes less severe penalties and requires the "two witness rule". Initially, the Second Circuit held that the defendant was properly convicted under the more specific statute, §1623. Further, the legislative history of §1623 clearly indicates it was intended by Congress to be employed in situations such as the court faced in Ruggiero. The House Report on Bill No. 91-1549 states:

"This title is intended to facilitate federal perjury prosecutions and establishes a new false declaration provision applicable in federal grand jury and court proceedings; it abandons the so-called two-witness and direct evidence rule in such prosecutions and authorizes a conviction based on irreconcilably inconsistent declarations under oath."

In Mauney v. United States, 454 F.2d 273 (6th Cir., 1972), the defendant was convicted under Title 18 U.S.C. §922(g) instead of Title 18 U.S.C. §1202. Both statutes were identical in specificity, i.e., there was no specific or general statute but rather two equally applicable statutes. Therefore, Mauney is inapplicable to the present case.

As in Kneiss v. United States, supra, p. 754, the government in the present case seeks to strengthen its reliance upon the general rule allowing election of statutes by claiming §641 and §1361, unlike the Antiquities Act, requires proof of the additional element of specific intent. The government apparently claims that while Congress intended that individuals who steal artifacts or despoil ancient ruins absent scienter are to be prosecuted under the Antiquities Act, Congress intended that such conduct, when coupled with the specific intent to violate the law, be prosecuted under §641 and §1361. As stated by this Court in Kneiss v. United States, supra:

"Inferences as to possible legislative intent drawn from such variations and statutory terminology have questionable validity. The phrases employed by one legislative draftsman are an unreliable clue as to that which another writer, at a different point in time, but seeking similar results, may have intended by the use of slightly different terms."
Id., 754.

In addition, as described above, prior to the passage of the Antiquities Act in 1906, Congress was concerned with the "ruthless violation" of ancient ruins and artifacts. Congress did not distinguish between willful and non-willful spoliation of historic ruins. Because Congress determined that there was no federal legislation proscribing such conduct passage of the Antiquities Act in 1906 was deemed imperative.

Finally, on March 12, 1906, in H.R. 11016 the Antiquities bill was reported back from the Committee on Public Lands with an amendment that would make it a specific intent

crime by inserting the words "willfully or wantonly" after the word "shall" in the first sentence of the Act, thus making the statute read:

"Any person who shall willfully or wantonly appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity ..." 40 Cong. Rec. 3709 as accompanied by H.R. Rep. 2224, 59th Cong., 1st Sess., 1906.

The House eventually accepted the Senate's version of the Act which excluded any intention of making the Act a specific intent crime. In rejecting the proposed amendment, there is no indication in the legislative history that Congress considered the forerunners of §641 and §1361 to cover willful and wanton conduct. Instead, it is clear that Congress intended the Antiquities Act with its penalties of a \$500 fine and/or 90 day imprisonment to proscribe all conduct, regardless of intent, which jeopardized the integrity of historic ruins and artifacts. ^{3/}

^{3/} At p. 15 of its opening brief, the government states that "it is charged essentially that appellees mounted a well organized and well financed campaign to systematically plunder an irreplaceable national treasure. Clearly then, the decision to prosecute appellees under ... 641 and 1361 -- was not gratuitous or random, but a deliberate choice based on the seriousness of appellees' conduct and the government's belief that criminal scienter can be proved". (Emphasis added) It should first be noted that the government's characterization of appellees' conduct as a well organized and well financed campaign to systematically plunder national treasures is totally unsupported by the record. The characterization and adjectives used by the government must be attributed to the authors own creativity and imagination. The government, in its response to the defendant's Motion to Dismiss the Indictment clearly stated that its choice to prosecute under §641 and §1361 was predicated upon the fact that the Antiquities Act had been declared unconstitutionally vague by this Court in United States v. Diaz, 499 F.2d 113 (9th Cir., 1974), and therefore unavailable for use in the present case. (T.R. 136-137)

The government correctly states at pages 18-19 of its opening brief that in passing §641 Congress intended to legislate against all means of theft. Indeed in passing §641 Congress attempted to codify the common-law crimes of larceny and embezzlement, together with those other acts which shade into those common-law offenses. United States v. Howie, 427 F.2d 1017, 1018 (9th Cir., 1970).

However, the government incorrectly infers that by codifying all common-law means of theft Congress also intended §641 to protect all types of property from theft. The government cites no authority for that proposition. Indeed, at page 23, fn. 18, ¶18, of its opening brief, the government admits:

"Before the passage of the Act [Antiquities Act] there were no state or federal laws prohibiting conduct covered by the Act; the primary weapon available to the United States for protecting antiquities on public land was to withdraw specific tracts of land from sale or entry for a temporary period. Citing Levy, infra, Appellant's App. 33-39."

Therefore, the District Court did not err in finding as a matter of law that Congress never intended the provisions and penalties of §641 and §1361 to apply to the specific conduct and property alleged in the indictment.

B. Legislative History reveals that in passing the Antiquities Act of 1906, Congress intended that Act to be the exclusive means of protecting historic ruins and artifacts from theft or depredation.

As discussed in Section A, in passing the Antiquities Act in 1906, Congress apparently believed that no other legislation then existing prohibited thefts of ancient artifacts or destruction of ancient ruins. Congress therefore found it necessary to pass the Antiquities Act as the sole means of protecting historic ruins and objects of antiquity.

The history of the Act, previously discussed, makes this readily apparent. Quite clearly Congress could not have intended to exclude application of any other statute, for Congress had determined no other statute applied.

Recognizing that historic remains were subject to "ruthless spoliation" by ambitious amateur archeologists and the fact that no legislation existed at that time to protect those remains, Congress passed a comprehensive Antiquities Act which was specifically limited to the protection of historic ruins and artifacts. While Section 433 of the Antiquities Act has remained unchanged since its initial passage in 1906, departments of government have promulgated rules and regulations, consistent with the intent of Congress, to preserve American Antiquities. Two regulations have been issued by the government under the authority of Title 16 U.S.C. §432. See 43 C.F.R. Part 3 (1977) and 25 C.F.R. Part 132 (1977). In addition, the Department of Agriculture has issued its own regulation pro-

hibiting conduct covered by Title 16 U.S.C. §433, on the basis of the authority it is given by Title 16 U.S.C. §551. See, 36 C.F.R. 261.9 (1977). This regulation, covering property within the National Forest Service, provides for a penalty of \$500 or imprisonment not more than six months, or both. Similarly, the National Park Service, Department of the Interior, has issued its own regulations prohibiting conduct covered by Title 16 U.S.C. §433, on the basis of the authority it is given by Title 16 U.S.C. §3. See, 36 C.F.R. §§1.3(a) and 2.20 (a)(1) (1977). This regulation provides the same penalty as the Agriculture Regulation.

It is noteworthy that the penalties prescribed in the above two regulations are misdemeanor in nature as is the penalty contained in §433 of the Antiquities Act. The clearly distinct misdemeanor penalties provided by Congress for violations of historic ruins and artifacts as compared to the harsher five year and ten year penalties of imprisonment as provided in the general theft and depredation of government property statutes, §641 and §1361, is a strong indication that Congress intended to accord antiquities violations separate treatment. Kneiss v. United States, supra, p. 759.^{4/}

^{4/} In addition, as stated by the appellant at page 4 of its opening brief, in the immediate vicinity of the Indian ruins where the appellees were observed digging there existed a United States Department of Agriculture - Forest Service Antiquities Notice sign which provided in part: "Ancient ruins, artifacts, fossils and historical remnants in the vicinity of this notice are fragile and irreplaceable. The Antiquities Act of 1906

(footnote 4 cont'd)

protects them for the benefit of all Americans... any person who, without official permission, injures, destroys, excavates or appropriates any historic or prehistoric ruin, artifact or object of antiquity on the public lands of the United States is subject to arrest and penalty of law."

Also, as testified to by government witness Jimmy E. Hibbets, District Ranger-United States Forest Service, an additional sign existed at the scene of the digging:

"Q. Does it say anything about digging?

A. Yes, it says cannot disturb or remove artifacts.

Q. ---Does it describe a penalty that might be imposed?

A. I believe it says \$500 or six months. I'm not real sure." (A. 10/11, Motion to Suppress)

Therefore, it is apparent that not only Congress, but the agencies empowered to protect the integrity of historic ruins and artifacts considered the Antiquities Act to be the exclusive means of protecting Indian ruins and artifacts.

C. Assuming arguendo that doubt exists as to Congress' intent in the passage of the specific and general overlapping statutes, rules of statutory construction require that the specific receive precedent over the general and that conflicts regarding statutory interpretation be resolved in favor of the defendants.

A detailed review of the legislative history surrounding the passage of the general theft and depredation statutes as well as the Antiquities Act, indicates that the former statutes were not intended by Congress to proscribe the conduct alleged in the indictment. However, assuming arguendo that doubt remains as to Congress' intent in passing overlapping statutes, rules of statutory construction require that the specific statute receive precedent over the general.

In United States v. Burnett, supra, the defendants were convicted under Title 18 U.S.C. §1001 which generally forbids false statements before a federal agency. The defendants claimed that they should have been tried for violating Title 18 U.S.C. §1919 which specifically forbids giving false statements in order to obtain credit for federal employment to obtain unemployment insurance. The defendants did admit that the terms of both statutes applied to their conduct. Their claim that §1919 precluded application of §1001 to their conduct was based on three rules of statutory construction, two of which are as follows: (1) that the specific statute takes precedence over the general one, and (2) that any conflicts in statutory interpretation are resolved in favor of the defendant.

In affirming the defendant's conviction, this Court held that the defendant's principles of statutory construction were valid but inapplicable in the instant case. The Court noted that the rules of construction would only be useful in resolving legitimate doubts about Congress' intent in passing overlapping statutes. Id., 816. Assuming legitimate doubts may exist as to Congress' intent regarding passage of the statutes involved in the present case, the general rules of statutory construction recognized by this Court in Burnett are applicable.

In Robinson v. United States, 142 F.2d 431 (5th Cir., 1944), the Court held the following:

"So that, although the larceny of any property of the United States in general may be punished by ten years imprisonment, it is forbidden to impose more than three years for larceny of that particular United States property which belongs to the Post Office Department. Elementally the special stands against the general. That is, where there is law against any stealing, and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception." Id., 432
(Emphasis added)

In Price v. United States, 74 F.2d 120 (5th Cir., 1934), the defendant was charged and convicted of stealing 67 automatic pistols, property of the United States Government, which were furnished by it to a company of National Guard for use in military service. The defendant was sentenced to imprisonment for seven years in a penitentiary. The defendant contended that he was properly charged under an indictment

framed within the terms of Title 18 U.S.C. §100 which provided a maximum penalty of five years in prison for larceny of all kinds of personal property belonging to the United States. The indictment, however, set out all the elements of an offense governed by Title 18 U.S.C. §87, which dealt specifically with the larceny of arms furnished or to be used for military or naval service. In affirming the defendant's conviction the Court held:

"Both statutes, it is true, punish larceny, but the punishment provided in one denounces larceny of a particular kind of property specially; whereas the other relates not to the kind of property stolen, but to the offense of larceny generally. The particular is entitled to preference over the general statute. The intention of Congress evidently was to provide for a greater punishment for stealing military or naval equipment than for the general crime of larceny of property of the United States." Id., 120 (Emphasis added)

In addition, the Supreme Court has held that any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. See United States v. Bass, 404 U.S. 336, 347-348 (1971) and Rewis v. United States, 401 U.S. 808, 812 (1971).

Therefore, if this Court determines that there is doubt as to Congress' intent in passing general theft and depredation statutes as well as the specific Antiquities Act, rules of statutory construction require that the conflict be resolved in favor of the defendant and the latter Act receive preference.

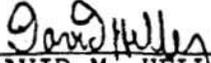
CONCLUSION

The District Court did not err in finding as a matter of law that Congress did not intend the provisions and penalties of Title 18 U.S.C. §641 and §1361 to apply to the specific conduct and property alleged in the indictment. The appropriate legislative history clearly establishes that Congress did not intend those general statutes to apply to historic ruins and artifacts. In addition, legislative history reveals that in passing the Antiquities Act of 1906, Congress intended that the Act be the exclusive means of protecting historic ruins and artifacts from theft or depredation. Finally, assuming arguendo that doubt exists as to Congress' intent in the passage of the specific and general overlapping statute, rules of statutory construction require that the conflict be resolved in favor of the defendant and the specific statute receive precedent over the general.

Wherefore, it is respectfully requested that this Court enter an order affirming the District Court's decision.

Respectfully submitted: August 30, 1978.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

KYLE R. JONES, THAYDE L. JONES
and ROBERT E. GEVARA,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF FOR THE UNITED STATES

1. Appellees initially allege that the facts which led to the arrest and indictment of the defendants are "immaterial to a decision on the issue presented by this appeal" (App. Br. 3). 1/

1/ The Record on Appeal in this case has been supplemented to include the McAllister affidavit (App. 32) which is referred to in our opening brief (Br. 6 n.7) (R.A. 195-196). (Cont'd on next page)

However, throughout their brief appellees continually stress that the Antiquities Act is punishable by only a fine of not more than \$500, or a period of imprisonment of not more than ninety days, or both, while both 18 U.S.C. 641 and 1361 are felonies punishable by fines of not more than \$10,000, or imprisonment of not more than ten years, or both (App. Br. 2,11,18 n.3, 21-22). 2/ Implicit in this argument is the position that 90 days is sufficient for the theft of American antiquities of the type involved in this

(Footnote 1 cont'd):

We also object to appellees mischaracterization of footnote 3 in our opening brief (Br. 4 n.3) as leaving the impression that the appellees were responsible for the action described therein. The purpose of this footnote, which purpose we believe is clear from its content, was solely to establish why there were two Forest Service officers overflying the Brooklyn Basin region of the Tonto National Forest on December 20, 1977.

Finally, our reference to appellee Thayde Jones' prior conviction in a Utah state court for excavating prehistoric ruins (Br. 6 n.6) is relevant to this case, as it assists the government in meeting its burden of proving that Thayde Jones had the requisite specific intent to violate 18 U.S.C. 641 and 1361. (See Br. 13-14). Further, the trial judge has ruled that "as to the conviction of [Thayde L. Jones] for prior excavation of ruins without a permit, that would be probative on the question of knowledge and intent and it will be admissible, if offered by the Government at the appropriate time of trial." (H. 13). See also Rule 404(b) F.R. Ev.; Andresen v. Maryland, 427 U.S. 463, 483, 484 (evidence of similar acts, even if those acts are themselves criminal, is admissible to prove a defendant's intent or the absence of mistake); United States v. Nichols, 534 F.2d 202, 204-205 (9th Cir. 1976).

2/ What appellee does not stress is that both 18 U.S.C. 641 and 1361 have misdemeanor penalty provisions if the value of the property stolen or damaged does not exceed \$100. (See Br. 15 n.12).

- 2 -

case, and the destruction of historic ruins, while the felony provisions of 18 U.S.C. 641 and 1361 are too harsh — a position we heartily disagree with.

The government also objects to appellees statement that the government's choice of prosecuting the defendants under 18 U.S.C. 641 and 1361 "was predicated upon the fact that the Antiquities Act had been declared unconstitutionally vague by this Court in United States v. Diaz, 499 F.2d 113 (9th Cir., 1974), and therefore unavailable for use in the present case. (T.R. 136-137)" (App. Br. 18 n.3).

The full statement made by the Assistant United States Attorney handling the case was that

"Thus, if the government had the choice between the Antiquities Act and theft and destruction of government property, it could have selected the same charges now contained in the indictment. However, because of the decision in Diaz, supra, selection of the Antiquities Act is not a feasible alternative. 3/ The government has no choice but to charge under the general statutes." (R.A. 136-137) (emphasis added)

3/ The Criminal Division of the Department of Justice is of the position that an indictment under 16 U.S.C. § 433 can be brought in the Ninth Circuit, in spite of the Diaz opinion. The constitutionality of the Antiquities Act was neither briefed nor argued in Diaz. The Solicitor General declined to authorize further appellate action in Diaz, primarily for the reason that with the advantage of hindsight Diaz should not have been prosecuted under the Antiquities Act for taking face masks which were no more than three or four years old from a cave on an Indian (Cont'd on next page)

No where does the government indicate that it would have prosecuted under the Antiquities Act had that option, in the legal opinion of the United States Attorney's office, been available. To the contrary, the age of the artifactual materials removed (more than 900 years old); the value of the objects recovered at the site (\$1,217 to as much as \$5,000 to \$6,000); the amount of damage done to the site (\$10,000); the fact that signs had been posted in the area (see Br. 4-7; App. 32); and the conduct of the appellees shortly before and after their arrest would have, and do, justify bringing felony charges under 18 U.S.C. 641 and

(Footnote 3 cont'd): reservation. The Court in Diaz should have evaded deciding the constitutionality of the Antiquities Act, but should also have reversed Diaz' conviction on the grounds that his conduct was not unlawful under the Act, as the face masks were not objects of antiquity. Cf. Liverpool, New York and Philadelphia SS Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) ("[the Supreme Court should never] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.")

In this case, with our facts, had the appellees been indicted under 16 U.S.C. 433 they should not have successfully been able to challenge the constitutionality of 16 U.S.C. 433, for the sound reason that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 1721 (1960).

Our analysis of the constitutionality of 16 U.S.C. 433 has been adopted by the United States District Court for the District of New Mexico in United States v. Smyer et al. (App. 10-15), the appeal of which case is now pending before the Tenth Circuit. (See Br. 20 n.16).

1361 — and those may well have been the charges even if an indictment under 16 U.S.C. 433 was an alternative. 4/

We therefore stand by our statement, supported by the record, that "[a felony indictment under the provisions of 18 U.S.C. 641 and 1361 is justified] * * * where the government has charged not that appellees were vacationing souvenir hunters or local residents peddling an occasional pilfered day pot or arrowhead, but has charged essentially that appellees mounted a well-organized and well financed campaign to systematically plunder an irreplaceable national treasure." (Br. 15) (see App. Br. 18, n.3).

2. Neither the facial interpretation of 18 U.S.C. 641 and 1361 nor an analysis of their similar legislative history supports the contention that the conduct alleged in the indictment in this case does not fall squarely within the area covered by 641 and 1361.

a. From United States v. Wiltberger, 5 Wheat. 76 (1820), through Scarborough v. United States, 431 U.S. 563 (1977) the Supreme Court has recognized that the first guide to the application of a statute is its text. This settled rule of construction

4/ The appellees alternatively could have been charged with violating 36 C.F.R. 261.9 (1977) (App. 27), which is based on the authority given the Secretary of Agriculture by 16 U.S.C. 551. (See Br. 27 n.21.)

is based on the sensible proposition that the best indication of what Congress means is what it says. Where "there is no ambiguity in the words of [the statute] * * * there is no justification for indulging in uneasy statutory construction." Barrett v. United States, 423 U.S. 212, 217. Legislative history cannot "be relied upon to * * * add unspecified conditions to statutory language which is perfectly clear." Pipefitters v. United States, 407 U.S. 385, 446 (Powell, J., dissenting.) 5/

5/ Although it is true that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," Rewis v. United States, 401 U.S. 808, 812 (1971) (App. Br. 25) the Supreme Court has recently held that "But [where] Congress has conveyed its purpose clearly [we will] decline to manufacture ambiguity where none exists," United States v. Culbert, 98 S.Ct. 1112, 1117 (1978), and that the lenity maxim is "not be used 'in complete disregard of the purpose of the legislation.'" Scarborough v. United States, 431 U.S. 563, 577 (1977), quoting United States v. Bramblett, 348 U.S. 503, 510 (1955).

Similarly, appellees' reliance on Robinson v. United States, 142 F.2d 431 (8th Cir. 1944) (App. Br. 24), is misplaced, as this opinion was distinguished one year after its publication, in Sullivan v. United States, 149 F.2d 753 (8th Cir. 1945). In Robinson, the indictment specifically charged that the money taken was "a part of the postal revenues of the Post Office Department," which placed the indictment squarely within the section dealing with theft of property belonging to the Post Office Department. That is, the indictment did not charge theft of personal property belonging to the United States, which would have placed the charge within the general and more severe theft of government property statute. Logically, the court concluded that since the indictment stated theft of postal property that that was what the indictment meant, and the language of the indictment governed over the statutory citation appended to the indictment. This is the distinction pointed out in Sullivan, supra, 149 F.2d 753, 754-755, and is the distinction that holds in this case, for the defendants are charged with theft and destruction of government property. (See R.A. 134).

Count I of the indictment in this case charges that appellees did "* * * wilfully and knowingly steal and purloin Indian artifacts * * * property of the United States * * *" in violation of 18 U.S.C. 641 and 2; Count II charged that appellees "wilfully * * * did injure property of the United States, that is, Indian ruins located in Brooklyn Basin of the Cave Creek Range District of the Tonto National Forest * * *" in violation of 18 U.S.C. 1361 and 2. (R.A. 24-25). Both 18 U.S.C. 641 and 1361 are clear on their face and are applicable to this facts of this case, as the objects of antiquity stolen are "thing[s] of value of the United States" (18 U.S.C. 641), and the land injured was "property of the United States" (18 U.S.C. 1361).

In a closely analogous series of cases the Ninth Circuit has held that 18 U.S.C. 641 and 1361 are applicable to the theft of objects located on federal lands and to the destruction of such lands. See the discussion in our opening brief of Lamb and its progeny (Br. 12-13) 6/ This Court found it unnecessary to discuss the legislative history of 18 U.S.C. 641 and 1361 in the Lamb cases but stressed (as we do with respect to 16 U.S.C. 433 on the one hand and 18 U.S.C. 641 and 1361 on the other)

6/ It should be noted that appellees make no attempt to distinguish the Lamb series of cases in their brief; indeed, they make no reference at all to these important cases.

that the separate statutes involved in the cases present "two offenses [which] differ markedly, each requiring proof the other does not." United States v. Cedar, 437 F.2d 1033, 1036 (9th Cir. 1971). (See Br. 13-16)

b. In any event, the extensive analysis of the legislative history of 18 U.S.C. 641 and 1361 engaged in by the appellees (App. Br. 4-11) and by the lower court (App. 4-7; 441 F. Supp. 42, 44-45) does not support the conclusion that "amended section 35 [the predecessor of 18 U.S.C. 1361; Act of March 4, 1909, 35 Stat. 1095, as amended by the Act of October 23, 1918, 40 Stat. 1015, by the Act of June 18, 1934, 48 Stat. 996 and by the Act of April 4, 1938, 52 Stat. 197] does not extend beyond property already protected by the theft prohibition of section 47 [the predecessor of 18 U.S.C. 641; Act of March 4, 1909, 35 Stat. 1097]; and section 47 does not apply to Indian artifacts regulated by the Antiquities Act." (App. 7; 449 F. Supp. 42,45).

In our view section 47 of the Act of March 4, 1909 (quoted at App. 5), would have authorized a prosecution of the thefts of antiquities which occurred in this case, for that provision prohibited "steal[ing] * * * property * * * or valuable thing whatever * * * of the United States." Even if we are wrong in this assertion, there can be no doubt but that after the 1948 codification of the criminal law (Act of June 25, 1948, ch. 645,

62 Stat. 725) 18 U.S.C. 641 was (as we previously indicated (Br. 19)) designed to expand the reach of prior laws covering depreations of government property, not further fragment them and widen the gaps in their coverage. 7/

c. As we discuss at greater length in our opening brief (Br. 16-20), the legislative history of the Antiquities Act (Br. 23-28) establishes that the Act was meant to be comprehensive; however, there is no support in this same history (or in the legislative history of 18 U.S.C. 641 or 1361) for the proposition that the Act is to be the exclusive means for the preservation of Indian ruins located on public lands, as argued by appellees (App. Br. 20-22).

3. Assuming that Congress did intend by its enactment of the Antiquities Act in 1906 to preempt the field and replace the 1875 theft statute (Act of March 3, 1875, 18 Stat. 479), that

7/ It is not unusual or noteworthy that no prosecution was ever brought, or attempted to be brought, from 1909 on under section 47, for we note that the first prosecution that we are aware of under the Antiquities Act was not brought under the prosecution of Diaz in 1973 — sixty-seven years after the passage of 16 U.S.C. 433.

Nor do we concede that a prosecution could not have been had under the 1875 version of 18 U.S.C. 641 (Act of March 3, 1875, 18 Stat. 479; App. Br. 4), which provides that "Any person who shall * * * steal * * * any * * * property * * * or valuable thing whatever * * * of the United States, shall be guilty of a felony." In fact, we feel that a close examination of this early statute would have supported an Antiquities Act type prosecution.

congressional intent can logically and cogently be presumed to be bottomed on the premise that the Antiquities Act would be fully effective. Congress certainly did not intend to replace the earlier provision, or indeed any subsequent enactments which would prohibit similar conduct, if the Act were to be held unconstitutional.

We have been unable to discover any Federal criminal law case that holds that a statute, here the Antiquities Act, can be relied upon for the purpose of squelching prosecutions under otherwise applicable statutes, here 18 U.S.C. 641 and 1361, while at the same time being held unconstitutional for its own purposes (and see Br. 19 n.16). The general rule dealing with implied repeal (and essentially that is what appellees are urging, and what the district court ruled) is that:

"A legislative enactment which is unconstitutional cannot repeal by implication a prior statute upon the subject that is encompassed by the later enactment, since a judicial declaration of invalidity eliminates the conflict which is the essential element of the repeal." Sutherland, 1A Statutory Construction (Sands ed., 4th ed., 1972) § 23.24.

Cf. Weissinger v. Boswell, 330 F. Supp. 615, 625 (M.D. Ala. 1971); Stewart v. Waller, 404 F. Supp. 206, 215 (N.D. Miss. 1975); Schaffer v. Green, 496 P.2d 375 (Okla. Crim. App. 1972); State v. Minear, 401 P.2d 36 (Ore. 1965); Rowland v. State, 311 S.W. 2d 831 (Tex. Crim. App. 1957); Ex parte Sohncke, 148 Cal. 262, 82

Pac. 956 (1905); People v. Fox, 294 Ill. 263, 128 N.E. 505
(1920); People v. Schaeffer, 310 Ill. 574, 142 N.E. 248 (1924);
73 Am. Jur. 2d. Statutes, § 418 (The rule of statutory construction that repeals by implication are not favored, and will not be indulged if there is any other reasonable construction, is applicable to statutes relating to crime.) B/

B/ There is also an analogy in the wills field. If a person destroys a will, intending to revoke it, but on the premise that another document has been validly executed to replace the first will, and the second will is not effective, the court can hold that the intent to revoke was conditional on the effectiveness of the later document, and then allow the first will to remain unrevoked. See 79 Am. Jur. 2d Wills, § 528; Ritchie, et al., Cases and Materials on Decedent's Estates and Trusts (4th ed. 1971), pp. 258-278.

CONCLUSION

For the reasons stated above and in the government's opening brief, it is respectfully submitted that the order of the district court dismissing the indictment be reversed and that the case be remanded to the district court for trial.

DATED this 13 day of September, 1978.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing REPLY BRIEF FOR THE UNITED STATES were served upon counsel for appellees by depositing the same at the United States Postal Service facility at 12th Street and Pennsylvania Avenue, N.W., Washington, D.C., and sending same express mail, addressed to:

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Dated this 13 day of September, 1978.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
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v.

KYLE R. JONES, THAYDE L. JONES
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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SUPPLEMENTARY APPENDIX FOR APPELLANT

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A PROPOSAL TO MODERNIZE THE
AMERICAN ANTIQUITIES ACT

By

Robert Bruce Collins and Dee F. Green

The Act for Preservation of American Antiquities became law in June 1906. The Act was passed during a time in U.S. history when people first began to realize that the American frontier, celebrated in Frederick Jackson Turner's epochal paper (1920), was not endless, and that the time had come to conserve the Nation's natural resources and preserve its historical and archeological heritage. Since the 1890's there had been great public interest in the art and history of the Indians of the Southwestern U.S., and this interest had created a great demand for authentic prehistoric artifacts. As a result, ruins and cliff dwellings, such as Casa Grande, Mesa Verde, and Chaco Canyon, were indiscriminately excavated and vandalized. There were no state and Federal laws that provided for the protection of prehistoric sites, and there were few professional archeologists. Thus, the need for protective legislation was particularly acute when the Antiquities Act was passed in 1906.

The Act, which was codified in section 433, Title 16 of the U.S. Code, prohibited the appropriating, excavating, injuring, or destroying of any "historic or prehistoric

ruin or monument" or "object of antiquity" found on Government-owned or -controlled land, without the permission of the Secretary of the department of the Government having jurisdiction over the land. The Act was drafted and presented first to the American Anthropological Association and the Archaeological Institute of America by the archeologist Edgar Lee Hewett. Hewett's draft bill was introduced in the House of Representatives and the Senate in early 1906, and after passage it was signed into law by President Theodore Roosevelt.

The legislative history of the Antiquities Act--that is, the record of debates and reports on the bill in committees and on the House and Senate floors (No. 3797, 59th Congress, 1st Session)--provides little insight into the intended breadth of the statute. The legislative history is important because the courts look to it in interpreting the meaning of the laws. However, the Senate report indicates that the purpose of the bill was the preservation of "relics." The entire report is less than a page and the important language is less than a sentence:

. . . in view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums, colleges, etc., your committee are of the opinion that their preservation is of great importance.

The remaining legislative history is found in the House debate on the bill. Representative John Lacey, who introduced the bill in the House, stated that the object of the bill ". . . is to preserve these old objects of special interest and the Indian remains in the Pueblos in the Southwest . . ." (40 Congress. Rec. 7888).

Archeologists, historians, and paleontologists have relied on the Act as the legal basis for protecting cultural and fossil resources. Despite the passage of additional legislation in 1935, 1966, and 1974 which regulates cultural resources on Federal lands, the 1906 Act remains the only piece of legislation which imposes criminal penalties for action detrimental to the preservation of these resources.

Review of Cases

The first reported challenge to the Antiquities Act came nearly 70 years after its passage in the case United States v. Diaz. In the Diaz case, an Arizona attorney and expert on Apache Indian culture observed certain authentic Apache religious artifacts on display in a storefront window in Scottsdale, Arizona. The attorney learned the artifacts were owned by Ben Diaz and contacted Diaz to inquire as to the price of the artifacts. Diaz told the attorney during a telephone conversation that he had found approximately 22 face masks, head-dresses, ocotillo sticks, bull-roarers, fetishes, and mud dogs in a medicine man's cave on the San Carlos Indian Reservation. The attorney offered to purchase the items from Diaz for \$1200, but Diaz rejected the offer as too low. Five days later, two undercover agents of the Federal Bureau of Investigations (FBI) visited Diaz at his home and indicated that they were interested in buying artifacts that he had for sale. When Diaz showed them the artifacts, they proceeded to identify themselves as FBI agents and placed him under arrest.

Diaz was charged in U.S. Magistrate's Court for the District of Arizona with appropriating ". . . objects of antiquity situated on lands owned and controlled by the Government of the United States without the permission of the Secretary of Interior . . ." in violation of the Antiquities Act. During the trial before the Federal magistrate, a medicine man from the San Carlos Indian Reservation identified the face masks as having been carved 3 or 4 years before the trial by another medicine man personally known to him. Keith Basso, a professor of anthropology at the University of Arizona, testified as an expert that the anthropological term "object of antiquity" could include something that was made just yesterday if related to religious or social traditions of long standing.

The magistrate found Diaz guilty and fined him \$500. Diaz immediately appealed the decision to the U.S. District Court for the District of Arizona, the next higher Federal court, arguing, among other things, that the lower court had erred in holding that any object less than 5 years old was an object of antiquity. In affirming the judgment, the district court agreed that age should not be the sole determinant of whether something is classified as an antiquity. Although it is highly unlikely that Congress, in passing the Antiquities Act, intended items 3 or 4 years old to be so classified, the court wrote ". . . [i]n a case such as this, there can be no specific definite time limit as to when an object becomes an 'antiquity.' The determination can be made only after taking into consideration the object or objects in question, the significance, if any, of the object, and the importance the object plays in a cultural heritage."

Diaz appealed the district court's decision to the Circuit Court of Appeals for the Ninth Circuit on the ground that items 3 or 4 years old should not come within the scope of the Antiquities Act. The court of appeals accepted the interpretation of "object of antiquity" adopted by the district court below and, rather than attempt to define judicially the language of the statute, declared the statute unconstitutional for failing to give sufficient notice of the conduct proscribed. In holding the Antiquities Act was unconstitutionally vague, the circuit court stated:

Protection [provided by the act], however, can involve resort to terms that, absent legislative definition, can have different meanings to different people. One must be able to know, with reasonable certainty, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he has found them. Nowhere here do we find any definition of such terms as "ruin" or "monument" (whether historic or prehistoric) or "object of antiquity." The statute does not limit itself to Indian reservations or to Indian relics. Hobbyists who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the act's proscriptions.

The 1974 circuit court decision effectively wrote the Antiquities Act out of the United States Code in the Ninth Circuit. Consequently, Federal prosecutors in those districts within the Ninth Circuit were forced to seek other laws to protect and preserve historic and prehistoric sites and artifacts in their district.

Quarrell Case

The ramifications of the Ninth Circuit's Diaz decision were first felt in the Tenth Circuit in the case United States v. Quarrell, which arose out of an incident in October 1975 in New Mexico's Gila National Forest. Two Forest officers observed three men excavating a Mimbres Indian ruin in the Forest. The officers went to the Mimbres Ranger Station for reinforcements, and a party of seven officers and Grant County Sheriff's deputies returned to the site on foot. Upon arriving at the ruin, a sheriff's deputy observed Charles and Mike Quarrell digging with picks and shovels in deep holes, and Frank Quarrell standing near the holes. The men were placed under arrest; they all admitted excavating the ruins. Artifacts recovered included two metates, two grooved stone axes, other miscellaneous stone tools, three nearly complete Mimbres bowls, and a quantity of assorted sherds. The average of three professional appraisals placed the value of the materials at \$2706.

The vandalized site (AR-03-06-05-32) is located on a small hill overlooking the

Mimbres river at an elevation of 6575 feet within the pinyon-juniper vegetation type. The site originally consisted of about seven to ten rooms, a kiva of the Classic period, and probably four pithouses. Tree-ring samples suggest a date of about A.D. 1000. The presence of a kiva in the Mimbres area is unusual, this being the third one reported. The pottery is typical of the Mimbres Classic period including several pieces with fine naturalistic designs (LeBlanc and Anyon n.d.).

Mike and Charles Quarrell were charged with violating the Antiquities Act and the case was tried before U.S. Magistrate John Darden in Las Cruces, New Mexico, in May 1976. During the trial one of us (Green) testified that the site excavated by the Quarrells was an authentic prehistoric Mimbres village dating from A.D. 1000 to A.D. 1100. He stated that the artifacts were 800 to 900 years old and in his opinion were objects of antiquity.

At the conclusion of the evidence, the defense counsel argued that the charges should be dismissed because the Antiquities Act was unconstitutionally vague as judged in the Diaz decision. The other author (Collins), citing the Supreme Court cases United States v. National Dairy Corporation and United States v. Raines, argued that the determination of whether a statute is unconstitutionally vague must be made in light of the facts of the particular case. He stated that the facts of the Quarrell case were solidly within the ambit of the Antiquities Act inasmuch as the 800- or 900-year old artifacts were unquestionably objects of antiquity. The magistrate agreed with the Government, found that the artifacts excavated by the Quarrells were objects of antiquity, and upheld the Act. He found the Quarrells guilty of violating the Act and sentenced Mike and Charles to perform 40 hours community service and placed them on supervised probation for 1 year. The defendants did not appeal the conviction.

Camazine Case

The constitutionality of the Antiquities Act was challenged a second time in the Tenth Circuit in United States v. Camazine. Scott Camazine, a 25-year old Harvard medical student, was arrested July 24, 1977, by Zuni Tribal rangers at the site of a prehistoric ruin on the Zuni Indian

Reservation in western New Mexico. Camazine admitted digging for artifacts at the site when confronted by the rangers. The pottery sherds unearthed by Camazine were photographed in place and were seized the following day by an FBI agent.

The site, known as T:8 in the files of the Zuni Archeological Enterprise, is a small 20- to 30-room pueblo ruin consisting of a subterranean kiva and two separate room blocks that were at least two stories high, with a large peripheral artifact scatter. Both room blocks have dense trash areas to the east. Types of painted pottery include St. Johns polychrome, Reserve-Tularosa black-on-white, and Puerco black-on-white; these suggest that the site dates from A.D. 1100 to A.D. 1200. One of the room blocks has four wings in an elongated "X" shape with the kiva depression in the southeast wing. The site is located on the top of a small hill in Horsehead Canyon at an elevation of 6940 feet. Vegetation includes a pinyon-juniper overstory with sage and grass ground cover (Ferguson n.d.).

Camazine was charged with violating the Antiquities Act in a COMPLAINT filed on July 28, 1977, in a U.S. Magistrate Court. Before trial, Camazine's attorney filed a motion to dismiss the complaint, claiming the Antiquities Act was unconstitutionally vague. The Government's response pointed out that artifacts and ruins in question were undoubtedly objects of antiquity and concluded: "To strike down the Antiquities Act as being unconstitutional would expose all National Forests and National Parks and their ruins and monuments to wanton and irreversible destruction at the hands of souvenir and commercial pottery hunters."

The Camazine case was tried before U.S. Magistrate David R. Gallagher on August 15, 1977. Magistrate Gallagher declined to rule on the defendant's motion to dismiss until after the U.S. presented its case. Bruce Anderson, an archeologist for the National Park Service and T. J. Ferguson, an archeologist for the Zuni Tribe, testified that the ruin was an Anasazi pueblo inhabited from approximately A.D. 1100 to A.D. 1200 and the ceramic sherds were 700 to 800 years old. At the conclusion of the Government's case, Magistrate Gallagher granted Camazine's motion and dismissed the COMPLAINT, holding that the Antiquities Act was unconstitutionally vague on its face and fatally vague as applied to the facts

of the case. Inasmuch as the magistrate waited until the Government put on its case before striking down the statute, the U.S. was precluded by the double jeopardy clause of the 5th amendment to the Constitution from appealing the magistrate's opinion.

Smyer-May Case

Gallagher's decision in the Camazine case left some question in the District of New Mexico, and in the country as a whole, as to the continuing validity of the Antiquities Act. However, the issue was resolved quickly in the case United States v. Smyer and May, which concerned, once again, activities in the Gila National Forest in southwestern New Mexico. In October 1977, Forest Service officers discovered that a prehistoric Mimbres ruin had been recently excavated. Consequently, they swept the roads leading to the site of all tire tracks so that they would be able to determine if another vehicle entered the road to the ruin. On October 29 two Forest Service officers observed fresh tire tracks on the road to the ruin. The tracks led directly by a sign warning that it was unlawful to appropriate, excavate, injure, or destroy ruins, monuments, or objects of antiquity in the area. When the two officers reached the site, they found several large freshly dug holes surrounded by fresh backdirt on two ruins approximately 300 yards apart. They also found various excavation tools and, in an arroyo between the two sites, they discovered a pickup truck whose tire treads matched those of the tire tracks on the road leading to the site. In looking for the truck's registration they uncovered a photograph of defendant Byron May standing on the ruin with skulls on each shoulder and a skull on his head and long bones in each hand. The registration revealed that the pickup was owned by Byron May of Deming, New Mexico.

The two sites (AR-03-06-03-250 and 251) are located on an eastern fork of Sapillo Creek just over the divide from the Mimbres River drainage. The sites are on southern exposed slopes at an elevation of 6600 feet with a vegetation cover of pinyon-juniper. Site 250, the larger, consists of 20 to 30 rooms, three-fourths of which have been vandalized. More than 800 sherds, all of the Mimbres Classic period, were recovered from the vandals' spoil dirt at the site. In addition, chipped stone artifacts were found in abundance along with a few pieces

of worked shell. Also present were skeletal remains of more than 10 humans, all badly crushed or disarticulated by the vandals. Site 251 had four potholes dug into a trash area. The single room at this site was not disturbed.

In an interview with a Forest Service officer on October 30, May admitted that he and William Smyer had been digging at the ruins for several weeks for Indian artifacts, and that he had sold two bowls recovered from the ruin for \$4000. He offered to return the artifacts taken from the site and took the officer to Smyer's house, where May selected six Mimbres black-on-white bowls, a bone awl, and a clay effigy from a collection of 30 to 40 bowls and turned them over to the officer. Several days later, Smyer was interviewed and confirmed May's statement. On November 7, two Forest Service officers and two archeologists returned to Smyer's home with a search warrant and seized 31 Mimbres bowls, each missing one or more pieces. Several days before, Forest Service archeologists and volunteers from the Mimbres Foundation, and under the direction of Green, had screened the fresh backdirt at the site searching for pottery sherds. Green compared the bowls taken from Smyer's house with the sherds found at the ruin and concluded that one of the sherds fit a Mimbres black-on-white bowl seized from Smyer.

The U.S. Attorney's Office charged Smyer and May with two counts of excavating the two prehistoric Mimbres ruins and nine counts of appropriating objects from the ruins in violation of the Antiquities Act. In light of the split among the district's magistrates as to the constitutionality of the Antiquities Act, the U.S. Attorney chose to bypass magistrate's court and brought the case directly to the U.S. District Court for resolution of the question.

As in the Camazine case, counsel for Smyer and May filed a motion to dismiss the COMPLAINT before trial, asserting that the Antiquities Act was unconstitutionally vague. Collins responded that the Ninth Circuit in the Diaz case ". . . rallied too quickly to a spontaneous constitutional attack on the statute forgetting its duty to seek a limiting construction that might save the Act . . ." He argued that in deciding whether a statute is unconstitu-

tionally vague, the determination must be made in view of the facts of a particular case:

In the case before the Court, the two ruins excavated by the defendants were prehistoric Mimbres ruins of the Classic period, which were inhabited by Indians of the Mimbres branch of the Mogollon civilization from approximately the year 1000 A.D. to the year 1200 A.D. The objects appropriated from the Mimbres ruin were not a couple of ceremonial masks carved three or four years ago, but were seven classic Mimbres black-on-white bowls, a clay effigy, and a bone awl, all of which are approximately 800 to 900 years old. Thus, the facts of the instant case fall squarely within the ambit of the Antiquities Act. Clearly, 800- to 900-year-old bowls are "objects of antiquity" and the 900-year-old Mimbres ruins excavated by the defendants are "historic ruin[s]" within the meaning of the Act.

Moreover, the defendants here are not unwary tourists who stumbled upon ceremonial war masks, but are experienced commercial pottery hunters. The evidence will show that the defendants used shovels, picks, and screens to excavate the ruin in search for Mimbres pottery. The remains of their excavation demonstrated the defendants' expertise. The defendants knew the bowls would be found in the corners of the prehistoric walls and in the graves of the former inhabitants and concentrated the excavation there. The defendant Byron May, told a Forest Service officer that he had sold two of the bowls from the site for \$4000, and a collection of approximately twenty [sic] Mimbres Black-on-White bowls were seized from the defendant William Smyer's home.

The Government's response concluded with a quote from J. J. Brody, the director of the Maxwell Museum of Anthropology at the University of New Mexico and author of a recent book, Mimbres Painted Pottery.

The Mimbres people are gone. Where they came from, where they went, and

why such simple villagers became such sophisticated artists is unclear. Much that we could have learned from their village sites has been lost to us--torn up, bulldozed, smashed and looted--by those whose only concern is to steal the pots and sell them to collectors who ask no questions. This rape of New Mexico goes on daily, nightly, as crews of thieves armed with bulldozers and shovels, descend with systematic and silent expertise on likely sites. Not only the pots disappear in these swift raids. Great chunks of knowledge have also disappeared forever.

Evidence at the motion hearing established the authenticity and age of the Mimbres ruins and artifacts.

Upholding the constitutionality of the Antiquities Act in its opinion on the Nation, the court focused on the fact that the ruins and objects excavated by Smyer and May were 800 to 900 years old. Judge Howard Bratton wrote: "The words 'ruin' and 'monument' plainly require no guessing at their meaning, and the term 'objects of antiquity' is no less comprehensible. Webster's Third New International Dictionary defines 'antiquities' as 'ancient times; times long since past,' so an object of antiquity is an object out of or from ancient times long since past." Judge Bratton rejected the premise that the language of the Antiquities Act must be mathematically certain. He wrote: "While it may not be possible to state in the abstract a precise number of years that must pass before something becomes an 'object of antiquity,' such exactitude is not required . . . The Antiquities Act must necessarily use words 'marked by flexibility and reasonable breadth, rather than meticulous specificity,' (Grayned v. City of Rockford, 408 U.S. Supreme Ct. Rep. 104, 1971:110) in order to accomplish its purposes."

Judge Bratton, holding the Antiquities Act was not unconstitutionally vague, continued: "It is clear that the acts alleged . . . fall squarely within the proscription of the Antiquities Act. In light of what the evidence . . . indicated was the defendants' experience with Indian artifacts and the age of the artifacts . . . the argument that the defendants could not rea-

sonably have had notice from the language of the Antiquities Act that their alleged activities violated that statute is simply not credible. When measured by common understanding and practice, it is evident that the language of the Act is not indefinite, vague or uncertain."

The case was tried before Judge Bratton in January 1978 in Las Cruces, New Mexico. At the conclusion of the evidence and argument of counsel, Judge Bratton found Smyer and May guilty. They were sentenced to imprisonment for 90 days on each of the 11 counts charged, the periods of confinement to run concurrently.

Need for New Statute

Despite the success of the Smyer-May case in upholding the constitutionality of the Antiquities Act, there is a real need for a new statute. The penalties provided in the 1906 Act are inadequate to deter the looting of prehistoric ruins and commercial dealings in stolen prehistoric artifacts. In 1906, Congress could not have anticipated the lucrative market in prehistoric artifacts that exists today. In light of the commercial values attached to artifacts, especially pottery, a fine of \$500 for a violation of the Act is in effect a business expense. The nine artifacts in the Smyer-May case were appraised at \$3975 and those in the Quarrells case, at \$2706. The drafters of the Antiquities Act could not have imaged that Byron May would sell two Mimbres bowls for \$4000, or that the Forest Service would return a collection of 30 bowls worth approximately \$30,000 to William Smyer because they could not prove they were taken from the National Forest.

Other Federal statutes impose stiffer penalties for comparable activities. For example, theft of U.S. Government property exceeding \$100 in value, or receipt or concealment of such property if stolen, or destruction or depredation of property of this value is punishable by a fine of \$10,000 or imprisonment for a term of 10 years, or both.

Furthermore, the Antiquities Act imposes no penalties for those who deal in artifacts stolen from Federal land. It prohibits only the appropriation of objects of antiquity; hence, those who sell or purchase prehistoric artifacts taken from National Forests or Parks do so with impunity. The

breadth of the Act's prohibitions should be expanded so as to stop, in some measure, the lucrative commercial dealings in illegally obtained artifacts.

In addition, although the meaning of the terms "object of antiquity" and "historic or prehistoric ruin or monument" poses no problem in the Tenth Circuit, the vagueness question is still an issue in the Ninth Circuit and in other courts that have not addressed the issue.

Proposed New Statute

With the above considerations in mind we have drafted a bill to amend the present Antiquities Act. The draft statement strengthens the old one in three respects: 1) the nature of the actions made unlawful is clearly specified; 2) dealing in artifacts stolen from Federal land is brought under the bill; and 3) violation of the Act is made a felony, with maximum penalties for repeat violations of 5 years in prison, \$10,000 in fines, or both.

The new Act resolves the problem of ambiguity by defining the sites at which

excavation is barred and the objects of antiquity whose removal is unlawful. Definitions of the terms prehistoric site, historic site, paleontological site, prehistoric specimen, historic specimen, and paleontological specimen are an integral part of the statute.

The actions barred under the bill are covered in two clauses. One overlaps the present Act with the words "excavate, injure, disturb, destroy, appropriate, remove, or commit any deprivation." The second clause bars dealing in antiquities with the words "wilfully [sic] possess, sell, purchase, barter, offer to sell, purchase, or barter, traffic in, or transport." Maximum penalties are the same for each clause.

The bill in making violation of its provisions a felony and increasing the maximum penalties, reflects the economic realities of the 1970's market in antiquities and the importance with which the Nation views their preservation. It is hoped that the bill, if enacted into law, will deter rather than annoy the predators of the Nation's cultural heritage.

The question of the constitutionality of the Antiquities Act has been resolved in the District of New Mexico by Judge Bratton's opinion in the Smyer-May case. The prospect for affirmance of Smyer's and May's conviction by the Tenth Circuit Court of Appeals appears good in light of the circumstances of the case and Judge Bratton's sound opinion. It is unlikely the Tenth Circuit will choose to follow the Ninth Circuit's reasoning in the Diaz case but, naturally, that determination must await briefing and arguments by counsel before the Court of Appeals.

Despite the success of the Smyer-May case in upholding the constitutionality of the Antiquities Act there is a real need for a new statute. In 1906 Congress could not have anticipated that there would be a lucrative market in prehistoric artifacts in the 1970's. In light of the commercial values attached to artifacts, especially pottery, a fine of \$500 for a violation of the Act is simply a business expense. The nine artifacts involved in the Smyer-May case were professionally appraised at \$3,975.00 bringing the value of the objects known to have been taken from the site to \$7,975.00. Furthermore, as written the Antiquities Act imposes no penalties for those who deal in artifacts stolen from Federal lands. Additionally, although the meaning of the terms "object of antiquity" and "historic or prehistoric ruin or monument" is readily apparent, the vagueness question is still an issue, if not in the Tenth Circuit, certainly in the Ninth. With the above considerations in mind we propose Section One of the Act be amended as follows:

PROPOSED NEW STATUTE

A B I L L

To amend the Act entitled an Act for the Preservation of American Antiquities, approved June 8, 1906, 34 Stat. 225 to enlarge the scope of prohibited activity under the law and to increase the punishment for violation thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That, section one of the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 433), is hereby amended to read as follows:

(a) Whoever shall willfully excavate, injure, disturb, destroy, appropriate, remove, or commit any depredation against any prehistoric, historic or, paleontological site or any prehistoric, historic, or paleontological specimens situated on or beneath lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of Government having jurisdiction over said lands, shall be fined not more than \$5,000 or imprisoned not more than two years, or both: Provided that in the case of a second or subsequent conviction for a violation of this section committed after _____ [date of passage], such person shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) Whoever shall willfully possess, sell, purchase, barter; offer to sell, purchase or barter; traffic in or transport any prehistoric, historic or paleontological specimen, taken illegally from lands owned or controlled by the Government of the United States without the permission of the Secretary of the Department having jurisdiction over said lands,

knowing said object of antiquity to have been taken illegally, shall be fined not more than \$5,000 or imprisoned not more than two years, or both: Provided, That in the case of a second or subsequent conviction for a violation of this section committed after _____ [date of passage], such person shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(c) The term "prehistoric site" means any locality in which human behavior has been of sufficient duration or complexity to result in the deposition of a number of prehistoric specimens or the building of structures prior to the advent of written history in that geographical local.

(d) The term "historic site" means any locality in which human behavior has been of sufficient duration or complexity to result in the deposition of a number of historic specimens or the building of structures since the advent of written history in that geographical local.

(e) The term "paleontological site" means any locus of fossil preservation.

(f) The term "prehistoric specimen" means any item which has been made or modified by human action prior to the advent of written history in a geographical locality. As used in this Act the term includes but is ^{not} limited to ~~any~~ petroglyphs, pictographs, paintings, pottery, tools, ornaments, jewelry, coins, fabric, ceremonial objects, vessels, ships, armaments, vehicles, and human skeletal remains.

(g) The term "historic specimen" means any item which has been made or modified by human action since the advent of written history in a geographical locality and is at least 50 years of age. As used in this Act the term includes but is not limited to paintings, pottery,

tools, ornaments, jewelry, coins, fabric, ceremonial objects, vessels, ships, armaments, and vehicles.

(h) The term "paleontological specimen" means any evidence of fossil remains of multicellular invertebrate and vertebrate animals and multicellular plants including imprints thereof. Organic remains primarily collected for use as fuels such as coal and oil are excluded.

COMMENTS

The proposed amendment to the Antiquities Act of 1906 will expand the prohibitions in the Act to include the willfull possession, sale, purchase, barter or offer to sale, purchase, or barter, or any commercial dealings in illegally obtained specimens. The 1906 Act prohibited only the appropriation of objects of antiquity and hence, those who sold or purchased prehistoric artifacts taken illegally from Federal lands did so with complete impunity. The purpose of this section is to stop, in some measure, the lucrative commercial dealings in illegally obtained artifacts.

Additionally, the proposed amendment increases the penalties for the prohibited acts from a fine of \$500 or imprisonment for a term of 90 days, or both, to a fine of \$5,000 or imprisonment for two years, or both, for the first offense, and a fine of \$10,000 or imprisonment for five years, or both, for the second and subsequent convictions. The penalty established in the 1906 Act may have been adequate in 1906, but it does not deter the looting of prehistoric ruins and commercial dealings in prehistoric artifacts in the 1970's. The drafters of the 1906 Act could not have anticipated that Byron May would have sold two Mimbres bowls for \$4,000 nor that the Forest Service would have had to return a

collection of thirty Mimbres bowls to William Smyer worth approximately \$30,000 because they could not prove they were taken from the National Forest. Additionally, the new penalties are reasonable in light of criminal penalties imposed by other federal statutes for comparable activities. For example, the theft or conversion of United States government property of a value exceeding \$100 or receipt or concealment of stolen United States government property of a value exceeding \$100 is punishable by a fine of \$10,000 or imprisonment for ten years, or both. The destruction or commission of any deredation against any property of the United States having a value exceeding \$100 is punishable by a fine of \$10,000 or imprisonment for a term of ten years, or both. The casual tourist who picks up a pottery sherd or arrowhead in a National Forest or Park does not have to be prosecuted under the Act. The Departments of Agriculture and Interior both have regulations that proscribe such conduct and which can be treated as a misdemeanor and handled by a Federal Magistrate (22).

The word "willfully" has been added to the language of the 1906 Act because a violation of the section is now a felony. However, as Judge Learned Hand stated in American Surety Co. v. Sullivan(20), the word "willful" in a criminal statute means only that the person acted on his own volition and was aware of the acts he was committing. It does not mean that the actor knows he is breaking the law. Furthermore, although willfulness is an element of the offense under the proposed amendment, the United States need not prove the accused knew the archaeological, historical or paleontological site or specimen was located on United States government property. The requirement that the site or specimen

was situated on United States government property furnishes the jurisdictional basis for the federal offense. Knowledge of such jurisdictional facts is not generally an element of the required intent under federal statutes(21).

Finally, those terms that were deemed by the Ninth Circuit in Diaz to be "undefined terms of uncommon usage" have been defined in the body of the proposed amendment, thus, eliminating any claim that the Act does not give sufficient notice of the conduct proscribed. We feel (23) the time is appropriate for a change in the criminal penalties of the 1906 Act which will both increase the penalties commensurate with the realities of the 1970's and extend the penalties to those who deal in illicitly acquired antiquities.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Kyle R. JONES, Thayde L. Jones and
Robert E. Gevara,
Defendants-Appellees.

No. 78-2055.

United States Court of Appeals,
Ninth Circuit.

Oct. 24, 1979.

The United States District Court for
the District of Arizona, 449 F.Supp. 42,

William P. Copple, J., dismissed indictment charging defendants with theft and malicious mischief, and Government appealed. The Court of Appeals, Tang, Circuit Judge, held that Congress, in enacting Antiquities Act, did not mean to limit applicability of general theft statutes nor did it intend that such statutes would not apply to conduct covered by Antiquities Act, and thus Government was not precluded from prosecuting defendants under the more general theft and malicious mischief statutes.

Reversed and remanded.

1. Criminal Law — 29

Where an act violates more than one statute, Government may elect to prosecute under either unless congressional history indicates that Congress intended to disallow use of the more general statute.

2. Statutes — 158

Repeals by implication are not favored, and effect should be given to overlapping statutes where possible.

3. Criminal Law — 29

In enacting Antiquities Act, Congress did not mean to limit applicability of general theft and malicious mischief statutes, nor did Congress, in enacting general theft and malicious mischief statutes, intend that they would not apply to conduct covered by the Antiquities Act; thus, Government was not precluded from prosecuting defendants under the more general statutes for alleged conduct which was prohibited by express language of the general statutes. 16 U.S.C.A. § 433; 18 U.S.C.A. §§ 641, 1361.

4. Statutes — 190

Generally, courts are reluctant to look beyond express language of statute where statute is unambiguous.

5. Statutes — 188

Where words and purpose of statute plainly apply to a particular situation, fact that specific application of statute never

occurred to Congress does not bar court from holding that situation falls within statute's coverage.

6. Larceny — 3(1)

Malicious Mischief — 1

Government must prove specific intent as an element of the proof of the violation of theft or malicious mischief statutes. 18 U.S.C.A. §§ 641, 1361.

Daniel R. Drake, Asst. U. S. Atty., Phoenix, Ariz., Daniel E. Fromstein, U. S. Atty., Dept. of Justice, Bethesda, Md., on brief; Michael D. Hawkins, U. S. Atty., Phoenix, Ariz., argued, for plaintiff-appellant.

David M. Heller, Samuel Alba, Jay M. Martinez, Hermilio Iniguez, Phoenix, Ariz., on brief; Tom O'Toole, Federal Public Defender, Phoenix, Ariz., argued, for defendants-appellees.

*Appeal from the United States District Court for the District of Arizona.

§Before WALLACE and TANG, Circuit Judges, and THOMPSON,* District Judge.

TANG, Circuit Judge.

On December 22, 1977 Forest Service officers and archaeologists allegedly observed the defendants, Kyle Jones, Thayde Jones, and Robert Gevara, digging in Indian ruins located on federal government land in the Brooklyn Basin of the Cave Creek Range District of the Tonto National Forest. The officers arrested the defendants, and a grand jury returned a two count indictment. Count I of the indictment charged that the defendants willfully and knowingly stole Indian artifacts consisting of clay pots, bone awls, stone metates and human skeletal remains, of a value in excess of \$100, in violation of 18 U.S.C. §§ 641 and 2. Count II charged that the defendants, by means of a pick and shovel, injured the Indian ruins located in the Brooklyn Basin of the Cave Creek Range District of the Tonto National Forest, causing damage to the property in

*The Honorable Gordon Thompson, Jr., District Judge for the Southern District of California, sitting by designation.

excess of \$100, in violation of 18 U.S.C. §§ 1361 and 2.

The defendants moved to dismiss the indictments, and in a published opinion, *United States v. Jones*, 449 F.Supp. 42 (D.Ariz. 1978), the district court granted the motion. After reviewing the legislative history of the Antiquities Act, 16 U.S.C. § 433, and the theft and malicious mischief statutes, 18 U.S.C. §§ 641 and 1361, the district court concluded that Congress intended that the Antiquities Act be the exclusive means of prosecuting the conduct alleged in the indictment. Because this court had previously held that the penal provision of the Antiquities Act was unconstitutionally vague, *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974),¹ the Government's inability under the ruling to proceed under 18 U.S.C. § 641 or § 1361 meant that there was no statute under which the defendants could be prosecuted. The Government appeals the dismissal of the indictments. We reverse.

Initially, we set forth the statutes in question. The penal provision of the Antiquities Act, 16 U.S.C. § 433, provides that:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Under 18 U.S.C. § 641:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being

made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

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

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

Under 18 U.S.C. § 1361:

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

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

[1, 2] We have encountered a number of situations where certain conduct is proscribed by more than one statute. The rule we apply is straightforward: "where an act violates more than one statute, the Government may elect to prosecute under either unless the congressional history indicates that Congress intended to disallow the use of the more general statute." *United States v. Castillo-Felix*, 539 F.2d 9, 14 (9th Cir. 1976). See *United States v. Batchelder*, — U.S. —, —, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *United States v. Gomez-Tostado*, 597 F.2d 170 (9th Cir. 1979);

¹ In *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), the Tenth Circuit disagreed with our conclusion, and held that the penal provision of

the Antiquities Act was not unconstitutionally vague.

United States v. Burnett, 505 F.2d 815 (9th Cir. 1974), cert. denied, 420 U.S. 966, 95 S.Ct. 1861, 43 L.Ed.2d 445 (1975); *United States v. Brown*, 482 F.2d 1359 (9th Cir. 1973). Repeals by implication are not favored, and effect should be given to overlapping statutes where possible. *Burnett*, 505 F.2d at 816. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 102 (9th Cir. 1970).

The district court acknowledged this rule, *Jones*, 449 F.Supp. at 43, but held that our analysis in *Kniess v. United States*, 413 F.2d 752 (9th Cir. 1969), was controlling. In *Kniess*, a defendant who was charged with passing counterfeit postal money orders pleaded guilty to violations of both 18 U.S.C. § 472 (passing counterfeit securities) and 18 U.S.C. § 500 (passing forged postal money orders). After reviewing the congressional history of § 500, and observing that Congress had consistently designated a more lenient punishment for § 500 than § 472 each time it reenacted § 500, we concluded that Congress intended that § 500 be the exclusive means of prosecuting the conduct in question, and vacated *Kniess's* sentence under § 472.

In light of *Kniess*, the district court undertook a review of the historical development of both the Antiquities Act and 18 U.S.C. §§ 641 and 1361. Because the Antiquities Act, in addition to proscribing destruction of ruins penally, also authorized the President to declare national monuments by proclamation and provided for the issuance of permits for the examination and excavation of ruins, the court concluded that the act set out a "comprehensive method" for protecting remains that are still in the public domain or on Indian reservations.

2. Section 47 provided that

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

3. The Act of March 3, 1875, 18 Stat. 479 provided that

Jones, 449 F.Supp. at 44 (citing H.R.Rep.No. 2224, 59 Cong., 1st Sess. (1906)).

The court then turned to the history of the present theft and malicious mischief statutes. It found that §§ 641 and 1361 originated in § 47 of the Act of March 4, 1909, ch. 821, § 48, 35 Stat. 1095, 1096-98, which prohibited theft of government property.² Because § 47 differed little from the theft statute in existence when the Antiquities Act was passed,³ the court concluded that Congress, in passing the Antiquities Act either assumed that Indian ruins and artifacts were not "property" within the meaning of the theft statutes, or that five years imprisonment was too harsh a punishment for this type of conduct. Although injury to government property was not prohibited until § 35 of the Act of March 4, 1909 was amended in 1937, the court concluded that § 35 was amended to prevent injury to the same property protected by the theft statute and therefore § 35, like § 47, did not apply to Indian artifacts and ruins regulated by the Antiquities Act.

[3, 4] We compliment the district court's thoughtful consideration of this issue, but we are compelled to disagree with its conclusion. We begin our analysis by stressing that the alleged conduct of the defendants is prohibited by the express language of §§ 641 and 1361. There can be little doubt that the ruins located in the Tonto National Forest and the relics found on the ruins are the property of the United States government. The issue, then, is whether the passage of the Antiquities Act makes inapplicable the plain language of the §§ 641 and 1361.⁴

We restate the rule: where statutory coverage overlaps, the Government may

any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony

4. In general, we are reluctant to look beyond the express language of the statute where the statute is unambiguous. See *Intern. Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 917-18 (9th Cir. 1975).

Cite as 697 F.2d 369 (1979)

elect to prosecute under either statute "unless the congressional history indicates that Congress intended to disallow the use of the more general statute." *Castillo-Felix*, 539 F.2d at 14. We think that the district court gave too much weight and accorded too much significance to the sparse legislative history⁸ of the statutes in question. From our examination of this history, we find no indication that Congress, in passing the Antiquities Act, meant to limit the applicability of the general theft statutes; nor do we find that Congress in passing the general statutes, intended that they would not apply to conduct covered by the Antiquities Act. The history of each statute is simply silent on the effect it would have on the other statute. Given this silence, we cannot find that Congress intended to disallow use of the more general statute, see *id.*

The district court labeled the Antiquities Act a "comprehensive" method for protecting Indian remains and inferred from this that it was designed as the sole means of prosecuting the conduct it proscribes. We do not think, however, that even if the Antiquities Act was "comprehensive" that, without more, we can infer that Congress intended that it be the exclusive means of dealing with this conduct. Otherwise, we would be required to ascribe to Congress an intent to limit the punishment of theft and depredation on Indian ruins by means of a \$500 fine, no matter how great the theft or depredation. This we cannot do. Where the statute applies to the conduct in question and there is no affirmative evidence that Congress intended to limit the application of the more general statute, the prosecutor is free to elect to prosecute under either. We cannot ignore the plain meaning and application of a statute unless Congress affirmatively indicates that it intends that the statute should not apply. In the absence of such evidence, we must assume that Congress meant what it said.

⁸ The Senate report accompanying the Antiquities Act, S.R.Rep.No.3937, 59th Cong., 1st Sess. (1906) is only one page long; the House report, H.R.Rep.No.2224, 56th Cong., 1st Sess. (1906),

[5] We are also unpersuaded by the district court's analysis of the historical development of the general theft and depredation statutes. We are willing to assume that, when Congress enacted the general statutes it did not specifically contemplate whether they would apply to theft and depredation on Indian lands. Where the words and purpose of a statute plainly apply to a particular situation, however, the fact that the specific application of the statute never occurred to Congress does not bar us from holding that the situation falls within the statute's coverage. See *Patagonia Corp. v. Board of Governors of the Federal Reserve System*, 517 F.2d 803, 811 (9th Cir. 1975); *Eastern Airlines v. Civil Aeronautics Board*, 122 U.S.App.D.C. 375, 354 F.2d 507, 510-11 (D.C.Cir.1965).

Kniess is distinguishable. In *Kniess*, by tracing the history of several enactments of the narrow statute, we found that Congress intended that the narrow statute should preclude application of the more general statute. Such was not the case here. Other than the mere passage of the Antiquities Act and the scant history surrounding its enactment, there was nothing from which we can infer that Congress intended to preclude resort to the general theft and depredation statutes. Unlike *Kniess*, there has been here only congressional silence since the passage of the narrow statute.

[6] There is another meaningful distinction between this case and *Kniess*. In *Kniess*, where the narrow statute required proof of guilty knowledge and the general statute did not, we minimized the significance of the difference in language contained in the statutes. *Kniess*, 413 F.2d at 754. Because the narrow statute also carried a lesser penalty, we found it implausible that Congress would adopt a statutory scheme in which the more specific a person's guilty knowledge the less severe was his penalty. The present case is different. The Government must prove specific intent

is only eight pages in length, six pages of which merely described the ruins that would be covered under the Act.

as an element of the proof of a violation of §§ 641 or 1861, see *Ailsworth v. United States*, 448 F.2d 439 (9th Cir. 1971), but specific intent is not an element of 16 U.S.C. § 433. On the other hand, §§ 641 and 1861 provide greater penalties than § 433. Thus, there exists a rational statutory framework in which the degree of punishment corresponds to the presence of specific intent. In contrast to the situation in *Kniess*, our interpretation of the overlapping statutes is compatible with a rational congressional policy.

Reversed and remanded.

No. 79-5683

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

KYLE R. JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 607 F.2d 269. The opinion of the district court (Pet. App. II) is reported at 449 F. Supp. 42.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1979. The petition for a writ of certiorari was filed on November 26, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners may be prosecuted under 18 U.S.C. 641 and 1361 for excavating Indian ruins on government property and stealing property from them, even though their conduct also violated the Antiquities Act, 16 U.S.C. 433.

STATEMENT

In 1977, Forest Service officers observed petitioners digging in an area containing Indian ruins located on United States property in the Tonto National Forest. Petitioners were arrested and subsequently charged in the United States District Court for the District of Arizona with the theft of Indian artifacts (including clay pots, bone awls and human skeleton remains), in violation of 18 U.S.C. 641 and 2 and with injuring the ruins by means of pick and shovel, in violation of 18 U.S.C. 1361 and 2.^{1/}

^{1/} 18 U.S.C. 641 provides in pertinent part:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another * * * any * * * thing of value of the United States or of any department or agency thereof, * * * [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year or both.

(cont'd)

Petitioners moved to dismiss the indictment arguing that the penal provision of the Antiquities Act, 16 U.S.C. 433,^{2/} which prohibits damaging ruins or objects of antiquity, was the exclusive means of prosecuting their conduct.^{3/} The district court agreed and dismissed the

18 U.S.C. 1361 provides in pertinent part:

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof * * * shall be punished as follows:

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

^{2/} 16 U.S.C. 433 provides:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

^{3/} Petitioners could not have been prosecuted under 16 U.S.C. 433 because the Ninth Circuit had held that provision to be unconstitutionally vague. United States v. Diaz, 499 F.2d 113 (1974); contra, United States v. Smyer, 596 F.2d 939 (10th Cir. 1979).

indictment (Pet. App. II). The court of appeals reversed, holding that the legislative history of the Antiquities Act on which the district court relied was too sparse to indicate that Congress meant to limit the application of either 18 U.S.C. 641 or 1361 in enacting 16 U.S.C. 433 (Pet. App. I, 375-376). In the absence of such legislative intent, the court held that the government could elect to prosecute under the general theft and malicious mischief statutes, which by their terms covered the conduct in question (id. at 376).

ARGUMENT

Petitioners do not contend that the language of 18 U.S.C. 641 and 1361 does not proscribe their conduct.^{4/} Instead they contend (Pet. 7-18) that the legislative history of these statutes and of the Antiquities Act demonstrates that the destruction of historic ruins is an action that is prohibited exclusively by 16 U.S.C. 433 and that the court of appeals' contrary decision conflicts with this Court's decision in United States v. Batchelder, No. 78-776 (June 4, 1979). This contention is erroneous. Moreover, the question presented in this case is of little continuing importance because new penal provisions concerning antiquities

^{4/} As the court of appeals noted (Pet. App. I, 4), "[t]here can be little doubt that the ruins located in the Tonto National Forest and the relics found on the ruins are the property of the United States government."

have been enacted in the Archaeological Resources Protection Act of 1979, P.L. No. 96-95, 93 Stat. 721 (1979) (see Pet. 10 n.2).^{5/}

In Batchelder, this Court held that where two statutes providing for different penalties cover the same criminal act, the prosecutor may elect to proceed under either statute in the absence of a clear indication of legislative intent that one statute was meant to preclude the use of the other. See also United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976). The Court held that the fact that two statutes provide different penalties for the same conduct is "no justification for taking liberties with unequivocal statutory language." Slip op. 7. The legislative intent to repeal must be manifest, if not in the legislative history, in the "positive repugnancy between the provisions." Ibid.

In light of these principles, the court of appeals here examined the legislative history of the Antiquities Act and properly concluded that there was no evidence of a legislative intent to make 16 U.S.C. 433 the only penalty applicable to conduct like petitioners', to the exclusion of 18 U.S.C. 641 and 1361 (Pet. App. I, 4-5 and n.5). See H.R. Rep. No. 2224, 59th Cong., 1st Sess. (1906); S. Rep. No. 3797, 59th Cong.,

^{5/} One of the primary reasons for passing the new statute was to eliminate the difficulties caused by the decision in United States v. Diaz, supra. See H.R. Rep. No. 96-311, 96th Cong., 1st Sess. 7-8 (1979). The legislative history of the new statute clearly demonstrates that Congress recognized that the conduct proscribed was also covered under the general theft and mischief statutes and that Congress did not intend to preclude any action under those general statutes. See Pet. 10 n.2; H.R. Rep. No. 96-311, 96th Cong., 1st Sess. 11 (1979).

1st Sess. (1906). Similarly, nothing in the language or legislative history of the general theft and mischief statutes suggests that Congress intended to exclude historical ruins from their coverage.

Petitioners argue (Pet. 8-12) that the exclusivity of 16 U.S.C. 433 can be deduced from the background of the enactment of the Antiquities Act. Because the language of 18 U.S.C. 641 is similar to the language of the Act of March 3, 1875, 18 Stat. 479, it is contended that their coverage is coextensive. And, the argument runs, the 1875 Act must not have covered historic ruins, else Congress would not have felt it necessary to pass 16 U.S.C. 433 in 1906. We submit that this argument provides no justification for ignoring the unambiguous language of 18 U.S.C. 641 and 1361. Assuming that 18 U.S.C. 641 and the 1875 Act are coextensive, it does not follow that they do not cover theft of historical relics. It was quite sensible for Congress to enact 16 U.S.C. 433 even though it provided overlapping coverage. The Antiquities Act was designed to set out a "comprehensive plan" (H.R. Rep. No. 2224, 59th Cong., 1st Sess. 8 (1906)) for protecting antiquities, including provisions for setting up national monuments and issuing excavation permits. A penal provision for damaging such antiquities, like that contained in 16 U.S.C. 433, is a logical part of such a scheme.

Moreover, 16 U.S.C. 433 complements the general statutes, rather than contradicting them in any way.^{6/}

^{6/} As the court of appeals found (Pet. App. I, 376-377), this case in no way conflicts with the Ninth Circuit's earlier decision in Kniess v. United States, 413 F.2d 752

(cont'd)

A violation of 16 U.S.C. 433 requires no proof of specific intent and carries a maximum penalty of 90 days' imprisonment and a \$500 fine. By contrast, 18 U.S.C. 641 requires a finding of specific intent (see Ailsworth v. United States, 448 F.2d 439, 441 (9th Cir. 1971)) and 18 U.S.C. 1361 covers only "willful" violations. Both provide felony penalties ranging up to ten years' imprisonment and a \$10,000 fine if the value of the stolen or injured property exceeds \$100. Thus, 16 U.S.C. 433 covers some conduct that is not within the coverage of the general statutes and provides more flexibility in prosecuting relatively minor injuries to protected antiquities. To read 16 U.S.C. 433 as exclusive, however, ascribes to Congress the odd intent to limit punishment to \$500 and 90 days in prison even when a defendant acts willfully and causes great damage to priceless antiquities.^{7/} Accordingly, it is clear that the court of appeals properly

(1969). In Kniess, the court relied on the fact that reading the two statutes to cover the same conduct was not compatible with any rational Congressional policy. The specific statute, 18 U.S.C. 500, dealing exclusively with postal money orders, had a specific intent requirement yet more lenient penalties than the general securities fraud statute, 18 U.S.C. 472. Accordingly, the court reasoned, Congress intended to treat passing forged postal money orders as a distinct crime because it would be irrational to provide a harsher penalty for the same conduct when specific intent was absent. No such irrationality exists in the statutory scheme involved here.

^{7/} Such a disparity in the maximum penalty available is inconsistent with the Congressional intent in enacting the Antiquities Act to provide special protection for antiquities.

followed United States v. Batchelder, supra, in finding that no clear legislative intent has been expressed that should negate the unambiguous statutory language authorizing prosecution under 18 U.S.C. 641 and 1361.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1980

NATIONAL AFFAIRS

in which he chased two of his third wife's friends out of his house, rammed their car and fired a gun at it. The year before, he had a heart attack and tangled bitterly with NBC over his controversial, short-lived variety show. He was also jailed in 1974 for income-tax evasion, and before that he suffered what he calls a "walking nervous breakdown" that left him in debt and his career temporarily in shambles.

Last week, Pryor was responding favorably to treatment in the burn center of the Sherman Oaks Community Hospital in Los Angeles. While he remained in critical condition, doctors who initially put his survival odds at 1 in 3 said he had an even chance to live—but faced years of skin grafting. "Burn patients are patients for life," said Dr. Jack Grossman. "He's lucky to be alive. He's been through a hell of a lot." Police said they had no intention of pressing drug charges, his doctors denied that Pryor had told them he had been free basing—and his manager maintained that the fire was caused by a glass of rum and a cigarette. Police, however, stood by the free-base theory, and authorities hoped the accident would help discourage the spread of a drug habit that many see as literally playing with fire.

DENNIS A. WILLIAMS with JANET HUCK
in Los Angeles and bureau reports

Grave Robbers In the Southwest

They were farmers and traders, a little-known Indian people who tilled a remote valley in southwestern New Mexico for more than 500 years. Traces of their gardens and stone huts dot the banks of the Rio Mimbres for nearly 40 miles, fragile and fast-disappearing evidence of a civilization that vanished four centuries before the Spaniards came. Today, the homeland of the Mimbres people is under siege by twentieth-century greed. Gangs of looters searching for their unique, black-on-white pottery have plowed up the valley's ruins and ransacked its ancient burial vaults. Of thirteen major Mimbres sites along the river, says the University of New Mexico's Steven Le Blanc, "six are heavily damaged and six have been completely bulldozed." Small wonder: Mimbres pots, coveted by collectors for their whimsical decorative figures, sell for as much as \$25,000 apiece.

The pillage of the Mimbres valley is only one sign of an onslaught that is rapidly stripping the West of its archeological heritage. For the past decade, speculation in primitive art has created a profitable market for American Indian artifacts. Even the plainest pot can have value, and one collection of relics allegedly looted from Federal and in Arizona sold recently for \$750,000. Burial mounds are routinely raided by ama-

teur pot-hunters, and major archeological sites have been reduced to rubble by a new breed of mechanized grave robbers. Although prosecutors now are armed with a tough new law protecting antiquities on Federal land, the guardians of the past are hopelessly outnumbered and the damage is already severe. Looters "are after one thing—money," says Stanley Honanic, vice chairman of Arizona's Hopi tribe. "And they have no respect for the dead." One measure of that callousness: a prehistoric skull seen in the rear window of a pot-hunter's car—with red lights installed in the eye sockets as turn signals.

The scavengers are destroying a mute record of societies that often reached remarkable complexity. Between the time of Christ



Kyle Jones at a dig: Pillaging the nation's past

and the early sixteenth century, for example, the site of Phoenix was settled by Indians who built 200 miles of irrigation canals, a feat not duplicated until this century. Other tribes built towns of up to a square mile that included temples, ball courts and apartment buildings housing thousands of people. Once disturbed, such sites are often incomprehensible to archeologists. "The big sites, which had the important political, economic and religious things going on, are almost all gone," says Scott Wood, assistant archeologist at the Tonto National Forest near Phoenix, Ariz. "It's like devastating New York and Washington, D.C.," adds Paul Fish of the Arizona State Museum.

Pot-hunting is a traditional sport in many areas of the Southwest, and aficionados argue there are Indian sites aplenty for both hobbyists and scholars. But now, experts

say, amateur collectors are so numerous that vast chunks of prehistory are being destroyed. In Arkansas, says archeologist Dan Morse, "there are so many people digging you just can't believe it." Sophisticated gangs of commercial looters strip-mine protected sites with bulldozers and power shovels, and some use helicopters and citizens band radios to spot approaching ranger patrols. At the government-owned Homolavi ruins near Winslow, Ariz., clandestine diggers have left a lunar landscape of craters, and a crunchy carpet of potsherds and bone fragments covers the unexcavated ground. One watchman at the site was threatened at gunpoint, another was offered a bribe, and a government team surveying the devastation recently found a new pit dug with a backhoe only hours before.

Battle-weary preservationists say looting of prehistoric pottery is encouraged by the high prices paid by dealers who care little about protecting historic sites—a charge the dealers bitterly resent. "Vandalism of any site is very serious, and of course I don't condone it," says Douglas Ewing, a New York art dealer who is president of the American Association of Dealers in Ancient, Oriental and Primitive Art. He insists that most relics sold to collectors were excavated legally—but others are less certain. "When it comes down to the nitty-gritty, one just doesn't know where a piece came from," says New York dealer Harmer Johnson. "There's a fair chance that most of the pottery now on the market is of at least questionable legality."

Loophole: Federal prosecutors in the West have begun to crack down on looting. In Phoenix recently, three Utah men—Thayne L. Jones, 37, his brother Kyle, 27, and Robert E. Gevara, 39—were sentenced to prison terms under the 1979 Archeological Resources Protection Act for sacking a ruin in the Tonto National Forest; macabre snapshots they took of each other with skeletal Indian remains were used as evidence. But current law offers little or no protection to privately owned archeological sites—a legal void exploited by many commercial pot-hunters. "We either buy the ruin outright, lease it or let the landowner take part of the find," says C. Frank Turley Jr., a Mesa, Ariz., "investor-collector" who is Public Enemy No. 1 to many archeologists. "We've never dug on public land, and we've never been on a site that had not been vandalized already." The only defense against such legal despoliation, Federal officials say, is educating the public to leave the sites alone—and in the long run, they hope, greed will give way to heightened reverence for the past.

TOM MORGANTHAU with JEFF B. COPELAND in Arizona and JACOB YOUNG in New York