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Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals

According to Christian theology, the means for preserving remnants of life on earth is the ark.¹ Picture then, an ark containing all the treasures and tenets of American archaeophiles. The year of its construction, 1879, marked the beginning of the cultural preservation movement in the United States; the year of its launching, 1906, coincided with the passage of the American Antiquities Act;² the ark floundered at sea for over seventy years, weathering severe storms particularly in the 1930s and 1940s; it settled, finally, precariously perched atop an apparent Ararat: the Archaeological Resources Protection Act of 1979 (ARPA).³ The ark was threatened throughout by the perils of raiders and pirates—the twentieth century visigoths called “pothunters,”⁴ or more politely, artifact collectors.

This article traces the development of public awareness and legis-

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¹ *Genesis* 6:5-8:22 (King James); see also *Raiders of the Lost Ark* (Lucasfilm, Ltd. 1982).

² 16 U.S.C. §§ 431-433n (1982).

³ 16 U.S.C. §§ 470aa-470ll (1982).

⁴ For the etymology of this appellation, see G. Nickerson, *Considerations on the Problems of Vandalism and Pot-hunting in American Archaeology* (Oct. 1962) (unpublished paper No. 22, Montana State University, Anthropology and Sociology).

lative enactments from 1879 to the present. The first section is divided into quarters, each covering archaeological developments during the past century of pothunting in the United States. In addition, the first section analyzes cases enforcing the Antiquities Act. Section two discusses ARPA: its legislative highlights, the politics involved in promulgating regulations, its forfeiture provisions and civil penalties. The third section outlines additional statutes and international agreements aimed at preventing the destruction of our cultural heritage. Additionally, the article examines regulations of the six federal agencies with authority to protect archaeological resources on public lands.

The article concludes by elaborating specific proposals to stop the destruction and theft of this nation's archaeological resources. The reasons why the visigoths are still prevailing notwithstanding the long history of attempts to stop them are five-fold: (1) American policies favor private enterprise and private ownership; (2) protective laws and prosecutions are often poorly conceived; (3) dealers', collectors', and museums' powerful lobbies frustrate legislative and regulatory change; (4) federal agencies charged with enforcement of the laws lack committed resources and continually bungle their responsibility; and (5) the public (i.e., the jury) is indifferent, or even worse, hostile to punishing pothunters. This last factor provides the key for turning around the other four. If the public can be persuaded by archaeophiles to assert ownership of their ark, federal policies, laws, and agencies will follow their cue.

I

A CENTURY OF POTHUNTING AS A NATIONAL PASTIME (1879-1979)

A. First Quarter, 1879-1904, American Archaeology's Awakening

The year 1879 marked the nascence of the cultural resource preservation movement in the United States.⁵ Five events at that time signalled this foray into forensic archaeology: the establishment of the Smithsonian's Bureau of Ethnology;⁶ the appointment of Frederick W. Putnam as curator of the Peabody Museum of American

⁵ R. LEE, *THE ANTIQUITIES ACT OF 1906* 120 (Nov. 16, 1970) (National Park Service Monograph). The author has relied heavily on Mr. Lee's excellent research of early sources in the first two subsections of this article.

⁶ G. HELLMAN, *THE SMITHSONIAN: OCTOPUS ON THE MALL* 105-06 (1967).

Archaeology and Ethnology at Harvard University;⁷ the election of Lewis Henry Morgan, an anthropologist, as president of the American Association for the Advancement of Science;⁸ the founding of the Anthropological Society of Washington;⁹ and the organization of the Archaeological Institute of America.¹⁰ These events combined to excite public interest in aboriginal Americans and, as a direct consequence, subjected the material remains of the ancients to renewed public exploitation. As a result, scientists, in conjunction with fledgling citizens' resource preservation leagues, began to pressure Congress for legislation to protect archaeological finds on public lands.¹¹

Preservation efforts were further fueled by reports published in the early 1880s documenting the destruction of prehistoric ruins in the southwestern United States.¹² The reports caused a furor among eastern scholars which, in turn, prompted Senator George Frisbee Hoar of Massachusetts to petition Congress to withdraw archeological sites from public sale. The legislation was never voted

⁷ R. DIXON, *DICTIONARY OF AMERICAN BIOGRAPHY* 276-78 (1928).

⁸ See generally L. WHITE, *AN INTRODUCTION TO THE HISTORY OF SOCIOLOGY* (1948).

⁹ Hough, *Otis Tufston Mason*, 10 *AM. ANTHROPOLOGIST* 661, 664 (1908).

¹⁰ The organization issued its first annual report in 1880. See *ARCHAEOLOGICAL INSTITUTE OF AMERICA, 1880 ANNUAL REPORT* (1880).

¹¹ At that time, the only legal means to preserve archaeological areas was to withdraw the site from public land sales. Withdrawal of public lands from settlement was a cumbersome process. For instance, in 1896 Richard Wetherill tried to homestead the spectacular Pueblo Bonito ruin in Chaco Canyon, New Mexico. A protest by the Santa Fe Archaeological Society and a five-year investigation by the government finally resulted in an official recommendation against the claim and a suggestion that the land be set aside as a national park. After four more years of bureaucratic wrangling, the government determined that the ruins themselves should remain in the public domain. By 1904, public land withdrawals had been made for the Pajarito Cliff Dwellers area, the Jemex Cliff Dwellers area, and at El Morro in New Mexico. In Arizona, the Petrified Forest and Montezuma's Castle were reserved, and in Colorado, the Mesa Verde had been reserved. Custodians had also been appointed for the Arizona areas of Casa Grande, Walnut Canyon, and Canyon del Muerto. K. LEE, *supra* note 5, at 42.

¹² In outlining the destruction of the Pecos ruin in New Mexico, Adolph Bandelier noted:

In general, the vandalism committed in this venerable relic of antiquity defies all description. . . . All the beams of the old structure are quaintly . . . carved . . . much scroll-work terminating them. Most of this was taken away, chipped into uncouth boxes, and sold, to be scattered everywhere. Not content with this, treasure hunters . . . have recklessly and ruthlessly disturbed the abodes of the dead.

A. BANDELIER, *Report on the Ruins of the Pueblo of Pecos*, in *PAPERS OF THE ARCHAEOLOGICAL INSTITUTE OF AMERICA: AMERICAN SERIES* 42 (2d. ed. 1976).

out of committee.¹³

Seven years later, Senator Hoar presented a more modest, specific proposal to preserve the rapidly deteriorating Casa Grande complex in Arizona. The proposal recounted that Casa Grande was "entirely unprotected from the depredations of visitors; and that it has suffered more in eleven years from this source than in the three hundred and fifty years preceding."¹⁴ Within a month, Congress appropriated the requested two thousand dollars.¹⁵ Three years later, President Harrison signed an executive order "reserving the Casa Grande Ruin and 480 acres around it for permanent protection."¹⁶ Although this minor legislative achievement is historically important, archaeological resources remained threatened from a general lack of governmental protection.

In succeeding years, public interest in archeological treasures continued to grow, as demonstrated by a close succession of major exhibitions of prehistoric American artifacts in 1892 in Madrid, Spain; in 1893 in Chicago; and in 1904 in St. Louis.¹⁷ Popular books and scholarly articles on American antiquities also proliferated.¹⁸ Museums and academic anthropology flourished; unfortunately, so did pothunters.¹⁹

¹³ The petition stated that the Pecos ruin was "being despoiled by the robbery of its graves, while its timbers are used for campfires, sold to relic hunters, and even used in the construction of stables." 13 CONG. REC. 3,777 (1882). The petitioners prayed that "at least some of these extinct cities or pueblos . . . be withheld from public sale and their antiquities and ruins be preserved, as they furnish invaluable data for the ethnological studies now engaging the attention of our most learned scientific, antiquarian and historical students." *Id.*

¹⁴ S. Misc. Doc. No. 60, 50th Cong., 2d Sess. (1889).

¹⁵ Act of Mar. 2, 1889, ch. 411, 25 Stat. 961 (1889).

¹⁶ See R. LEE, *supra* note 5, at 20.

¹⁷ Colorado and Utah employed approximately 100 residents to find artifacts for their exhibits at the World's Columbian Exposition in Chicago.

¹⁸ See, e.g., A. BANDELIER, *THE DELIGHT MAKERS* 490 (1890).

¹⁹ One historian noted that:

Rising public interest in the history and art of the southwestern Indians in the 1890's was accompanied by a swelling demand for authentic prehistoric objects. The desires and needs of growing numbers of collectors and dealers, exhibitors and curators, teachers and students, added to the native curiosity of cowboys, ranchers, and travelers, created an avid demand for original objects from the cliff dwellings and pueblo ruins of the Southwest. *Most of these ruins were situated on public land or Indian reservations. There was no system of protection and no permit was needed to dig. . . . The eager seeker for artifacts had one chief worry—that someone else would reach a ruin rich in valuable objects before he did. The result was a rush on prehistoric ruins of the Southwest that went on, largely unchecked, until about 1904.*

R. LEE, *supra* note 5, at 29.

Perhaps the most infamous pothunters during the period were the Wetherill brothers. While cattle-ranching in the winter of 1888, the Wetherills discovered Colorado's Mesa Verde pueblo complex. They spent the next several years profitably digging indiscriminately through 182 cliff dwellings in the canyons of the Four Corners.²⁰ While the brothers dismantled and shipped entire ancient rooms to the American Museum of Natural History in New York, they also accumulated a large collection for themselves and profited from later sales of some of their finds.²¹

The Wetherills were joined in 1891 by Gustav Nordenskjold, a Swede, who went so far as to record his exploits in a book.²² Local officials' attempts to prosecute Nordenskjold to prevent the removal to Sweden of his artifacts failed for lack of applicable laws protecting artifact removal and export. Nordenskjold's extensive collection has never returned to the United States.²³

Toward the end of this first quarter, the pressure on Congress to take action grew immense. Dr. J. Walter Fewkes warned legislators in 1896 that "unless laws are enacted . . . 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 the cliffs."²⁴ In 1901, Dr. Walter Hough informed the country that "there is scarcely an ancient dwelling site or cemetery that has not been vandalized by 'pottery diggers' for personal gain."²⁵ Archaeologist T. Mitchell Prudden lamented at one scene: "Cattlemen, ranchmen, rural picnickers, and professional collectors have turned the ground well over and have taken out much pottery, breaking more and strewing the ground with many crumbling bones."²⁶ The effect of increased public awareness, the notoriety of the pothunters, and the writings of experts created a political situation demanding new protective laws.

²⁰ The area where the borders of the states of Utah, Colorado, Arizona, and New Mexico meet.

²¹ See C. NORDENSKJOLD, *THE CLIFF DWELLERS OF THE MESA VERDE, SOUTHWESTERN COLORADO: THEIR POTTERY AND IMPLEMENTS* (1893).

²² *Id.*

²³ The artifacts are currently stored on an upper floor of the Kansallismuseo in Helsinki.

²⁴ Fewkes, *Two Ruins Recently Discovered in the Red Rock County, Arizona*, 9 *AM. ANTHROPOLOGIST* 263, 269-70 (1896).

²⁵ Hough, *Notes and News*, 3 *AM. ANTHROPOLOGIST* 990 (1901).

²⁶ Prudden, *The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado and New Mexico*, 5 *AM. ANTHROPOLOGIST* 224, 263 (1903).

B. Second Quarter, 1905-1930, The Antiquities Act: Its Promoters and its Progeny

The events of the preceding twenty-five years (1879-1904) led to a concerted effort to promote and pass national preservation legislation. This effort spanned six years and involved three sessions of Congress. Park Service historians divide this legislative effort into three "rounds," corresponding to the 56th, 58th, and 59th Congresses.²⁷

The first round consisted of four legislative proposals submitted to the 56th Congress. One proposal preserved natural as well as historic areas and provided for the reservation of an unlimited amount of surrounding land.²⁸ Another proposal merely penalized anyone damaging antiquities.²⁹ A third proposal was directed only to the ruins in the Four Corners area and specified that no more than 320 acres could be set aside around each ruin.³⁰ The fourth proposal granted power to the President "to establish and administer national parks."³¹ Members of the Public Lands Committee, however, were understandably worried about the political consequences of granting such broad authority to the President and his appointees.³² Each bill died in the House and the archaeological preservation controversy was left to simmer over the next four years.

²⁷ R. LEE, *supra* note 5, at 47-48.

²⁸ H.R. 8066, 56th Cong., 1st Sess. (Feb. 5, 1900).

²⁹ H.R. 8195, 56th Cong., 1st Sess. (Feb. 6, 1900).

³⁰ H.R. 9245, 56th Cong., 1st Sess. (Mar. 7, 1900).

³¹ H.R. 11021, 56th Cong., 1st Sess. (Apr. 26, 1900).

³² Congress was already fighting a President who was expanding federal powers at the expense of the states. In his first year in office, from 1901-1902, President Theodore Roosevelt created 13 new forest reserves containing 15.5 million acres. In response, efforts were underway to restrict the President's power to reserve public lands. By February 24, 1907, Congress had passed legislation revoking presidential authority to create or expand forest reserves in Oregon, Washington, Idaho, Montana, Colorado, and Wyoming. Undeterred, the President and Gifford Pinchot worked feverishly during the eight days between passage of the bill and the date it was to be signed. Their efforts culminated in the President's "midnight proclamation." As one commentator noted, when the "midnight proclamation rang down on March 4, they [Roosevelt and Pinchot] created 21 new reserves totalling some 16 million acres. "The opponents of the Forest Service turned hand-springs in their wrath, and dire were the threats against the Executive" Eliot, *T.R.'s Wilderness Legacy*, NAT'L GEOGRAPHIC, Sept. 1982, at 340, 358. By the time he left office in 1909, President Roosevelt had "enriched the public domain by approximately 230 million acres The ebullient slash of his pen quadrupled the existing forest reserves and proclaimed the first federal wildlife refuges, more than 50 of them." *Id.* at 340.

The 58th Congress began consideration of the issue with a legacy from its predecessor. In addition to the legislative bills already discussed, the 56th Congress had created a report which conceded the necessity of reserving land containing antiquities and of establishing penalties for destroying artifacts.³³ With this legacy, advocates of a national preservation law were better prepared to force Congress to act.

In 1904, Representative Rodenberg of Illinois introduced legislation which had overwhelming support from the academic and scientific communities. Massachusetts Senator Henry Cabot Lodge, a close ally of President Roosevelt, introduced a Senate counterpart.³⁴ Notwithstanding the support for this bill, the Regents of the Smithsonian Institution sponsored their own bills designed to give the Smithsonian greater control over excavations and collections.³⁵

Independent scholars testified against and defeated the Smithsonian bill at the Senate hearings.³⁶ Undaunted, the Smithsonian forces reassembled and successfully defeated the Lodge bill in the House.³⁷ As a result, through no device of their own, pothunters prevailed once more.³⁸

The third round of the battle for preservation legislation began with the appearance of Edgar Lee Hewett, a rising young archaeological star.³⁹ Hewett convinced his archaeological colleagues to present a united front in support of the American Antiquities Act.⁴⁰ Hewett lobbied several key figures on Capitol Hill and authored a jurisdictional compromise whereby the agency regulating the land in which an archaeological project was located also regulated the project.⁴¹

³³ H.R. REP. NO. 1104, 56th Cong., 1st Sess. 1 (1900).

³⁴ S. 5603, 58th Cong., 1st Sess. (Apr. 20, 1904).

³⁵ S. 4127, 56th Cong., 1st Sess. (1900); H.R. 12447, 56th Cong., 1st Sess. (1900).

³⁶ S. EXEC. DOC. NO. 3114, 58th Cong., 2d Sess. 6-7 (1904).

³⁷ M. BAUM, *Pending Legislation for the Protection of Antiquities on the Public Domain*, RECORDS OF THE PAST III 103, 147-50 (1904) (available in Office of History and Historic Arch., Eastern Service Center, Washington, D.C.).

³⁸ See R. LEE, *supra* note 5, at 65-66.

³⁹ See R. LEE, *supra* note 5, at 68. Prior to the convening of the 59th Congress, Hewett accompanied Representative John Lacy of Iowa on a tour of major archaeological sites in the Four Corners. Hewett submitted a survey of all significant antiquities in the area to Congress. *Id.*

⁴⁰ Hewett, *Preservation of American Antiquities: Progress During the Last Year; Needed Legislation*, 8 AM. ANTHROPOLOGIST 109, 113 (1906).

⁴¹ Hewett's plan sought to avoid raising bureaucratic hackles over territorial disputes between, primarily, the Department of Interior and the Department of Agri-

Hewett's proposal was introduced in the House in January 1906 and a Senate companion measure followed the next month.⁴² Hewett's proposal covered six previously neglected and controversial areas including:

- 1 — protection of antiquities on "lands owned or controlled by the Government of the United States"—as opposed to the "public lands" cited in earlier bills which did not specifically apply to Indian lands, forest reserves and military reservations;
- 2 — inclusion of "historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest"—thereby protecting natural areas which had been overlooked before;
- 3 — direction that monuments be limited to "the smallest area compatible with the proper care and management of the objects to be protected"—contrasted with the confining figures of 320 or 640 acres contained in earlier legislative proposals;
- 4 — introduction of the term "National Monument";
- 5 — authorization for the Secretary of Interior to accept donations of private land; and
- 6 — promulgation of regulations—in which it was understood that the role of the Smithsonian would be protected.⁴³

The House bill was reported favorably two months after its presentation;⁴⁴ the Senate took three months to do the same.⁴⁵ The Conservationist President, Theodore Roosevelt, signed the American Antiquities Act of 1906 on June 8, 1906.⁴⁶ Thus, the ark was launched.

Probably at the prompting of his good friend and Chief Forester, Gifford Pinchot, President Roosevelt proclaimed the first national monument under the Antiquities Act on September 24, 1906.⁴⁷ During the next three years, President Roosevelt's administration established nine more monuments administered by the Department of Agriculture and eight more monuments administered by the Department of the Interior.⁴⁸ Although the Antiquities Act allowed

culture. *Id.* The constant jurisdictional battle between the Departments of Interior and Agriculture persisted throughout the early part of this century. Under the Antiquities Act, the jurisdictional dispute resulted in persons attempting to obtain mining rights in areas given national monument status. These attempts were completely rejected in *Cameron v. United States*, 250 F. 943 (9th Cir. 1918), *aff'd*, 252 U.S. 250 (1920).

⁴² S. 4698, 59th Cong., 1st Sess. (Feb. 26, 1906).

⁴³ R. LEE, *supra* note 5, at 74-76.

⁴⁴ H.R. REP. NO. 2224, 59th Cong., 1st Sess. (1906).

⁴⁵ R. LEE, *supra* note 5, at 76.

⁴⁶ Now codified at 16 U.S.C.A. §§ 431-433n (West. Supp. 1987).

⁴⁷ Proclamation No. 658, 34 Stat. 3236 (1906).

⁴⁸ See R. LEE, *supra* note 5, at 88.

for the creation of national monuments, it did little to induce agencies to protect the monuments. One person was caught in 1917 digging for gold in the Gran Quivira area and was fined \$100.⁴⁹ Another, John Brandt, was convicted of digging on Indian land in the mid-1920s. Brandt was forced to forfeit his artifacts, and fined \$500.⁵⁰ There is no record of any other successful enforcement of the Antiquities Act during this period.

C. Third Quarter, 1931-1955, The Floundering and FDR

Enforcement activity under the Antiquities Act was inadequate because the Act itself was sparse and because monitoring agencies put a low priority on preventing further destruction of archaeological sites. In addition, the Great Depression inadvertently spawned an increase in pothunters. Programs developed to alleviate unemployment actually taught people the value of pothunting.⁵¹

The part-time pothunting plague spread at such a pace that one commentator noted:

The decade of the 30s witnessed one of the most virulent epidemics of pothunting ever Archaeologists . . . sought to stem the tide of potting by preaching. Too often their manner was either condescending or threatening. The reaction in the collector ranks was defiance and hostility, resulting in fortified determination to continue the Sunday hobby regardless of antipathy in certain quarters.⁵²

Apparently, federal law enforcement officials did little to slow the pothunting frenzy. The first officially recorded federal investigation of pothunting activity in the 1930s was not until 1936.⁵³ In 1936, a twenty-two-year-old employee of The Tonto National Museum, Woodrow Spires, saw three men digging on the shores of Lake Roosevelt.⁵⁴ Spires ordered the men to leave. In response, one of the men said that "he would not want to be taken into custody for violating any law, that he had been out of work for several months

⁴⁹ Amsden, *There Ought to be a Law*, THE MASTERKEY 16, 16 (1929).

⁵⁰ *Id.*

⁵¹ This was the case, for instance, in Arizona's Verde Valley area. The Sinagua ruins exhibit at Tuzigoot National Monument was developed by Work Projects Administration funds in 1934, and the enthusiasm it generated also helped produce a new generation of pothunters in the surrounding towns. For a general review of these federal employment programs see Setzler & Strong, *Archaeology and Relief*, 1 AM. ANTIQUITY 301 (1936).

⁵² See generally R. LISTER & F. LISTER, EARL MORRIS & SOUTHWESTERN ARCHAEOLOGY (1968).

⁵³ F.B.I. File No. 70-37, Phoenix Arizona (Mar. 28, 1936) (S/A H.F. Small).

⁵⁴ *Id.* at 2.

and that he had a large family."⁵⁵ Spires noted the license plate of the nearby car and reported the incident to the Gila County Sheriff's office.

The principal suspect in the case, Thomas W. Simmons, age 39, a mail carrier from Miami, Arizona, was a self-proclaimed collector of ancient artifacts.⁵⁶ Simmons confessed to digging for artifacts, but maintained that he had not found any on *public* lands that day. The FBI report summarily states the result of the investigation:

Subjects alleged to have excavated and removed ancient pottery from Forest Service land near Roosevelt, Arizona on February 22, 1936 Investigation discloses that Subjects dug and searched for pottery on Forest Service land . . . but did not remove same. United States Attorney, Phoenix, declines prosecution.⁵⁷

The United States Attorney declined prosecution for two legally deficient reasons: (1) there had been no vandalism committed at the Tonto National Monument proper; and (2) the subjects had not removed anything of value.⁵⁸ The Director of the National Park Service and the Acting Chief of the Forest Service acceded to this decision, resulting in the closure of this landmark FBI case.⁵⁹

Although the federal government was doing little to enforce the laws against artifact collecting on public lands, others were actively involved in trying to stop the pothunters. Writers for professional journals vehemently decried the inaction of responsible federal officials, warning that "dealers and relic hunters in practically every state are steadily destroying an irreplaceable heritage."⁶⁰ In addition, private institutions took steps to avoid serving as outlets for

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* These justifications were legally deficient because the Antiquities Act prohibitions apply to *forest* reserves as well as monument reserves and the Act applies to vandalism as well as theft. 16 U.S.C. § 433.

⁵⁹ Letter from Arno B. Cammerer, Director National Park Service, to Charles E. Rachford, Acting Chief Forest Service (Apr. 18, 1936). Thirty-nine years later, in 1975, Thomas W. Simmons, age 78, sold his artifact collection to the Favell Museum in Klamath Falls, Oregon, for reportedly over one-half million dollars. Many of his artifacts are displayed in the museum and are labeled as taken from the Tonto Basin. That same year, Simmons was cited pursuant to Forest Service regulations for pothunting in the Tonto National Forest. He was fined a mere \$15. Personal communications with Special Agent-in-Charge Lynell Schalk of the Bureau of Land Management (May 1, 1981).

⁶⁰ Setzler & Strong, *supra* note 51, at 308.

traffickers in illegally obtained antiquities.⁶¹ Local law enforcement alternatives were also proposed. For example, a 1938 resolution sponsored by the Indian Neighborhood Society of Rochester, New York, sought state legislation against "unauthorized and nonprofessional digging of prehistoric sites."⁶²

Periodically, assertive chief executives established "a much wider range of national monuments than the framers of the Act appear originally to have had in mind."⁶³ Consequently, opposition mounted against the exercise of this presidential power.

The greatest challenge to the exercise of presidential power to withdraw public lands for use as national monuments came in 1943. President Franklin D. Roosevelt proclaimed the Jackson Hole National Monument by taking previously reserved forest lands from the Department of Agriculture.⁶⁴ President Roosevelt's action aroused tremendous opposition in Wyoming and in Congress.⁶⁵ A coalition of livestock groups and the State of Wyoming filed a civil action seeking invalidation of the president's proclamation.⁶⁶

The district court, however, side-stepped the presidential power issue, suggesting instead that "if the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice . . ."⁶⁷ Taking the district court at its word, Congress passed an act establishing Grand Teton National Park in 1950,⁶⁸ thereby superseding President Roosevelt's proclamation. The legislation specifically provided that "no further extension or establishment of national parks or monuments in Wyoming may be undertaken except by express authorization of the Congress."⁶⁹ In passing this legislation, Congress took away the president's power to protect, in Wyoming at least, that for which the Antiquities Act's promoters had labored.⁷⁰

⁶¹ See Hodge, *Pot-hunting: A Statement of Policy*, 3 AM. ANTIQUITY 184, 184 (1937).

⁶² See Sutton, *Indians Versus Pot-hunters*, 3 AM. ANTIQUITY 267, 267 (1938).

⁶³ R. LEE, *supra* note 5, at 92.

⁶⁴ Proclamation No. 2578, 3 C.F.R. 327 (1943).

⁶⁵ R. LEE, *supra* note 5, at 98.

⁶⁶ *State of Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

⁶⁷ *Id.* at 896.

⁶⁸ Act of Sept. 14, 1950, Pub. L. No. 81-787, 64 Stat. 849 (codified as amended at 16 U.S.C. §§ 460d-1 to -5 (1982)).

⁶⁹ 16 U.S.C. § 431a.

⁷⁰ Before this impasse occurred, President Roosevelt managed to extract from

D. Fourth Quarter, 1955-1979, Ararat Achieved?

Marking the archaeological preservation movement during this era was the continued destruction of archaeological sites by vandals (and, even worse, by agency action and inaction), a resurgence of federal legislation resulting from the environmental movement and, finally, public pressure which ultimately led to the passage of the Archaeological Resources Protection Act of 1979 (ARPA).⁷¹

The adverse impacts of weekend antiquity ravaging as a family pastime is perhaps best exemplified by an occurrence in Wayland, Massachusetts. An extraordinary ancient burial site was accidentally uncovered in Wayland in 1959. Within minutes, the "archaeological admirers" who had discovered the site completely destroyed it.⁷² This fiasco drew archaeologists' attention to themselves.

During a period of self-analysis, archaeologists attempted to ascertain public perceptions of their profession.⁷³ One archaeologist noted that "the public must believe that archaeological finds are based on chance, not skill, and that objects and techniques, not ide-

Congress one important piece of civil legislation for the protection of the national heritage: the Historic Sites Act of 1935, 16 U.S.C. §§ 461-469h (1982). This Act was significant for the preservation of artifacts in two ways. First, it announced a national policy for historic preservation. See Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31, 34-35 (1976). Second, it granted authority for the "development of an administrative program to identify and evaluate cultural resources." *Id.* at 34.

The Act's benefits, however, have been limited. It only protects resources of "national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461. Unfortunately, interesting and important artifacts may not be "significant" and are thus unprotected by the Act. See Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 HARV. ENVTL. L. REV. 61, 70 (1982). Later legislation has also adopted this restrictive language. See, e.g., Reservoir Salvage Act of 1960, 16 U.S.C. §§ 469-469c (1982); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470w-6 (1982).

⁷¹ 16 U.S.C. 460aa-460ll (1982).

⁷² Byers, *The Rape of Wayland*, 25 AM. ANTIQUITY 420 (1960). One archaeologist warned:

As a result of both deliberate looting and expansion of civilization, the material remains of the past are being churned up at an unprecedented rate. . . . For the first time in our history we face the novel prospect of a future without a past. Given the present tempo of destruction, by the end of the century all unexplored major archaeological sites may be irrevocably disfigured or ravaged. We are witnessing the equivalent of the burning of the library at Alexandria by the Romans.

K. MEYER, *THE PLUNDERED PAST* 8 (1973).

⁷³ See, e.g., Ascher, *Archaeology and the Public Image*, 25 AM. ANTIQUITY 402 (1960) (Ascher analyzed a decade of Life magazine articles).

ology, are most important."⁷⁴ Partly in response to this image problem, the Society for American Archaeology appointed a committee on "Public Understanding of Archaeology" and began a public education campaign in the late 1960s.⁷⁵

The Salmon Ruins project in northern New Mexico evidenced the success of that sort of effort. In 1967, a developer planned to purchase land in Bloomfield, New Mexico which he intended to subdivide into ten-foot "digging rights" for sale to pothunters. In order to stop the developer, "nearby residents hastily organized a door-to-door campaign and scraped up funds to make the down payment."⁷⁶ The residents then combined forces with the Anthropology Department at Eastern New Mexico University and began a mammoth professionally-led excavation which has yielded a wealth of information about the associated Chacoan culture and which has resulted in a tourism boom.⁷⁷

Public awareness in archaeology also increased as a result of the passage of several pieces of federal legislation. For instance, the government continually built dams which inundated ancient fishing, hunting, ceremonial, dwelling and burial grounds. The heightened activity of the United States Corps of Engineers in building hydro-power projects led to the passage of the Reservoir Salvage Act of 1960.⁷⁸ The Reservoir Salvage Act authorized the National Park Service to investigate soon-to-be-flooded archaeological sites.⁷⁹ But this authority was not given so the Park Service could prevent the destruction of the ancient sites. Rather, the legislation sought to minimize information loss due to the dam's submergence of the site.⁸⁰

⁷⁴ L. WILLIAMS, *VANDALISM TO CULTURAL RESOURCES OF THE ROCKY MOUNTAIN WEST* 16 (1978) (Cultural Resources Report No. 21, USDA Forest Service, Southwestern Region).

⁷⁵ Personal Communication with Dr. C. Melvin Aikens, Eugene, Or. (Apr. 23, 1984).

⁷⁶ Canby, *The Anasazi: Riddles in the Ruins*, NAT'L GEOGRAPHIC, Nov. 1982, at 554, 579.

⁷⁷ *Id.*

⁷⁸ 16 U.S.C. §§ 469-469c-1 (1982). For a discussion of the statute's implications see, Fish, *Federal Policy and Legislation for Archaeological Conservation*, 22 ARIZ. L. REV. 681, 690 (1980); G. Somers, *The Role of the Federal Government in Historic Preservation* 14-16 (1979) (unpublished Ph.D. thesis, Univ. of Ariz., Dep't of Anthropology).

⁷⁹ 16 U.S.C. § 469a-2(a); see Rak, *Federal Protection of America's Archaeological Resources*, 5 PRESERVATION L. REP. 2001, 2013-14 (Spring 1986).

⁸⁰ *Id.* at 2013-14.

Passage of the National Historic Preservation Act (NHPA)⁸¹ added to the litany of archaeological laws in 1966. The NHPA's primary focus was to coordinate diverging preservation efforts by various agencies and to provide financial and technical assistance to local preservation activities.⁸² The NHPA did not fulfill its purpose.

Another source of federal legislation affecting archaeological resources resulted from the emerging environmental protection movement. Chief among these statutes was the National Environmental Policy Act of 1969 (NEPA).⁸³ NEPA's impact was limited by the requirement that an advisory council be formed to function as an agency conscience, which was virtually powerless beyond commenting on major federal action. Such institutionalized hand-wringing may provoke some gestures toward mitigation, but will not halt the eventual havoc of unrestrained "progress."⁸⁴

The federal government took two other actions in the 1970s before federal officials recognized the need for stronger legislation to protect our cultural patrimony. First, President Nixon signed Executive Order No. 11,593 in 1971.⁸⁵ The executive order required all federal agencies to locate and inventory "all significant cultural resources under their jurisdiction or control," by July 1, 1973.⁸⁶ Most archaeologists regard this requirement as an important statement of a full-employment policy for their profession, but the requirement was otherwise unworkable.⁸⁷

The Archaeological and Historic Preservation Act of 1974 (AHPA),⁸⁸ on the other hand, was more realistic in that it simply expanded the Reservoir Salvage Act to include all construction projects with federal involvement and, more importantly, required that those projects budget and plan for archaeological "clear-

⁸¹ 16 U.S.C. §§ 470-470w-6 (1982). For a discussion of the NHPA's implications see Fish, *supra* note 78, at 690-91; Rosenberg, *Federal Protection for Archaeological Resources*, 22 ARIZ. L. REV. 701, 712-14 (1980); Somers, *supra* note 78, at 16-17.

⁸² 16 U.S.C. §§ 470(b)(7), 470b(a)(1)-(6). See generally, Rak, *supra* note 79.

⁸³ 42 U.S.C. §§ 4321-70 (1982).

⁸⁴ See Rosenberg, *supra* note 81, at 714 (notes that "cultural interests are not accorded a uniform position of priority over all other social values . . .").

⁸⁵ Exec. Order No. 11,593, 3 C.F.R. 154 (1971), reprinted in 16 U.S.C. § 470 app. at 549 (1976).

⁸⁶ *Id.* at 2(a), 3 C.F.R. at 155, 16 U.S.C. § 470 app. at 549.

⁸⁷ See Fish, *supra* note 78, at 692.

⁸⁸ 16 U.S.C. §§ 469-469c-2 (1982).

ances."⁸⁹ Once it was determined that there "was no alternative to destruction, . . . prompt and careful surveys . . . and proper excavation techniques could [be used to] salvage and preserve the materials found."⁹⁰ AHPA also offered a needed official nudge to federal agencies which were often reluctant to support archaeological activities on their own.⁹¹ Although important in their respective spheres of influence, those legislative acts failed to fill the need for comprehensive archaeological resource legislation.⁹²

Finally, professional archaeologists, tribal leaders, frustrated prosecutors, individual citizens and conservationists coalesced in the mid-1970s to educate Congressional forces to remedy deficiencies in cultural resources preservation tools. The product of that lobbying effort was the passage of ARPA in 1979.⁹³ One of its promoters hailed ARPA as "a very real and tangible solution to a major part of the . . . problem."⁹⁴ Wishful archaeophiles cast it as a savior.⁹⁵ Disappointingly, however, the preliminary tally of sentences for archaeological vandalism and thievery imposed under ARPA is not impressive.⁹⁶

⁸⁹ 16 U.S.C. § 469a-2. See generally T. KING, P. HICKMAN & G. BERG, ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE'S CLUTTER (1977); C. MCGIMSEY & H. DAVIS, THE MANAGEMENT OF ARCHAEOLOGICAL RESOURCES: THE AIRLIE HOUSE REPORT 12 (1977) (special publication of the Society for American Archaeology).

⁹⁰ Somers, *supra* note 78, at 19.

⁹¹ AHPA requires Federal agencies to recognize any potential archeological destruction and to either survey and preserve such items or call upon someone else to perform these services. 16 U.S.C. § 469c-1.

⁹² In addition, the Ninth Circuit created panic among archaeophiles by rendering an opinion which appeared to nullify the Antiquities Act's criminal penalties. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974); see *infra* notes 98-109 and accompanying text.

⁹³ 16 U.S.C. §§ 470aa-470ll (1982); see *infra* notes 138-211 and accompanying text.

⁹⁴ Fike, *Antiquities Violations in Utah Justice Does Prevail*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 49, 52 (1980) (U.S.D.A. Forest Service, Southwestern Region).

⁹⁵ See Blair, *American Indians v. American Museums: A Matter of Religious Freedom* (pt. 2), AM. INDIAN J., June 1979, at 2, 6; Fish, *supra* note 78, at 695; Northey, *supra* note 70, at 112-14; Rosenberg, *supra* note 81, at 726.

⁹⁶ See, e.g., *United States v. Perkins*, 83-101 (D. Colo. 1983); *United States v. Jaques*, 83-129fr (D. Or. 1983); *United States v. Bender*, 81-119-BE (D. Or. 1981); *United States v. Shumway*, 80-5-W (D. Utah 1980). Only two reported jury convictions under ARPA have been reported, and these were reduced from a felony to a misdemeanor. *United States v. Plumb*, No. 85-280 (D. Ariz. 1986); *United States v. Rahn*, No. 82-72 (D. Ariz. 1982); see Green & Hanks, *Prosecuting Without Regulations: ARPA Successes and Failures*, 5 AM. ARCHEOLOGY 103, 105 (1985).

In the more than eight years since ARPA's passage, there has only been one jury

*E. Pre-ARPA Prosecutions: Caught Between a Rock
and a Hard Place*

Prior to passage of ARPA⁹⁷ and the consciousness raising which accompanied it, federal antiquities convictions were few and far between. Violators were primarily cited under agency regulations and state laws. Most citations resulted in a minor fine. When the government finally attempted stringent enforcement of the Antiquities Act, some seven decades after its passage, it backfired.

The Ninth Circuit's opinion in *United States v. Diaz*⁹⁸ is a classic example of the maxim: bad prosecutions make bad precedents. In 1973, Ben Diaz was charged under the Antiquities Act with appropriating objects of antiquity, consisting of religious artifacts approximately four years old,⁹⁹ from a cave on the San Carlos Apache Indian Reservation in Arizona. A local attorney saw them on display in a suburban Phoenix gallery and offered to buy them for \$1,200, but Diaz wanted a higher price. The attorney reported the incident to the FBI. Subsequently, two agents went to Diaz's home to pose as potential buyers. After showing the agents his wares, Diaz was arrested.¹⁰⁰

Diaz consented to trial before a United States magistrate,¹⁰¹ who found him guilty and assessed a \$500 fine. He appealed to the district court on the grounds, *inter alia*, that the magistrate erroneously held "that any object less than five years old is an 'object of antiquity' "¹⁰² under the terms of the Antiquities Act. At trial, the government's expert witness, Dr. Keith Basso, Professor of Anthropology at the University of Arizona, testified that "something made today could very easily become an 'antiquity' tomorrow,"¹⁰³ due to its classification in long-standing tribal or religious customs, and

felony conviction in the nation. The bottom line in obtaining guilty verdicts is changing jurors' perception that the crime is not serious and does not affect jurors personally. Until archaeophiles make headway in this area, they are doomed to frustration and failure. *United States v. Cortiana*, CR. No. 87-122 (D.C. Ariz. 1987) is a recent case where prosecution failed. See generally K. Rogers, Practical Problems in A.R.P.A. Prosecutions (Apr. 1986) (unpublished paper, presented at the American Archaeology's Annual Meeting).

⁹⁷ 16 U.S.C. §§ 470aa-470ll (1982).

⁹⁸ 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).

⁹⁹ The artifacts included "face masks, headdresses, ocotillo sticks, bull-roarers, fetishes and muddogs." 368 F. Supp. at 857.

¹⁰⁰ *Id.*

¹⁰¹ This is a permissible request under 18 U.S.C. § 3401 (1982).

¹⁰² *Diaz*, 368 F. Supp. at 857.

¹⁰³ *Id.* at 858.

that in his opinion, Diaz's artifacts were antiquities. In addition, Dr. Basso stated:

They [the artifacts] are not of the present. They are very much of the past and they are . . . viewed by Apaches as articles which are, if left alone, able to return to nature, to their former state, to disintegrate slowly according to the natural processes of time, and to that extent to return to the past from whence they came. This, too, is a religious tenant [*sic*] of the people involved.¹⁰⁴

The district court held that based on this expert opinion, and the "uniqueness" of the objects themselves, the magistrate's ruling would stand. However, the circuit court rejected this argument.¹⁰⁵ The appellate court's analysis rested on the "void for vagueness" doctrine articulated by the Supreme Court in *Grayned v. City of Rockford*.¹⁰⁶

Notwithstanding its verbal support for the protection of Native American cultural remnants against commercial plundering, the appeals court appeared more concerned about the innocent amateur collector.

One must be able to know, with reasonable certainty, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he found them 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 In our judgment the statute, by use of undefined terms of uncommon usage, is fatally vague¹⁰⁷

Since the vagueness doctrine requires interpretation within the factual context of each case,¹⁰⁸ the court of appeals' analysis in *Diaz* was legally sound. However, the holding was not restricted to its facts in subsequent proceedings. The *Diaz* case set an unfortunate precedent which other courts too readily cited.¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

¹⁰⁶ *Id.* at 114-15 (construing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

¹⁰⁷ *Diaz*, 499 F.2d at 114-15. The government did not seek review of the decision. In retrospect, federal prosecutors should have charged Diaz with violating a more generally applicable criminal statute, such as one prohibiting theft from an Indian tribal organization. See 18 U.S.C. § 1163 (1982).

¹⁰⁸ *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32-33 (1963); *United States v. Raines*, 362 U.S. 17, 22 (1960).

¹⁰⁹ See, e.g., *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing*

Although there were some successful prosecutions of pothunters,¹¹⁰ there were more cases like *United States v. Camazine*¹¹¹ where, despite overwhelming evidence and supportive facts, pothunters were allowed to pillage with impunity. The defendant, Scott Camazine, a Harvard medical student, was charged with unlawful excavation of a prehistoric ruin on the Zuni Indian reservation. Despite testimony of two experts that the ruin and artifacts involved dated from between A.D. 1100-1200, the magistrate accepted the defense argument that the Antiquities Act was unconstitutionally vague and dismissed the charges.¹¹² Because the court did not rule on the motion to dismiss until after the government had presented its evidence, double jeopardy attached. Consequently, there was no appeal.

Two months after *Camazine*, another case arose in New Mexico which presented the United States Attorney's Office in Albuquerque with an opportunity to seek a more favorable judicial decision in district court.¹¹³ In October 1977, Forest Service officers on the Gila National Forest observed recent pothunting activity at a prehistoric Mimbres ruin. Distinctive tire tracks led to the site which was posted with signs. Almost one thousand artifacts were found scattered around the site, including pottery shards, stone implements, skeletal remains, and shell fragments. A pickup truck was found parked in a nearby gully. A search for the registration of the abandoned vehicle revealed the owner as Byron May of Deming, New Mexico. In addition, on the front seat of the vehicle, officers found a photograph of May "standing with a skull on his head and on each shoulder. He was holding skeletal bones in his hand."¹¹⁴ May was apprehended and later confessed to digging for artifacts with William Smyer.¹¹⁵

Vessel, 569 F.2d 330, 340 n.24 (5th Cir. 1978); *United States v. Jiminez*, 454 F. Supp. 610, 613 (M.D. Tenn. 1978).

¹¹⁰ See, e.g., *United States v. Quarrell*, Crim. No. 76-4 (D.N.M. 1976).

¹¹¹ *United States v. Camazine*, reported in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 78 (1980) (U.S.D.A. Forest Service, Southwestern Region).

¹¹² *Id.*

¹¹³ *United States v. Smyer*, Crim. No. 77-284 (D.N.M. 1977), *aff'd*, 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979).

¹¹⁴ 596 F.2d at 943.

¹¹⁵ May admitted that he and Smyer had been digging for Indian artifacts for several weeks. The men sold two bowls recovered from the ruin for \$4,000. May took the officer to Smyer's house, where he gave several artifacts to the officer. Several days later, Smyer was interviewed and confirmed May's statement. On November 7, two Forest Service officers and two archaeologists returned to

Smyer and May were charged in an eleven-count misdemeanor Information under the Antiquities Act.¹¹⁶ In response to a dismissal motion based on *Diaz*, the prosecution submitted a modified "Brandeis brief" criticizing the Ninth Circuit's reasoning. The prosecution's brief marshalled all the evidence of the artifacts' obvious antiquity and noted that Smyer and May were experienced commercial pottery hunters, not innocent tourists.¹¹⁷ This broadside approach proved effective. The district judge convicted the defendants and sentenced them to serve ninety days concurrently on each count.¹¹⁸

On appeal, the Court of Appeals for the Tenth Circuit took issue with the Ninth Circuit's earlier opinion which had found the Antiquities Act too vague.¹¹⁹ Citing Webster's Dictionary, and facts which contrasted Smyer and May's activities with those in *Diaz*, the court held that the "[a]ct gives a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial grounds and appropriating 800-900 year old artifacts is prohibited."¹²⁰

Smyer's home with a search warrant and seized 31 Mimbres bowls. One of the bowls matched shards found earlier at the ruin. Collins & Green, *A Proposal to Modernize the American Antiquities Act*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 55, 59 (1980) (U.S.D.A. Forest Service, Southwestern Region).

¹¹⁶ Counts I and II alleged unlawful excavation of two adjacent sites abandoned since approximately 1200 A.D. and Counts III-XI focused on specific "objects of antiquity" 800-900 years old which the defendants possessed. *Id.* at 59.

¹¹⁷ According to one source, the brief concluded with the following quote:

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 in these swift raids. Great chunks of knowledge have also disappeared forever.

Id. at 59-60.

¹¹⁸ Order, *Smyer*, Crim No. 77-284, reprinted in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 84 (1980) (U.S.D.A. Forest Service, Southwestern Region).

¹¹⁹ *United States v. Smyer*, 596 F.2d 939, 941 (10th Cir.), cert. denied, 444 U.S. 843 (1979).

¹²⁰ *Id.* at 941. After the defendants served their 90 days in jail, the Forest Service filed a civil complaint for \$76,348.05. The complaint was eventually settled out of court for \$7,000. CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 73-75, 78 (1980) (U.S.D.A. Forest Service, Southwestern Region) [hereinafter CULTURAL RESOURCES]. It is difficult for civil claims to keep pace with the artifact market. For instance, in 1980 "the value of prehistoric pottery in

Two months after *Smyer*, more depredators were discovered in Ninth Circuit territory. In *United States v. Jones*,¹²¹ the prosecution had a wealth of incriminating evidence, complete with photographs that the three defendants had taken of themselves at the site with the artifacts and ancient human remains. The site was posted, the defendants were observed digging in it, and a team of archaeologists documented the prehistoric evidence and the damage done.¹²²

The United States Attorney's Office in Phoenix decided to circumvent the *Diaz* ruling by prosecuting the defendants under the garden-variety felony criminal code provisions concerning theft and destruction of government property.¹²³ The United States Attorney's Office in Oregon had tried this approach with success, but since the defendants in Oregon pled guilty, there was no court ruling on its legal merits.¹²⁴ The defense attorneys for the Phoenix defendants cried foul, claiming that the Antiquities Act was the exclusive means for prosecuting pothunting violations. The trial judge agreed and granted the defendants' motion to dismiss.¹²⁵

In his opinion, District Judge Copple reasoned:

In 1906, the Antiquities Act was conceived as a comprehensive plan to deal with the preservation of ruins on the public lands . . . In-

Phoenix or Albuquerque runs about \$2,000 to \$7,000 for a complete Mimbres black-on-white bowl, \$1,000 to \$1,500 for a Sikyatki Polychrome vessel, and effigy-forms bring approximately \$2,000 to \$3,500. Prices on either coast are 25 to 50 percent higher than these. Thus, it becomes readily apparent to the pothunter that with the risk of only a moderate fine or sentence, it is lucrative to continue vandalizing sites." Anderson, *The Antiquities Act of 1906 and Problems with the Act*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 52, 53 (1980) (U.S.D.A. Forest Service, Southwestern Region).

¹²¹ 449 F. Supp. 42 (D. Ariz. 1978), *rev'd*, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). The factual background of the case is recounted at length in McAllister, *Smokéy and the Looters: The Jones-Gevara Pothunting Case, December 1977-June 1980*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 44, 44 (1980) (U.S.D.A. Forest Service, Southwestern Region).

¹²² McAllister, *supra* note 121, at 44.

¹²³ 18 U.S.C. §§ 641, 1361 (1982). For a discussion of Title 18 as a prosecutorial weapon against pothunters see *infra* notes 212-47 and accompanying text.

¹²⁴ See *United States v. Sheridan*, No. 78-103 (D. Or. 1978). The facts of this case are described in: Friedman, *Cultural Resource Protection in Hells Canyon National Recreation Area or How Much Does an Artifact Cost*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 34, 34 (1980) (U.S.D.A. Forest Service, Southwestern Region); see also *United States v. Thompson*, No. 79-25 (D. Or. 1979).

¹²⁵ *Jones*, 449 F. Supp. at 46. This decision immediately galvanized the lobby for new archaeological resources protection legislation. See McAllister, *supra* note 121, at 48.

deed, the departments of government have promulgated rules and regulations, consistent with the intent of Congress, to preserve American antiquities. The Antiquities Act is thereby the exclusive means by which the government could prosecute the conduct alleged in this action. The holding in *Diaz* . . . leaves a hiatus which Congress should correct by appropriate legislation.¹²⁶

Judge Copple's ruling demoralized the archaeological community and stirred comment in the media in the Southwest.¹²⁷ On appeal, the Ninth Circuit realized the Catch-22 it had spawned and reversed Judge Copple's order exactly one week prior to ARPA's passage.¹²⁸

The court's analysis was succinct, leaving little fodder for petitions to the Supreme Court. The opinion simply stated: (1) "the ruins located in the Tonto National Forest and the relics found on the ruins are the property of the United States government;¹²⁹ (2) given the lack of legislative history as to the interplay between federal criminal statutes and the Antiquities Act, "we cannot find that Congress intended to disallow the use of the more general statute;"¹³⁰ and (3) since the general statutes require proof of specific intent, accompanied by heftier penalties, as contrasted with the general intent provisions of the Antiquities Act, "there exists a rational statutory framework in which the degree of punishment corresponds to the presence of specific intent."¹³¹

By the time the Supreme Court declined to review *Jones*, ARPA had become law. A new trial date was set for the three defendants in May 1980. Plea negotiations re-commenced, and all three defendants, anxious to avoid ten-year criminal sentences¹³² petitioned the court to accept their guilty pleas under ARPA with the consent

¹²⁶ *Jones*, 449 F. Supp. at 45-46 (citations omitted).

¹²⁷ "The press responded . . . with a gratifying editorial outcry to the effect that archaeological sites in Arizona and the Ninth Circuit were now totally unprotected from looters. Unfortunately this also notified pothunters of this fact and we suspect that looting on Federal land intensified as a result." McAllister, *supra* note 121, at 48.

¹²⁸ *United States v. Jones*, 607 F.2d 269 (9th Cir. 1979).

¹²⁹ *Id.* at 272.

¹³⁰ *Id.* at 273.

¹³¹ *Id.* at 274. This same rationale has also been used by the Ninth Circuit in affirming convictions involving general criminal statutes and other specific laws. See, e.g., *United States v. Mackie*, 681 F.2d 1121 (9th Cir. 1982) (Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) (1982)); *United States v. Hughes*, 626 F.2d 619, 623-25 (9th Cir.) (Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40 (1982)), *cert. denied*, 449 U.S. 1065 (1980).

¹³² The maximum sentence under the sections charged was 10 years. 18 U.S.C. §§ 641, 1361.

of the United States Attorney.¹³³

Considerable national media attention was focused on the sentencing, especially since press photographers had obtained copies of the lurid photographs the defendants had taken of themselves with prehistoric human remains.¹³⁴ Robert Gevara received a split sentence¹³⁵ and a fine of \$1,000. Kyle Jones was sentenced to the maximum one year in jail pursuant to his misdemeanor plea, and also fined \$1,000. Judge Copple sentenced Thayde Jones, who pled guilty to the ARPA felony,¹³⁶ to serve eighteen months in prison and pay a \$1,000 fine. In the end, the defendants were released from confinement after serving approximately two-thirds of the terms imposed. They eventually paid the fines, and no civil action was pressed.¹³⁷

Since the *Jones* ruling dealt only with the Antiquities Act, conceivably the Ninth Circuit, among others, can decide that Congress meant ARPA to be *the* law in cultural resource protection. There is some legislative history to support this view, but prosecutors in Arizona, California, Colorado, Oregon, and Utah continue to use general criminal statutes in combination with ARPA for strategic purposes, particularly for plea-bargaining and as fallbacks in cases where legal problems develop with ARPA.

II

VISIGOTHS REVISITED—ARPA AT LAST!

A. *Legislative Highlights and Illusory Concessions to Collectors*

Unlike the protracted passage of the first antiquities legislation at the turn of the century, ARPA¹³⁸ passed through Congress in only one session. Representative Morris Udall of New Mexico introduced the House bill in February 1979, and the bill passed by the

¹³³ McAllister, *supra* note 121, at 49.

¹³⁴ *E.g.*, *Grave Robbers in the Southwest*, NEWSWEEK, June 23, 1980, at 31; *Three Artifact Thieves Sent to Prison for Rifling Arizona Indian Ruins*, N.Y. Times, June 7, 1980, at 6, col. 4.

¹³⁵ Six months in prison followed by a period of probation pursuant to 18 U.S.C. § 3651 (1982). See CULTURAL RESOURCES, *supra* note 120, at 77.

¹³⁶ The maximum penalty under the act is two years imprisonment and/or a \$20,000 fine. 16 U.S.C. § 470ee(d). Thayde Jones had a prior conviction under the Utah antiquities statute. See CULTURAL RESOURCES, *supra* note 120, at 77.

¹³⁷ Personal communication with U.S. Attorney's Office, Phoenix, Ariz. (May 5, 1984).

¹³⁸ 16 U.S.C. §§ 470aa-470ll (1982).

end of October, 1979.¹³⁹

ARPA's legislative history¹⁴⁰ is replete with expressions of hope that the 1980s will witness a new era of cooperation between private individuals and entities, and the federal government.¹⁴¹ The regulatory terms of ARPA are preceded by four specific congressional findings:

1. archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;
2. these resources are increasingly endangered because of their commercial attractiveness;
3. existing federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and
4. there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.¹⁴²

ARPA reinforces the fourth finding by requiring that federal authorities take specific steps toward cooperating with private individuals.¹⁴³ ARPA concludes by mandating the Secretary of Interior to report annually on the success of its mediation efforts relating to cooperation with private individuals.¹⁴⁴

¹³⁹ See 1979 U.S. CODE CONG. & ADMIN. NEWS 1709. The final version passed was S. 490, 96th Cong., 1st Sess. (1979).

¹⁴⁰ ARPA's legislative history was influenced by several key people. A nucleus of ARPA drafters and lobbyists had formed in the mid-1970s in New Mexico to begin the process of preparing and seeking passage of ARPA. Included within this group were Robert Collins, the Assistant United States Attorney who prosecuted *United States v. Smyer*, No. 77-284 (D.N.M. 1977), *aff'd*, 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979); Dee Greer, regional archaeologist for the Forest Service in Albuquerque, and Mark Michel, who was then a lobbyist for the Society for American Archaeology. Mark Michel is currently president of the Archaeological Conservancy in Santa Fe. For an insider's view of the passage of ARPA, see Collins and Michel, *Preserving the Past: Origins of the Archaeological Resources Protection Act of 1979*, 5 AM. ARCHEOLOGY 84 (1985).

¹⁴¹ See 1979 U.S. CODE CONG. & ADMIN. NEWS 1709; Letter from Congressmen John Rhodes and Morris Udall to "Colleague" (July 5, 1979). 16 U.S.C. § 470aa(b) memorialized this wishful thinking, announcing that part of ARPA's purpose is "to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data"

¹⁴² 16 U.S.C. § 470aa(a).

¹⁴³ *Id.* § 470jj.

¹⁴⁴ *Id.* § 470ll. Former Secretary of Interior James Watt may have the distinction of being the first cabinet officer to violate this section of ARPA. Interior's Annual Reports for 1980, 1981 and 1982 are silent on this issue.

The cooperation required by ARPA was stymied from the outset due to the first definition contained in the Act:

(1) The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such regulations . . . shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens . . . shall not be considered archaeological resources . . . unless found in an archaeological context. No item shall be treated as an archaeological resource . . . unless such item is at least 100 years of age.¹⁴⁵

Implementing agencies spent years trying to promulgate regulations containing an adequate definition of "archaeological resource." Consequently, agencies were not cooperating to enforce the law, rather they were working on defining its terms. During this time, the federal government was greatly criticized for its efforts and was losing criminal ARPA cases as a result.¹⁴⁶ Congress further directed that those portions of ARPA not dependent on the promulgation of regulations would go into effect on October 31, 1979.¹⁴⁷

Criminal prosecution under ARPA requires that the government prove three elements: (1) that the defendant(s) knowingly excavated, removed, damaged, altered or defaced an archaeological resource; (2) that the resource was on public or Indian lands;¹⁴⁸ and (3) that it was done without a permit.¹⁴⁹ Criminal penalties are dependent upon the value of the archaeological resource and restoration or repair costs. If the value of the resource and the repair costs exceed \$5,000, the maximum penalty is a fine of \$20,000 or two years imprisonment or both.¹⁵⁰ If the value or damage involved is

¹⁴⁵ 16 U.S.C. § 470bb(1).

¹⁴⁶ See cases cited *supra* note 96.

¹⁴⁷ 16 U.S.C. § 470ee(e). Provisions which required the promulgation of regulations were to be covered by the Antiquities Act during the interim. Excavation and removal provisions are largely covered by regulation. *Id.* § 470cc(h). Consequently, permits issued under the Antiquities Act remained valid.

¹⁴⁸ "Public lands" is defined in 16 U.S.C. § 470bb(3) and "Indian lands" in *id.* §§ 470bb(4).

¹⁴⁹ *Id.* § 470ee(a).

¹⁵⁰ *Id.* § 470ee(d). The legislative history is unclear, and no court has yet decided whether this language refers to both the misdemeanor and the felony provi-

less than \$5,000, the maximum penalty is halved.¹⁵¹ In addition, ARPA provides an enhanced penalty of five years imprisonment and/or a \$100,000 fine upon any "second or subsequent such violation."¹⁵² The method of estimating damage and value amounts has been the subject of much concern to potential expert witnesses¹⁵³ and federal prosecutors have discovered that convincing juries of this calculation is the most difficult aspect of an ARPA case. However, Assistant United States Attorneys in Arizona have experienced the least difficulty with ARPA's "resource" and "value" elements. This may result from ARPA's genesis in the Southwestern United States and its apparent emphasis on artifacts found in pueblo-type ruins.¹⁵⁴ Nevertheless, the method of estimating damage and value amounts may be the downfall of ARPA.¹⁵⁵

Despite various impediments to a successful prosecution, ARPA is worthwhile because of its trafficking provisions. For the first time in United States history, the actual or offered sale, purchase, exchange transportation or receipt of an archaeological resource taken from public or Indian lands is a clear violation of federal criminal law.¹⁵⁶ Moreover, if a resource is taken in violation of *any* state or

sions. The only case in which an opportunity to test this provision has arisen was handled as a parole violation. See Green and Hanks, *supra* note 96, at 104.

¹⁵¹ 16 U.S.C. § 470ee(d).

¹⁵² *Id.*

¹⁵³ See Green, *Prosecuting under ARPA: What To Do Until the Regulations Arrive*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 64, 66-70 (1980) (U.S.D.A. Forest Service, Southwestern Region).

¹⁵⁴ Southwestern archaeologists and prosecutors insist that ARPA has had a significant impact and cite *United States v. Rahn*, No. 82-72 (D. Ariz. 1982), and other cases in Arizona as examples of its successful implementation. However, there have been no prosecutions in New Mexico, and Utah has had major setbacks.

¹⁵⁵ In *United States v. Bender*, 81-119-BE (D. Or. 1981), a hole in the bottom of a prehistoric rock shelter was valued at approximately \$9,000 by two expert witnesses, but the jury would not accept this estimate. In *United States v. Jaques*, 83-129fr (D. Or. 1983), the jagged pothole in an open wildlife refuge site "squared off" to an archaeologist's preferred measure of a meter was estimated by the expert as representing approximately \$7,500 in damage. Again, the jury did not accept this figure. *Id.* An analysis of the methods of computing damage to archaeological resources is beyond the scope of this article. It is enough to note the bottom line of these calculations; a jury must often be asked to find that a square meter pothole represents roughly \$7,000 worth of damage. If that hole did not happen to be made in the wall or the floor of a kiva or some such obvious resource, jurors will be further called upon to imagine what wonders a professional team of archaeologists could uncover in a wheelbarrow full of ordinary-appearing dirt.

¹⁵⁶ ARPA disallows the sale, purchase, exchange, transport, or receipt of any archaeological resource if it was excavated or removed in violation of "any provision, rule, regulation, ordinance or permit in effect under any other provision of Federal law." 16 U.S.C. § 470ee(b)(2).

local law and then transported or advertised in interstate or foreign commerce, it is likewise a federal crime.¹⁵⁷

ARPA is the first federal antiquities preservation law to focus on entrepreneurs. ARPA provides the means to hold accountable the private "museums" scattered throughout small western towns which often provide the illegal market for pothunters. Thus armed, federal law enforcement officers can attempt to penetrate the infamous back rooms of some of the scofflaw trading posts; the sophisticated suburban galleries of "primitive art"; and the rented motel rooms of travelling private dealers. The hitch comes in proving that an artifact was taken from public or Indian lands. Trading post displays do not typically contain precise provenance certification.

If an artifact's source can be proven, however, then the seller or purchaser must ascertain whether any federal, or in the case of interstate commerce, state or local law was violated. Because ARPA is a general, not a specific, intent statute, a defendant may be convicted if he acted of his own volition and was aware of the acts he was committing.¹⁵⁸ ARPA's promoters hoped that these trafficking provisions would have a chilling effect on dealers and collectors.¹⁵⁹

Another worthwhile provision in ARPA is its reward system.¹⁶⁰ One-half of a civil or criminal penalty up to \$500 can be paid to private citizens who give information leading to a conviction.¹⁶¹ While this provision has produced complaints from artifact collectors that their friends and neighbors will rat on them during harsh economic times, only two cases of penalty awards to private citizens have been reported in almost eight years of ARPA's operation.¹⁶²

Artifact collectors and other proponents weakened ARPA to some extent through the insertion of six exemptions. Two of those

¹⁵⁷ *Id.* § 470ee(c). Approximately 26 states have some form of cultural resource legislation. See, K. MEYER, *supra* note 72, at 201-02 (summarizes state cultural resource legislation).

¹⁵⁸ H.R. REP. NO. 311, 96th Cong., 1st Sess. 11, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 1709, 1714.

¹⁵⁹ R. COLLINS, THE MEANING BEHIND ARPA: HOW THE ACT IS MEANT TO WORK 4-6 (July 1980) (U.S.D.A. Forest Service, Southwest Region); S. REP. NO. 179, 96th Cong., 1st Sess. 9 (1979).

¹⁶⁰ 16 U.S.C. § 470gg(a).

¹⁶¹ *Id.* Originally, ARPA called for a \$1,000 reward, but "several members of Congress feared the higher figure might encourage vigilante-type activity" or, more likely, "frivolous allegations." R. COLLINS, *supra* note 159, at 7-8.

¹⁶² See *Government Rangers Pursue Robbers of Ancient Indian Graves in Southwest*, N.Y. Times, June 23, 1980, at A14, col. 4; Letter from William Penn Mott, Jr., Director of the National Park Service, to Senator Pete Domenici (Mar. 13, 1987) [hereinafter Mott letter].

exemptions are substantive. The rest, however, are illusory. The most obvious concessions are made to miners and private land owners who find themselves occupying a treasure trove of archaeological resources. Congress explicitly excluded them from its statutory definition of depredator.¹⁶³ Thus, ARPA is powerless with respect to these sacred cows.

A third group which sought exclusion or "grandfathering" received a hollow concession. Section 470ee(f) states that persons who have "an archaeological resource which was in the lawful possession of such person prior to October 31, 1979" are exempted from the federal trafficking provisions.¹⁶⁴ This exception, however, is based on a fallacy since no person could be in possession of any artifact taken without a permit from federal lands prior to 1979 without violating general criminal statutes and regulations prohibiting theft and destruction of government property.¹⁶⁵ ARPA drafter Robert Collins gleefully confirmed this point:

At first glance, this subsection appears to permit one to sell or purchase artifacts after the date of the passage of the Act if they were possessed prior to the date of the passage of the Act, even though they may have been taken illegally from Federal property. However, a closer analysis of the subsection shows that a person must be in "lawful" possession of the artifact. One cannot have "lawful" possession of an archaeological resource that has been taken illegally from Federal property. Therefore, one cannot traffic in illegally obtained artifacts at any time after the date of the enactment of the Act, even though he had possession of the artifact prior to the Act's passage.¹⁶⁶

The last three exemptions are a result of particular lobbyists' efforts to get "insignificant" items excluded from the definition of an archaeological resource.¹⁶⁷ Accordingly, Congress deleted from ARPA: (1) "[n]on-fossilized and fossilized paleontological specimens . . . unless found in [an] archaeological context";¹⁶⁸ (2) surface collection of arrowheads;¹⁶⁹ and (3) "collection for private purposes

¹⁶³ 16 U.S.C. § 470kk(a), (c).

¹⁶⁴ *Id.* § 470ee(f).

¹⁶⁵ For a discussion of the illegalities of artifact taking prior to 1979 see *supra* notes 5-137 and accompanying text.

¹⁶⁶ R. COLLINS, *supra* note 159, at 6-7.

¹⁶⁷ See, e.g., Gamish, IN GEAR 4 (Dec. 1979) ("The National Outdoor Coalition in conjunction with the American Metal Detector Manufacturers launched a lobbying effort to protect amateur collectors who wished to continue to pursue their collecting on public lands and whose activities would not disturb true archaeological sites.").

¹⁶⁸ 16 U.S.C. § 470bb(1) (emphasis added).

¹⁶⁹ *Id.* §§ 470ee(g), 470ff(a)(3) (emphasis added).

of any rock, coin, bullet, or mineral which is not an archaeological resource. . . .¹⁷⁰

Fossil hunters, arrowhead collectors, metal detector "coin-shooters," and rock hounds could have claimed absolute victory in these exemptions absent the emphasized portions. Experience, however, reveals that any of those items will most assuredly be found in a larger archaeological context which cannot legally be disturbed in the course of searching for exempted items. Moreover, ample regulations within each individual agency cover items, such as arrowheads, which may appear to have been declared fair game by the passage of ARPA.¹⁷¹ As a result, the exemptions in ARPA, though substantial, are not as destructive as they at first appear.

B. The Politics of Promulgating Regulations

The United States Attorney's Office in Arizona, which had been instrumental in securing ARPA's enactment, predicated that agency regulations implementing ARPA would be completed by September of 1980.¹⁷² After all, it took the same departments only six months to pass similar regulations under the Antiquities Act. Fortunately, Congress, using unusual foresight, did not make all the portions of ARPA dependent on the promulgation of regulations.¹⁷³

¹⁷⁰ *Id.* § 470kk(b) (emphasis added).

¹⁷¹ Solicitors for the Departments of Interior and Agriculture have emphasized that agency regulations prohibit taking arrowheads from public lands. *See infra* notes 286-342 and accompanying text. In cases where an extremely valuable projectile point is discovered (such as a prehistoric Clovis point made from non-indigenous semi-precious stone) other statutes can also be invoked. *E.g.*, 18 U.S.C. § 641 (1982); *see infra* notes 212-46 and accompanying text.

¹⁷² Letter from United States Attorney; Phoenix, Ariz., to Agencies (June 3, 1980). ARPA directs that:

(a) The Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority, after consultation with other Federal land managers, Indian tribes, representatives of concerned State agencies, and after public notice and hearing, shall promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this chapter. Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act

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

16 U.S.C. § 470ii.

¹⁷³ 16 U.S.C. § 470ee(e) (prohibitions against trafficking took effect on Oct. 31, 1979). However both the House and Senate rejected amendments which would have eliminated the list of archaeological resources contained in 16 U.S.C. § 470bb(1), instead leaving the definition up to legislative action, thereby causing a

Nonetheless, at least four ARPA cases were lost for lack of defining regulations,¹⁷⁴ and defense attorneys consistently raised the issue.¹⁷⁵ It is an issue on which most defendants should not legally prevail and which prosecutors should not have had to fight.

After ARPA became law, federal agencies convened an inter-agency rule-making task force to concentrate on "basic government-site standards for the issuance of permits and for the implementation of civil penalty provisions."¹⁷⁶ However, the bulk of the task force's time was taken up with the definition of "archaeological resource."¹⁷⁷ Public hearings were held in various locations between March and April 1980;¹⁷⁸ proposed rules were published on January 19, 1981;¹⁷⁹ more public hearings were held during the sixty-day comment period;¹⁸⁰ and the comment period was then extended until April 1981.

The task force spent an inordinate amount of time redefining three specific areas of exemptions contained in the Act, and on efforts to delete additional items from ARPA's purview. The Tennessee Valley Authority was particularly concerned with giving itself discretion to declare resources under its jurisdiction not "of archaeological interest." Those efforts resulted in a new catchall exemption in the definition of "archaeological resource" which has the potential for wreaking havoc with criminal prosecutions and seriously undermining ARPA's authority.

The task force made the mistake of following ARPA's example of defining archaeological resources by using a "laundry list" approach. There are three major weaknesses to this approach. First, it invites defenses differentiating the resource at hand in some detail from the specific list. Second, in its effort to be exhaustive, the task force opened ARPA to ridicule by including such items as "copro-

delay. See S. REP. No 179, 96th Cong., 1st Sess. 6 (1979) (outlines proposed amendments).

¹⁷⁴ See cases cited *supra* note 96.

¹⁷⁵ See cases cited *supra* note 96.

¹⁷⁶ NATIONAL PARK SERVICE, 36 C.F.R. PT. 69, 1979 FINAL UNIFORM REGULATIONS 3 (1983) [hereinafter NPS letter] (available at the National Park Service, Archaeological Assistance Division, Washington D.C.).

¹⁷⁷ *Id.* at 8.

¹⁷⁸ Hearings were held in Denver, Colorado; Phoenix, Arizona; Portland, Oregon; and Knoxville, Tennessee. 46 Fed. Reg. 5,566 (1981).

¹⁷⁹ *Id.*

¹⁸⁰ These additional public hearings were held in Chicago, Ill.; Atlanta, Ga.; Albuquerque, N.M.; San Francisco, Cal.; Anchorage, Ala.; and Denver, Colo. *Id.*

lites"¹⁸¹ thereby appearing to give them the same consideration as "ceremonial structures." Third, the rule-makers cannot possibly keep pace with what is "of archaeological interest" to the scientific establishment as the latter's technology improves.

Eventually ARPA's statutory exemptions surfaced in the regulations with only slight variations. One variation dealt with non-fossilized paleontological specimens. The task force originally proposed that "paleontological remains" be included in the definition of prohibited items "only when they are found in a direct physical relationship with archaeological resources."¹⁸² However, in the final version published three years later, "paleontological remains" were shifted to a new section,¹⁸³ clearly setting them apart from the list of archaeological resources. In its supplementary information summary, the committee noted:

What is not an "archaeological resource" is included in a separate subparagraph . . . responding to comments that certain items had been listed, apparently counter to direction in the Act. Because of the way the definition was structured in the proposed rules, inclusion was appropriate since those items might be "archaeological resources" under certain circumstances. In the revised structure, paleontological remains . . . are definitely stated not to be archaeological resources themselves, unless they are located in immediate association with archaeological resources.¹⁸⁴

During rule-making hearings, the comments surrounding the surface collection of arrowheads were most extensive. The original rule-makers made frequent reference to the "high level of concern" on the part of hobbyists who collect a variety of items which might be considered "archaeological resources."¹⁸⁵ Hobbyists' lobbyists suggested that "surface collection of arrowheads should be given blanket exclusion from protection."¹⁸⁶ The task force rejected this notion and deliberately included arrowheads as an "archaeological resource," asserting that "their removal without a permit is in violation of prohibitions in the Act and the proposed regulations; and

¹⁸¹ Even one of the Act's most ardent supporters could not resist poking fun at archaeology's fascination with excrement: "Although the original draft of the bill included "feces" as an "archaeological resource," Congress excluded feces in the final bill, apparently believing that not all old objects are worthy of protection and preservation." R. COLLINS, *supra* note 159, at 4.

¹⁸² 46 Fed. Reg. 5,570 (1981).

¹⁸³ 43 C.F.R. § 7.3(a)(4)(i) (1987).

¹⁸⁴ NPS letter, *supra* note 176, at 9.

¹⁸⁵ 46 Fed. Reg. 5,567 (1981).

¹⁸⁶ *Id.*

they remain the property of the United States or the Indian individual or . . . tribe. . . ."¹⁸⁷ The concluding paragraph of the original task force's commentary highlighted the significance of this issue where it iterated its stance on arrowheads, coupled with a description of other agency regulations which also prohibit artifact removal of any kind.¹⁸⁸

The final version of the ARPA regulations pertaining to arrowheads reaffirmed the task force's resistance to lobbyists' efforts to legitimize these kinds of collections.¹⁸⁹ The definition of arrowhead, however, was changed from highly technical language to lay terms,¹⁹⁰ in recognition of "congressional intent . . . to protect unwary recreationists from the heavy fines and other punishment that might be levied under the Act"¹⁹¹ This was one of the most hotly contested provisions in the rule-making process, but neither side gained ground over what had already been a compromise in Congress between forces for total inclusion and total exclusion of "arrowhead" from items deemed to be "of archaeological interest."

The last definitional controversy involved rocks, coins, bullets, and minerals. These items were treated like paleontological specimens in the new subparagraph after the laundry list of included items, with the addition of the adjective "unworked" to modify "minerals and rocks." In deference to the metal detectors' lobby, a concluding section was added to the congressional transmittal.¹⁹²

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 5,569.

¹⁸⁹ NPS letter, *supra* note 176, at 11.

¹⁹⁰ 43 C.F.R. § 7.3(b) (1987) (arrowhead is defined as "any projectile point which appears to have been designed for use with an arrow").

¹⁹¹ NPS letter, *supra* note 176, at 11.

¹⁹² On the issue of metal detector use, the National Park Service wrote:

At the public hearings in March and April 1980 and during the commenting period, concern was expressed that the use of metal detectors and associated collector-hobbyist activities on public lands and Indian lands could be a major enforcement target of the Act and the regulations. Nothing in the Act or in these regulations addresses the use of metal detectors on public lands or Indian lands. In considering the legislation, Senator Dale Bumpers stated in the Congressional Record, 'This legislation does not affect the use of metal detectors on public lands. If it is legal to use metal detectors currently, this act does not diminish that use. If it is illegal to use metal detectors, as in national parks, this act does not allow such use.' (125 CRS 14711, October 17, 1979). The same is true of these regulations. However, while the use of metal detectors is neither authorized nor prohibited by the Act and those regulations, unauthorized excavation of archaeological resources discovered while using metal detectors is prohibited on public lands and Indian lands. Also, it is important for users of metal detectors and others to be aware that there are other

The weightiest concession which the collectors' lobby achieved is contained in a new subparagraph of the section defining archaeological resources. This embellishment is clearly the result of hobbyists working hand-in-hand with federal land managers worried about ARPA's implications for "recreational" activities. It allows land managers to "determine that certain material remains . . . are no longer of archaeological interest and are not to be considered archaeological resources . . ." ¹⁹³

Theoretically, this provision was inserted to accommodate hobbyists in collecting items "which had lost archaeological interest by reason of their dislocation," such as in the erosion of lake shores causing items to be "redeposited sufficiently out of context as to remove their information potential." ¹⁹⁴ The agencies which joined in urging this exemption were the United States Army Corps of Engineers and the Tennessee Valley Authority. Neither agency is known for the sophistication of its management in dealing with potential criminal violations since both must depend on others for law enforcement.

By giving authority to land managers to determine whether a specific item has lost its archaeological significance, the task force unwittingly provided numerous arguments for defendants wishing to avoid ARPA's penalties. One standard defense claim is that collectors contribute to the preservation of resources by preventing their disintegration in the wild. ¹⁹⁵ In addition, since middle level management decisions are often not subject to public scrutiny, it would not be at all surprising to find defense attorneys arguing that their clients interpreted something which was said by agency personnel in a field office as authorizing defendants' actions under this exemp-

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

Id. at 45-46.

¹⁹³ 43 C.F.R. § 7.3(5) (1987).

¹⁹⁴ NPS letter, *supra* note 176, at 9-10. *But see* SOPA NEWS, Mar. 1983, at 3 (arguing that "this kind of erosion literally creates collectors").

¹⁹⁵ NPS letter, *supra* note 176, at 10.

tion. Furthermore, defendants can argue that they were confused or unfairly discriminated against by contradictory signals from different areas.

Solicitors are well-advised to establish considerable constraint on managers' discretion at the district level. The Department of Interior has made a decent attempt to establish administrative oversight in its recent adoption of standard procedures for its own managers to follow in implementing these regulations.¹⁹⁶ Other departments need to do the same, and to compare notes on their practical application, so that the danger of the federal government speaking with forked tongue in this area is kept to a minimum.

C. Forfeiture Provisions: Pothunters' Pickups Bite the Dust

A study of several cultural resource vandalism cases in the Southwest catalogued the equipment commonly used by pothunters.¹⁹⁷ In addition to heavy machinery and bottomless tents, the most common vehicle in evidence at such sites is a pickup truck.¹⁹⁸

ARPA provides for the forfeiture of "all vehicles and equipment of any person which were used in connection with [an ARPA] violation," plus the forfeiture of any archaeological resource taken from the site.¹⁹⁹ It is unclear from the statute or the case law whether any such forfeiture must be noticed in an indictment, but the better practice is to give notice. Forfeitures may be sought by the United States upon: (1) a defendant's criminal conviction under ARPA; (2) assessment of an ARPA civil penalty; or (3) "a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation."²⁰⁰ This last determination may be made by an administrative law judge at the agency level, and is a powerful plea-bargaining tool for the prosecution.²⁰¹ In cases where an ARPA violation occurs on Indian lands, the Indian or the tribe is entitled to collect all civil penalties and forfeited items.²⁰²

¹⁹⁶ 52 Fed. Reg. 9,165 (1987) (to be codified at 43 C.F.R. §§ 7.31-.37).

¹⁹⁷ McAllister, *supra* note 121, at 28.

¹⁹⁸ *Id.*

¹⁹⁹ 16 U.S.C. § 470gg(b).

²⁰⁰ *Id.* Thus, according to one of ARPA's sponsors, "a person can have his two hundred thousand dollar bulldozer confiscated and forfeited . . . even if ultimately he was not convicted of a violation of the Act." R. COLLINS, *supra* note 159, at 7.

²⁰¹ See, e.g., *United States v. Schaff*, C.R. 83-129 (D. Or. 1983) (forfeiture proceeding against a vehicle was dropped in exchange for a guilty plea).

²⁰² 16 U.S.C. § 470gg(c).

During ARPA's consideration in Congress, the House Committee on Interior and Insular Affairs expressed the expectation that both courts and administrative law judges "would exercise their discretion to avoid unduly burdensome forfeitures of property belonging to persons who neither know nor could have known of the illegal activities."²⁰³ Obviously, it is the availability of agency forfeiture proceedings under ARPA which begins to give the Act some teeth beyond the minimal penalties which are often imposed. However, the most recent accounting to Congress disclosed that for fiscal year 1985, "\$20,158 worth of personnel [*sic*] property was seized by the Federal government as a portion of the penalty."²⁰⁴ Judging by the low value of confiscated property, it seems that the forfeiture provisions are not yet being fully utilized.

D. Civil Penalties

ARPA's civil provisions are completely dependent on the promulgation of regulations²⁰⁵ and hence were not enforceable for most of the first five years after ARPA's passage. In the interim, agencies sued pothunters using collections and trespass pleadings.²⁰⁶ The civil aspects of ARPA were not accorded much attention in its legislative history, but there is some scant testimony outlining potential applications:

The civil penalty section complements the criminal penalty section and provides the needed flexibility and variety of enforcement measures absent in the 1906 Antiquities Act. This section was designed primarily to provide an alternative to criminal penalties for the casual tourist and the non-commercial artifact hunter for whom imprisonment would be inappropriate. On the other hand, the civil penalties . . . can be assessed in addition to criminal sanctions in aggravated circumstances such as a case where commercial artifact hunters damage a site extensively while looting.²⁰⁷

The civil provisions employ the same cost estimates as the criminal section with the same definitional problems.²⁰⁸ Similarly, they provide for double penalties upon subsequent violations, and ex-

²⁰³ H.R. REP. NO. 311, 96th Cong., 1st Sess. 11, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 1709, 1714.

²⁰⁴ Mott letter, *supra* note 162, at 2; see also Burton, *Failure to Prosecute Violations of PL 96-95*, SOPANEWS, Mar. 1983, at 1.

²⁰⁵ 16 U.S.C. § 470ff(a)(2).

²⁰⁶ See 31 U.S.C. § 952 (1982); Green, *supra* note 153, at 68.

²⁰⁷ R. COLLINS, *supra* note 159, at 7.

²⁰⁸ 16 U.S.C. § 470ff(a)(2)(B); see *supra* notes 150-55 and accompanying text.

clude surface collection of arrowheads.²⁰⁹ Assessments may be appealed to the district courts, but the standard of review is "substantial evidence on the record considered as a whole."²¹⁰ Absent experience with actual civil ARPA cases, it is difficult to gauge the potential impact of civil penalties.²¹¹

III

OTHER ARROWS IN THE PROSECUTORIAL QUIVER AVAILABLE FOR ARCHAEOLOGICAL RESOURCE VIOLATIONS

A. General Federal Criminal Code Provisions and International Agreements

1. Title 18

If ARPA did not allow for the dual prosecutorial objectives of establishing precedents and enhancing second-conviction penalties, indictments alleging violations of the general criminal provisions of Title 18 of the United States Code would be the recommended course for federal prosecutors pursuing pothunters. Even with a viable ARPA count, however, pothunter prosecution under Title 18 does have certain advantages. The decision in *United States v. Jones*²¹² has given the judicial nod to this alternative. The elements of crimes alleged under sections 641, 1163, 1361, and 2314 of Title 18 are relatively straightforward and contain no complicated definitions to decipher. Moreover, the penalties provided are generally more severe than those in the resource-specific language of ARPA.²¹³

For instance, in the *Diaz*²¹⁴ case, had the defendant been charged with violating section 1163 of Title 18,²¹⁵ the jury would have been instructed to ascertain: (1) whether Ben Diaz had knowingly stolen

²⁰⁹ 16 U.S.C. § 470ff(a)(2)(B).

²¹⁰ *Id.* § 470ff(b)(1).

²¹¹ National Park Service statistics show that for fiscal year 1985, 15 civil cases arose, resulting in \$17,861 in collected fines. Mott letter, *supra* note 162, at 2.

²¹² 449 F. Supp. 42 (D. Ariz. 1978), *rev'd*, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980); see *supra* notes 97-109 and accompanying text.

²¹³ See generally 18 U.S.C. §§ 641, 1163, 1361, 2314 (1982).

²¹⁴ *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz.), *rev'd*, 499 F.2d 113 (9th Cir. 1974); see *supra* notes 97-109 and accompanying text.

²¹⁵ This provision provides:

Whoever embezzles, steals, knowingly converts to his use or the use of another, wilfully misapplies, or wilfully permits to be misapplied, any of the moneys, funds, credits, goods, assets or other property belonging to any In-

or converted to his own use, the religious artifacts in question at the time alleged; (2) whether the value of the property taken was more or less than one hundred dollars; and (3) whether the property taken belonged to an Indian tribal organization, as defined in the statute.²¹⁶ Had the judge or jury found these three elements proven beyond a reasonable doubt, as the facts of *Diaz* seem to indicate, *Diaz* could have been fined up to \$5000, imprisoned up to five years, or both.²¹⁷ Like ARPA, section 1163 also covers knowing receipt or concealment of artifacts, however, it is narrower than ARPA in that it does not proscribe excavation or other damage to sites where items of value are not taken.²¹⁸

The applicability of Title 18 is best illustrated by a prosecution under section 641²¹⁹ in a 1983 case from the Federal District of Colorado.²²⁰ On March 25, 1983, John Perkins and Peter Schier were charged in a three-count ARPA felony indictment for causing an estimated \$100,000 damage to the Chimney Rock archaeological area in the San Juan National Forest and with transporting the recovered artifacts in interstate commerce.²²¹ Because it was the first case of its kind in Colorado, the indictment was publicized with great fanfare.²²²

dian tribal organization or intrusted to the custody or care of any officer, employee or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another—

Shall be fined not more than \$5,000, or imprisoned not more than five 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

18 U.S.C. § 1163 (1982).

²¹⁶ *Id.*

²¹⁷ *Id.* (if the property was worth less than \$100, the potential penalty would be much less). One might question whether the penalties provided reflect a racist assessment of the value of Native American property, as they are only one-half the allowable maximums for theft and destruction of government property. See 18 U.S.C. §§ 641, 1361 (1982). However, the statute is probably more akin to 18 U.S.C. §§ 656, 661 (1982), which pertains to theft and embezzlement from banks or places within the special territorial jurisdiction of the United States, and have penalties identical to those in 18 U.S.C. § 1163.

²¹⁸ 18 U.S.C. § 1163.

²¹⁹ 18 U.S.C. § 641.

²²⁰ *United States v. Perkins*, No. 83-CR-101 (D. Colo. 1983).

²²¹ *Id.*

²²² See, e.g., *Artifact-taking Charged!*, *Idaho Statesman*, Mar. 30, 1983, at A9, col. 1.

Defense counsel immediately moved to dismiss the indictment, citing the vagueness of ARPA's terms and its lack of defining regulations.²²³ The government's feeble response apologized for "technical" mistakes in the indictment, and merely cited cases supporting the proposition that a charging instrument is sufficient "if it contains the elements of the offenses charged and fairly informs a defendant of the charge to permit the defendant preparation of defense and equip the defendant with sufficient facts to avoid double jeopardy."²²⁴ The response contained no argument of the facts of the theft itself, nor did it stress how the excavated artifacts were archaeological resources under ARPA.²²⁵ Additionally, the government did not utilize general criminal theft and destruction statutes as a fallback alternative to ARPA.

The indictment was dismissed one day after the government filed its response. The dismissal received similar publicity and quoted the defense attorney extensively about the deficiencies of ARPA.²²⁶ Rather than appeal the dismissal, as the government initially announced,²²⁷ the government chose to re-indict the defendants for, *inter alia*, violating section 641. Had the general criminal statutes been originally charged, this prosecution could not have been so easily derailed.

A gruesome Wyoming case²²⁸ reveals the absolute necessity of utilizing section 641 as an alternative prosecution tool in cases involving archaeological site depredation. During the summer of 1983, Earnest Ashford and Terry Biefscheuval of Rock Springs, Wyoming, uncovered and looted the grave of a Shoshone Indian warrior on Bureau of Land Management (BLM) land near the Wind River Indian Reservation. They took from the site valuable ceremonial goods which had been interred with the warrior and sold them for \$1,000. Shortly thereafter, their co-defendants, Mitchell Wolfe and Reno Forney, returned to the site and removed the intact mummy, which was clothed and ornamented in burial garb.²²⁹

²²³ For a discussion of regulations under ARPA, see *supra* notes 172-196 and accompanying text.

²²⁴ *Perkins*, No. 83-CR-101.

²²⁵ *Id.*

²²⁶ *E.g.*, *Charges of Artifact Theft are Dropped*, *Durango Herald*, June 8, 1983, at 1, col. 4.

²²⁷ *Id.* at 14, col. 1.

²²⁸ *United States v. Ashford*, No. 84-059 (D. Wyo. 1984).

²²⁹ *Id.*

This violation might have escaped federal attention but for the gallows humor of the defendants, who nicknamed the mummy Hector. The defendants took the mummy to various parties and drove through town with it riding "shotgun" in the back of a pickup truck. In a final callous act, on September 14, 1983, the defendants hoisted the mummy up a flagpole in downtown Marbleton, Wyoming, where it hung suspended overnight, until its legs fell off. As a result, the police arrested the men on state grave desecration charges.²³⁰

The skeletal remains were delivered to Dr. George Gill at the University of Wyoming in an effort to date them. Dr. Gill could not say, beyond a reasonable doubt, whether the body had been buried for more than 100 years. Prosecutors were thereby precluded from using ARPA, which defines an archaeological resource as being at least 100 years of age.²³¹ However, the federal theft prohibition of section 641 allowed the United States Attorney to prosecute for related federal crimes.²³² The four grave-robbers were charged in a two-count federal indictment with stealing "a saddle, bridles, pistol, ten rounds of ammunition, a knife . . . and skeletal remains with artifacts of clothing, a string of blue beads, various items of jewelry . . . and other archaeological resources of a value in excess of \$100.00 . . ." ²³³ in violation of section 641. All four men pled guilty, were fined \$250 each, and placed on probation.²³⁴ Although the media heavily publicized the case, the United States Attorney contributed the most to public education when he refused to allow reporters to photograph the mummy. The prosecutor explained:

I think that [taking a photo] would be in extremely bad taste, just as it was for these individuals to dig up the body, parade it around in the back of a pickup with a cigar in its mouth and then hang it from a flagpole. You have to remember that this was a human being, and, from the looks of the grave, an important member of the Shoshone tribe.²³⁵

Another example of the prosecutoreal wisdom of allowing the

²³⁰ Krza, *Men Face Desecration Charges*, Wyoming Star Tribune, Sept. 20, 1983, at A10, col. 4.

²³¹ 16 U.S.C. § 470bb(1).

²³² *Stolen Indian Remains Right on Century Mark*, Wyoming Star Tribune, Jan. 10, 1984, at A6, col. 1.

²³³ *Ashford*, No. 84-059.

²³⁴ *Id.*

²³⁵ Redling, *Mummy Rests in BLM*, The Wyoming Eagle, July 10, 1984, at A2, col. 4.

fact-finder to consider alternative statutory remedies in an archaeological resource damage case involves Casey Shumway, a pothunter captured in the BLM's Grand Gulch Primitive Area in Southeastern Utah in 1979.²³⁶ ARPA was not one month old when Shumway and Daryll Lyman vandalized an ancient Anasazi ruin known as the Turkey Pen site. Both men were charged with violating the ARPA felony provisions of Title 16, and destruction of government property in violation of Title 18, section 1361.²³⁷ The counts were submitted to the jury in the alternative, with instructions for them to consider ARPA first.

Shumway based a large portion of his defense on the argument that the area he was digging was not an archaeological resource within the meaning of ARPA. Trial testimony disclosed that he did much of the illegal digging in an area known as the "midden," or prehistoric trash heap, where burials are often found.²³⁸ After approximately nine hours of deliberation, the jury sent a note to the judge, asking whether a midden was an archaeological resource as a matter of law. Since ARPA's laundry list did not include the term,²³⁹ the judge could not instruct them that it was protected by the Act. After that exchange, the jury quickly acquitted Shumway on the ARPA count, but convicted him of destroying government property valued in excess of \$100.²⁴⁰

A common defense argument in cases like those above is that the prosecution must elect between an ARPA count and a more general criminal count before the case is submitted to the jury. In *Shumway*, the government agreed to have both counts submitted in the alternative, in an attempt to avoid the issue on appeal. In the District of Oregon, motions to elect have been denied in two recent cases²⁴¹ on the theory that it is legitimate to charge violations of

²³⁶ *United States v. Shumway*, No 80-5-W (D. Utah 1979).

²³⁷ This section provides that:

Whoever wilfully 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.

18 U.S.C. § 1361.

²³⁸ Fike, *supra* note 94, at 50.

²³⁹ See 16 U.S.C. § 470bb(i).

²⁴⁰ *Shumway*, No. 80-5-W.

²⁴¹ *United States v. Jaques*, No. 83-129FR (D. Or. 1983), *aff'd*, 753 F.2d 1084 (9th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *United States v. Bender*, No.

both ARPA and section 1361 because each offense has distinctly different elements and requires different degrees of intent.²⁴²

A final alternative or supplement to ARPA in Title 18 is the National Stolen Property Act (NSPA),²⁴³ passed by Congress in 1934. One crucial difference between NSPA and ARPA is the former's \$5,000 jurisdictional amount. In ARPA, the \$5,000 figure simply marks the felony/misdemeanor division. In NSPA, if the property in question does not exceed \$5,000, the federal prosecution must fail.²⁴⁴ Pothunters and their conduits have been prosecuted under NSPA in Texas, California, and Arkansas,²⁴⁵ where the stolen property crossed state lines or international borders.²⁴⁶

2. Title 19

With the publication of material by such people as Karl Meyer²⁴⁷ in the early 1970s, archaeophiles went on the offensive against the international looting rings. At last, professional archaeologists were willing to take the public podium and proclaim:

81-119BE (D. Or. 1981). As in *Shumway*, the jury in *Jaques* acquitted on the ARPA count and convicted under 18 U.S.C. § 1361. *Jaques* involved destruction of a site containing some of ARPA's listed resources, including pithouses and tools and weapons. *Jaques* argued that the word "site" was not defined in ARPA.

²⁴² See *Jaques*, No. 83-129FR; *Bender*, No. 81-119BE. ARPA is a general intent statute, using a "knowingly" standard, 18 U.S.C. § 470ec(d), whereas 18 U.S.C. § 1361 is a specific intent statute, using the word "willfully." The court's action is buttressed by *United States v. Duncan*, 693 F.2d 971 (9th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983).

²⁴³ The relevant part of NSPA provides: "Whoever transports in interstate or foreign commerce any goods, wares, merchandise . . . of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 2314 (1982).

²⁴⁴ *Id.*

²⁴⁵ The first reported case involving § 2314 and stolen artifacts was in 1972, when a California dealer, Clive Hollinshead, tried to sell a renowned pre-Columbian stela from Guatemala to the Brooklyn Museum. For an historical discussion of this case, see K. MEYER, *supra* note 72, at 32-33. Later, in 1979, the Fifth Circuit affirmed the convictions of five Texas sellers of stolen Mexican artifacts. *United States v. McClain*, 593 F.2d 658 (5th Cir. 1977), *cert. denied*, 444 U.S. 918 (1979).

²⁴⁶ Illegal artifact trafficking on an international scale is particularly difficult to prosecute under NSPA because of confusion generated by courts' interpreting other nations' statutory definitions. For instance, the issue in *McClain* was whether Mexico had claimed a property interest in pre-Columbian artifacts before the defendants transported the items across the border. *McClain*, 593 F.2d at 1000. Ownership by a nation is essential before conviction can be imposed under NSPA because the Act only concerns "stolen" goods. 18 U.S.C. § 2314.

²⁴⁷ K. MEYER, *supra* note 72.

Antiquities smuggling in many countries has reached such immense and lucrative proportions that it will soon be controlled by organized international crime in much the same way as illegal narcotic traffic. To believe otherwise is to be incredibly naive. It is no longer a case of simple peasants selling their chance finds; elaborate and complex operations utilizing helicopters and speed boats require enormous financial backing. Today the purchase of any valuable antiquity can only encourage further theft, smuggling and murder. It is time that it is stopped.²⁴⁸

In a partial effort to stem this tide and in response to the outcry from Central and South American countries over the constant drain of their national treasures into the United States for sale to private galleries or display in private museums, Congress passed the Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act (Importation Act).²⁴⁹ The Importation Act is extremely narrow in scope, dealing only with large stone carvings and wall art. Its key contribution is found in section 2092, which prohibits the importation of protected artifacts without a certificate from the country of origin stating that the artifact was not exported in violation of the laws of that country. Absent such certification, the resource may be impounded for three months at the importer's expense, and then returned to the country of origin or disposed of according to the laws of forfeiture. The Importation Act applies only to countries in the Western Hemisphere.²⁵⁰

Although the Importation Act lacks criminal penalties, the case of *United States v. Bernstein*²⁵¹ is often cited as the first successful prosecution to utilize it. The NSPA²⁵² could have been invoked in *Bernstein* but since it began as a customs investigation, the authorities looked first to the importing prohibitions. The facts of *Bernstein* are worth recounting, especially because two significant events are attributed to its fallout: (1) the signing of an Executive Agreement between the United States and Peru, and (2) the National Geographic Society's "Stolen Treasures" exhibit in 1983, which toured worldwide, raising money for a permanent repository of the stolen artifacts in Peru.²⁵³

²⁴⁸ McKinlay, *Archaeology and Legislation*, NEW ZEALAND ARCHAEOLOGICAL ASSOC., MONOGRAPH NO. 5 9 (1973).

²⁴⁹ 19 U.S.C. §§ 2091-95 (1982).

²⁵⁰ *Id.* § 2095(3)(A)(i).

²⁵¹ No. 82-19A (E.D. Va. 1982) (the case was tried a decade after passage of the Act).

²⁵² 18 U.S.C. §§ 2311-18 (1982).

²⁵³ The artifacts in *Bernstein* were officially returned to Peru in 1982. They were

On January 16, 1981, David Bernstein, a thirty-five-year-old private dealer operating out of his New York City apartment, landed at Dulles International Airport in Alexandria, Virginia after a flight from Lima, Peru. He declared the contents of his luggage as "66 Peruvian artifacts worth \$1,785," whereas his four suitcases in fact held "precious pre-Columbian textiles, gold alloy death masks, a rare feathered poncho, a ceramic pot from 800 B.C.—a total of 158 pieces . . . removed from ancient Peruvian graveyards . . . valued at \$288,000."²⁵⁴ Customs officers seized the items pursuant to Title 19, section 2092(b),²⁵⁵ and stored them under carefully controlled climatic conditions. Next, federal agents obtained a search warrant and seized approximately 587 other artifacts valued at \$1.4 million in Bernstein's apartment in New York City.²⁵⁶

Customs officers noted the suitcases at the airport because they were emitting a peculiar odor, which Bernstein explained was due to the contents having been "just dug up from graves."²⁵⁷ An archaeologist from the nearby Smithsonian Institution, Dr. Clifford Evans, examined the items.

. . . [Evans] found some of the specimens, all from unknown sites in Peru, to be finer than any he had seen in 35 years of work. He was depressed and angered by the inestimable archaeological losses represented by the loot . . . Dr. Evans said, "I don't want to look at this any more—it's making me sick." A few hours later, at his home, he suffered a fatal heart attack. Nobody can say that Dr. Evans' anguish directly caused his death. What is certain is that the voracious market for antiquities is destroying the heritage of Latin American nations. U.S. dealers import as many as 40,000 items a year from Peru alone—many of them literally strip-mined from archaeological sites with bulldozers and backhoes, destroying the history as well as the more delicate artifacts.²⁵⁸

When prosecutors realized that the Importation Act would not cover Bernstein's situation because of the types of artifacts involved, negotiations began. Bernstein eventually pled to a misdemeanor violation of submitting a false declaration by under-valuing the goods

then loaned to the National Geographic Society to exhibit until the Peruvian government had constructed an appropriate museum for them. Lewis, *Peru's Lost Worlds*, Washington Post, Aug. 5, 1982, at D1, col. 1.

²⁵⁴ Smith, *Art Importer Guilty of Misdemeanor in Movement of Pre-Columbian Items*, Washington Post, Jan. 27, 1982, at A6, col. 4.

²⁵⁵ The officials, by the way, used the wrong authority for the seizure because the artifacts were not stone carvings or wall art. See 19 U.S.C. § 2092(b).

²⁵⁶ *Bernstein*, No. 82-19A.

²⁵⁷ *Id.*

²⁵⁸ Garrett, *Editor's Column*, NAT'L GEOGRAPHIC, Mar. 1982, at 283.

he declared upon entering the country.²⁵⁹ On March 5, 1982, Bernstein was sentenced to a one-year suspended jail term and ordered to pay a \$1,000 fine. As a condition of probation, the court ordered Bernstein to perform 200 hours of community service in New York. Under the terms of the plea agreement, Bernstein "promised to cooperate with federal officials in a continuing investigation of pre-Columbian art imports."²⁶⁰ He also agreed to "return all artifacts that he could prove were purchased outside of Peru."²⁶¹

3. International Agreements

In 1972, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, called for international participation in a concerted effort to assist any party "whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials."²⁶² The Senate ratified the UNESCO agreement in 1972.²⁶³ The treaty contained many controversial clauses of major concern to private collectors and museums in the United States. For instance, Article 7a originally mandated measures "to prevent museums and similar institutions . . . from acquiring cultural property originating in another state party which has been illegally exported . . .", but Article 7a was amended to include the phrase "consistent with national legislation" at the behest of the United States reacting to pressure from private art dealers and museums.²⁶⁴ This change was made with the expectation "that private institutions would develop their own code of ethics consistent with the spirit of this provision."²⁶⁵

²⁵⁹ This violates 26 U.S.C. § 7207 (1982).

²⁶⁰ *Art Importer Fined, Given Suspended Sentence*, Washington Post, Mar. 6, 1982, at B5, col. 1.

²⁶¹ Smith, *supra* note 255, at A6, col. 5.

²⁶² Article 9. The complete text of the Convention is reprinted in K. MEYERS, *supra* note 72, at 291-301.

²⁶³ 118 CONG. REC. 13,378-79 (1972).

²⁶⁴ K. MEYERS, *supra* note 72, at 284.

²⁶⁵ *Id.* at 281-82. Secretary of State Rogers urged ratification:

I believe that the illicit movement of cultural property is a serious problem that warrants action on the international plane. The UNESCO Convention represents a pragmatic approach that deserves our strong support. Not only is the United States sympathetic to this effort to help other countries stem the illegal outflow of their national treasures, but in addition we should recognize that accession to this Convention is in our national interest. The destruction of irreplaceable remains of ancient civilizations is a loss to the cultural heritage of all mankind. And the appearance of important art treasures of suspi-

Often, however, museums' policies prove more Neanderthal than their contents. Behind the scene, in the battle over the enabling legislation, the Metropolitan Museum of Art, among others, was working to disarm Congressional action. The Department of Justice's response to the congressional committee concerned with the Met's opposition to implementation noted:

The Metropolitan proposal and related versions would significantly alter the application of existing criminal and civil law, both state and federal, in so far as archaeological or ethnological material is involved. In summary, these proposals would:

- (1) Exclude from the coverage of the . . . (NSPA) . . . any stolen archaeological or ethnological material where the claim of ownership to such property by a foreign nation is based solely upon legislation, edict or other declaration of that nation which vests in it ownership of such property;
- (2) Make the same type of situation as described in paragraph one above not subject to any state criminal prosecutions for offenses relating to the receipt or possession of stolen property; and
- (3) Modify, in effect, the commercial code and/or common laws of each state so that no foreign national could maintain a civil proceeding in any federal or state court for the recovery of such property as described in paragraph one above.²⁶⁶

Largely due to the continued opposition of private collectors and museums, enabling legislation was deadlocked for over a decade. The Convention on Cultural Property Implementation Act (CCPIA)²⁶⁷ finally went into effect in January 1983. The CCPIA resulted from a compromise bill responding to art dealers' reservations about the limited availability of foreign cultural property on the United States market, and the ability of American collectors to

cious origin in the United States gives rise to problems in our relations with other countries. Some countries have reacted to this problem in a fashion which unduly restricts the work of archaeologists within their territories as well as the legitimate trade of cultural property. In seeking to prevent the illegitimate trade in cultural property, the Convention should allay the anxieties of these countries and thus encourage the liberalization of laws governing the legitimate trade in such property. Moreover, the Convention should create a climate more conducive to the continued work of American archaeologists abroad. Further Article 7(b) is of direct benefit to the United States for it would require states to prohibit the import of, and take appropriate steps to recover and return, cultural property stolen from museums, religious or secular public monuments, or similar institutions.

Id. at 289.

²⁶⁶ Letter from Asst. Attorney General Patricia Wald to Hon. Charles A. Vanik, Subcommittee on Trade, Committee on Ways and Means (July 26, 1977).

²⁶⁷ 19 U.S.C. §§ 2601-13 (1982).

obtain unrestricted title to the material.²⁶⁸

Archaeological resources can also be protected through bi-lateral treaties or executive agreements. An example of an existing bi-lateral treaty is the "Treaty of Cooperation Between the United States of America and the United Mexican States Providing For the Recovery and Return of Stolen Archaeological Historical and Cultural Properties."²⁶⁹ The September 1981 Executive Agreement with Peru, which arose, at least in part, from *United States v. Bernstein*,²⁷⁰ is an example of an existing Executive Agreement. Because this last agreement was executed at the same time that revised versions of the implementing legislation to the UNESCO Convention were being circulated, the American Association of Dealers in Ancient, Primitive, and Oriental Art sharply criticized the executive order, noting that "[f]or eight years, there's been congressional debate about just how these issues should be handled . . . and now Customs and the State Department have decided they'll just handle it on their own. . . ."²⁷¹

*B. Code of Federal Regulations:
An Agency-By-Agency Assessment*

In May 1983, the Federal Law Enforcement Training Centers (FLETC) at Glynco, Georgia and Marana, Arizona began teaching advanced in-service sessions in archaeological resource protection to law enforcement officers and archaeologists from several agencies within federal, state, and local government. FLETC continues to hold sessions two or three times a year with twenty to forty participants in each one.²⁷² Before those sessions, only a handful of these agency personnel were aware of the legal framework for prosecuting

²⁶⁸ *Id.* § 2611. For a complete review of the legislative history, see S. REP. NO. 564, 97th Cong., 2d Sess. 4, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4078, 4098-4111. Many nations in the world do not recognize private ownership of cultural property. The most severe penalties for antiquities violations exist in communist countries. See K. MEYER, *supra* note 72, at 240-53.

²⁶⁹ Codified at 19 U.S.C. §§ 2091-95 (1982). The treaty became effective March 24, 1971, again under the administration of Secretary of State William P. Rogers. The Fifth Circuit applied this treaty in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

²⁷⁰ No. 82-19A (E.D. Va. 1982); see *supra* notes 251-61 and accompanying text.

²⁷¹ THE ART NEWSLETTER, Oct. 27, 1981, at 1, 2 (quoting Douglas Ewing, president of the American Association of Dealers in Ancient, Primitive and Oriental Art).

²⁷² For a description of the FLETC course, see Friedman, *ARPA Law Enforcement Training*, 5 A.M. ARCHEOLOGY 108, 108-09 (1985).

pothunters and traffickers. Virtually no sign of previous coordination existed among the agencies in this area of law enforcement activity. Moreover, there was a marked lack of communication between the law enforcers and the archaeologists, even within the same agency.²⁷³

The flavor of the FLETC course foreshadows the almost impenetrable maze of federal agency regulations scattered throughout Titles 25 through 50 of the Code of Federal Regulations.²⁷⁴ The various land management agencies have traditionally been forced to vie with each other for scarce federal funding. Within the agencies themselves, there is a natural tension between the administrators who want to play the role of nice guy with land users, and the law enforcement officers who must cite transgressors.²⁷⁵ Added to agency interplay are rabid archaeophiles rumored to share information only with fellow theoreticians and to stand in the paths of bulldozers on public lands. The result is a federal regulatory setting uncondusive to level-headed rule-making.

The best that can be said of the federal archaeological resource regulations is that they are confusing. In fact, they are a horrible hodge-podge, internally inconsistent and incomprehensibly vague. Spanning three federal cabinet level departments²⁷⁶ and covering approximately one-third of the nation's area,²⁷⁷ with individual fiefdoms of district managers within each system, agency regulations in this controversial field are probably best left untested in the courts. Given the law enforcement resources available in most parts of the country, this recommendation will probably be met by default. For example, in 1974, the Grand Gulch Primitive Area in southeast Utah was targeted for a first-of-its-kind archaeological resource protection law enforcement program. Congress allocated

²⁷³ Personal observation by the author, who has served as an instructor for this course since its inception.

²⁷⁴ See, e.g., 25 C.F.R. § 261 (1987); 36 C.F.R. §§ 2.1, 26.1, 327.14 (1986); 43 C.F.R. §§ 3, 9268.3 (1986); 50 C.F.R. § 27.61 (1986).

²⁷⁵ See Brewer, *Tougher Law Enforcement Aims to Cut Artifacts Thefts*, Idaho Statesman, July 13, 1986, at 4A, col. 4.

²⁷⁶ Within the Department of Interior and the Department of Agriculture there exists a multitude of interested agencies: the Bureau of Land Management (BLM), the Bureau of Indian Affairs (BIA), National Park Service (NPS) and the Fish and Wildlife Service (FWS) are within the Secretary of Interior's jurisdiction; the Army Corps of Engineers (COE) comes under the Department of Defense; and the Forest Service (USFS) is under the Secretary of Agriculture.

²⁷⁷ See ONE THIRD OF THE NATIONS LAND, A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 19-30 (1970).

special funding of \$95,000 to hire seven rangers to patrol 1,000 square miles. In 1974, the area had 2,081 Visitor Use Days (VUDs) and by 1980, there were 14,151 VUDs. During this time, patrols operated seven days a week using helicopters, fixed wings, jeeps, backpacking, horses and mules. The patrols achieved eleven convictions under the Utah State Antiquities Act during this five-year period. The funding then lapsed. Shortly thereafter, pothunting resurged.²⁷⁸

Currently, in Arizona, Colorado, Idaho, Montana, New Mexico, and Utah, there are two BLM law enforcement agents for each state. Oregon's grand total is three. The Forest Service is in a slightly better position, but enforcement is still demonstrably under-supported.²⁷⁹ According to a 1978 study, the 340 million acres of public lands administered by the BLM, plus the Outer Continental Shelf, are experiencing the severe difficulties with vandalism and theft of archaeological resources.²⁸⁰

In most western states, for the five year period between the Ninth Circuit's *Diaz* decision in June 1974 and enactment of ARPA in October 1979,²⁸¹ the agencies relied on their individual regulations to protect cultural property. The regulations were, and most still are, woefully inadequate and subject to the same constitutional attack as the Antiquities Act. Students at the FLETC course are advised not to resort to them, except in the case of blundering tourists, where prompt disposition by minor fine is sought by all concerned.²⁸²

Officers in the field can issue a citation similar to a traffic ticket for archaeological resource offenses before they have had a chance to develop any further information through investigation. Upon receiving a citation, any well informed professional pothunter would

²⁷⁸ An outline of this program was presented by Agent Schalk, who participated as a Ranger. Lecture by BLM Special Agent Schalk, the Federal Law Enforcement Training Center (May 4, 1983). Casey Shumway's behavior in 1979 is a prime example of the renewed pothunting activity. *United States v. Shumway*, 80-5 (D. Utah 1980).

²⁷⁹ Kane, *The Big—and Illegal—Business of Indian Artifacts*, N.Y. Times, Sept. 7, 1986, at F13, col. 1; Brewer, *supra* note 276, at 4A, col. 4.

²⁸⁰ L. WILLIAMS, *supra* note 74, at 104-05. The BLM is followed by the 191 million acres administered by the Forest Service. *Id.*

²⁸¹ *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974); see *supra* notes 98-109 and accompanying text.

²⁸² Another use of agency regulations may be to help implement the trafficking prohibitions of ARPA, which forbid the sale, purchase, exchange, transportation or receipt of any resource taken in violation of "any . . . regulation . . . of Federal law." 16 U.S.C. § 470ee(b)(2).

race to the nearest United States Magistrate to plead guilty and pay a small fine or, better yet, submit bail by mail. The pothunter would hope that the fine was paid before the United States Attorney's Office was notified and invoked the felony or misdemeanor provisions of ARPA.²⁸³ One prosecutorial advantage to issuing citations under the regulations, however, is that there would be no jury trial. In non-urban counties, where archaeological resource violations tend to occur, a pothunter is more apt to get a jury of his literal "peers" by whom artifact collecting is considered a wholesome family pastime and a matter of right.²⁸⁴ Consequently, there may be a greater chance of punishing pothunters, even minimally, through regulations.

A final backdrop against which implementation of agency regulations must be viewed is the cultural resource management policies and practices of agency executives. If an agency violates the spirit of regulations in other dealings with private contractors or its own personnel, its attempt to enforce the regulations against the public is doomed. The FLETC course devotes a substantial segment to examining official malfeasance which, under the clean hands doctrine, would foil prosecutions if they were disclosed to a fact-finder. In other words, an agency should not point dirty fingers at individual transgressors, if it might itself be subject to civil suit by archaeophiles for neglecting the cultural properties in its care, or damaging them in its haste to accomplish other activities such as building roads, dams, mines, or tourist facilities.²⁸⁵ One way to highlight such problems is to perform an agency by agency assessment of regulatory capability.

²⁸³ There is a question whether the Double Jeopardy Clause, U.S. CONST. V, or vindictive prosecution claims would apply to ARPA charges following regulatory convictions. Even if prosecutors could up the ante, it would not enhance their already tenuous jury appeal in these cases.

²⁸⁴ In the March 1983 issue of the bulletin, the President's Message contained this advice to his colleagues: "Write letters to your Congressmen and Senators protesting the big land sale that is being planned. This will hurt our local government. . . . We will be finding 'No Trespassing' signs in the woods. The rockhound, the grave hunter and the fisherman will have no place to go." *The President's Message*, THE OPEN LINE BULLETIN, Mar. 1983, at 3, 3 (emphasis added).

²⁸⁵ See, e.g., *New Mexico v. Block*, No. 84-1166BB (D.N.M. 1986); *Save the Jemez v. Block*, No. 84-1150HB (D.N.M. 1986) (these cases were consolidated and settled on Sept. 10, 1986); see also *Historians Claim Mines Destroyed 16,000 Sites*, *The Daily Tidings*, Jan. 14, 1985, at 8, col. 1.

1. Bureau of Indian Affairs

Bureau of Indian Affairs (BIA) regulations²⁸⁶ are essentially a restatement of the Antiquities Act, and as such, should be particularly avoided in those jurisdictions which have found the Act void for vagueness.²⁸⁷ The penalties are minimal, although the regulations provide a means for tribal administrators to seize artifacts taken from Indian lands.²⁸⁸ Perhaps the most beneficial use of the regulations is the requirement of conspicuous posting of warning notices in tribal offices and at protected sites.²⁸⁹

The ability of the BIA to enforce these regulations, if it so desires, depends on the individual tribe's assertiveness in managing its own cultural resource protection program. Some tribes are beginning steps toward such a program. For instance, Colvilles, Navajos, Umatillas, Warm Springs, Yakimas, and Zunis have actively sought training in this area, and have drafted their own tribal ordinances to deal with problems specific to their own lands.²⁹⁰ In addition, tribal authorities are attempting to regain control over their cultural and sacred properties by pursuing museums, government agencies, and archaeologists.²⁹¹

At both the Fort Bidwell Reservation in California and the Gila River Reservation in Arizona, "tribal chairmen sought a relaxation in historic preservation requirements when development projects were delayed by the presence of cultural resources."²⁹² Furthermore, the BIA itself sometimes shows little concern for the preservation of Indian history. In fact, one National Park Service employee is extremely critical of the BIA, and charges that "the Bureau of Indian Affairs appears to want to divorce itself from its historic preservation responsibilities. . . . [T]he agency . . . considers historic preservation responsibilities a burden that is either to be

²⁸⁶ 25 C.F.R. §§ 261.1-9 (1987).

²⁸⁷ *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974); see also *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 340 n.24 (5th Cir. 1978) (citing with approval *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974)); *United States v. Jiminez*, 454 F. Supp. 610, 613 (M.D. Tenn. 1978).

²⁸⁸ 25 C.F.R. § 261.6.

²⁸⁹ *Id.* § 261.7.

²⁹⁰ Training conducted by the author during 1985-87.

²⁹¹ Blair, *American Indians vs. American Museums: A Matter of Religious Freedom*, (pts. 1 & 2), *AM. INDIAN J.*, May 1979, at 13, *AM. INDIAN J.*, June 1979, at 2; Hodge, *Argument on reburial of excavated bones expected to heat up*, *The Arizona Republic*, Jan. 25, 1987, at B2, col. 1; Brinkley-Rogers, *Give back forebears' bones*, *Indians tell scientists*, *The Arizona Republic*, Sept. 24, 1986, at A1, col. 1.

²⁹² Somers, *supra* note 78, at 78.

ignored, given low priority, or legislated against."²⁹³

2. National Park Service

The National Park Service has a relatively new set of regulations,²⁹⁴ promulgated on April 30, 1984, which are still not in compliance with Section 10(b) of ARPA. The Department of Interior issued the regulations under its general authority to prevent depletions to, and regulate occupancy and use of, the parks.²⁹⁵ It is obvious, however, that the Department of Interior failed to consult with a criminal litigator before promulgating the rules; they refer to, and incorporate, the Antiquities Act's vague language which has been found unconstitutional.²⁹⁶ In contrast to the Antiquities Act, the authority of the Department of Interior to promulgate these regulations has been upheld in other contexts several times.²⁹⁷ Yet, the only reported field use of park regulations with respect to cultural resource damages occurred in April 1979, at the Chaco Canyon National Monument in New Mexico, and recently at Key Biscayne, Florida.²⁹⁸

Sections 1.3 and 1.4 of Title 36 of the Code of Federal Regulations (C.F.R.) detail the penalties and definitions for these regulations. Two key terms are "archaeological resource" and "cultural resource"; the former being at least 50 years old and the latter being "of significant cultural interest and . . . less than 50 years of age."²⁹⁹ The National Park Service defended its definitional "use of broad, generic terms" as "a better way to provide resource protection," noting that "[t]he listing of specific terms . . . invites the risk of omitting one, and weakens protection of park resources through a technical omission."³⁰⁰ In this regard, at least, the rule-makers had learned from four years of ARPA difficulties.³⁰¹

Part 2 of the regulations, which contains the actual listing of prohibited acts, begins by asserting a conservation premise: "to ensure that public use and enjoyment of natural and cultural resources is

²⁹³ *Id.* at 79-80.

²⁹⁴ 36 C.F.R. §§ 2.1-.62 (1987).

²⁹⁵ 16 U.S.C. § 1 (1982).

²⁹⁶ *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

²⁹⁷ *See, e.g., Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm.*, 393 U.S. 186 (1968).

²⁹⁸ CULTURAL RESOURCES, *supra* note 120, at 76.

²⁹⁹ 36 C.F.R. § 1.4(a) (1987).

³⁰⁰ 48 Fed. Reg. 30,255 (1983).

³⁰¹ *See supra* notes 172-96 and accompanying text.

generally non-consumptive . . . and conducted in a manner that . . . leaves them unimpaired for the enjoyment of future generations."³⁰² It is this attitude which distinguishes the Park Service from other multi-use agencies which may have more of a harvesting, leasing, or development mentality.

The Park Service has also traditionally been successful in gaining public and political support for specific pieces of legislation relating to singularly important sites. The unique statute pertaining to the Mesa Verde is a case in point.³⁰³ The statute offers the Park Service additional ammunition with which to battle pothunters.

For instance, in July, 1983, a Colorado college student excavated a back country cliff dwelling at Mesa Verde, and removed a 700-year-old jar that still had bits of yucca strap attached to it. The Park Service pushed the prosecution vigorously. It tailored a sentence under its unique statute pertaining only to Mesa Verde to impose 160 hours of public service in the park and force payment of \$452 in restitution to be used for preserving the jar.³⁰⁴

In areas other than legislative success, though, even the Park Service has its detractors. Had the Mesa Verde case gone to a jury the day newspaper columnist Jack Anderson exposed the National Park Service's slipshod storage methods, the judge might have had second thoughts about granting custody of the Anasazi jar to the federal officials.³⁰⁵ Anderson summarized an inspector general's report, which attempted to document missing, rotting, and utterly neglected national treasures with park service records in "hopeless disorder." Discrepancies in accounting for artifacts revealed over five million dollars' worth of errors in one region alone.³⁰⁶

The Park Service's omissions in its coordinating role may be attributed to a "lack of top level support for the Office of Archeology and Historic Preservation."³⁰⁷ In 1977, the United States Advisory Council on Historic Preservation (Council) expressed grave doubts about any agency within the Department of Interior managing the nation's cultural properties. The Council noted "deficiencies in management of historic resources, subordination of historic preservation budget and personnel needs to unrelated priorities, delays in

³⁰² 48 Fed. Reg. 30,263 (1983).

³⁰³ 16 U.S.C. § 114 (1982).

³⁰⁴ *United States v. Rubenstein*, No. 83-649-M (D. Colo. 1983).

³⁰⁵ Anderson & Spear, *Keeping Track of Treasures Too Much for Park Service*, *The Oregonian*, Jan. 6, 1987, at B11, col. 1.

³⁰⁶ *Id.*

³⁰⁷ Somers, *supra* note 78, at 69.

issuance of needed regulations caused in part by perceived inconvenience to departmental land managers [and] lack of interest in or understanding of historic preservation by key management officials. . . ."³⁰⁸ This perception remains valid today. As a forty year veteran of the Park Service and recipient of the National Parks and Conservation Association's annual award remarked, "Events have exposed [the Interior Department] as an adversary, not an advocate."³⁰⁹

3. *United States Forest Service*

Based on the Secretary of Agriculture's rule-making authority, the Forest Service revised its regulations on June 30, 1981.³¹⁰ The regulations do not depend on ARPA or any other individual statute.³¹¹ The definitions in the regulations, however, conform largely with ARPA. Consequently, the definitions do not suffer from the vagueness problems of many other C.F.R. provisions attempting to address antiquities violations. Section 261.2 contains concise descriptions of what constitutes an archaeological resource, a historical resource, a paleontological resource, and a prehistoric resource.³¹² Of all federal agencies, the Forest Service regulations provide the clearest proscriptions concerning cultural property. They are thorough, specific, and based on tested authority.³¹³

Forest Service Management has taken pains to emphasize the broad scope of these regulations to their field supervisors. In a letter written in June 1982 to a recalcitrant forest manager in Oregon, the national Director of Recreation affirmed that "the collection of arrowheads on National Forest lands is a violation of the Secre-

³⁰⁸ *Id.* at 87.

³⁰⁹ Chapman, *Separate Status for the Park Service*, 62 NAT'L PARKS 46 (1988).

³¹⁰ 36 C.F.R. §§ 261.1-9 (1986). The Secretary of Agriculture has rule-making authority pursuant to 16 U.S.C. § 551 (1982).

³¹¹ See Bates, *The Basis for the Regulations of the Secretary of Agriculture*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 11 (1980) (U.S.D.A. Forest Service, Southwestern Region).

³¹² 36 C.F.R. § 261.2. The archaeological resource definition is broader than ARPA's and includes items which are at least fifty years old. These regulations also clearly encompass arrowheads. Compare 36 C.F.R. § 261.2 with 16 U.S.C. §§ 470bb(1), 470ee(g), 470ff(a)(3).

³¹³ See Green & LeBlanc, *Vandalism of Cultural Resources: The Growing Threat to Our Nation's Heritage*, in CULTURAL RESOURCES LAW ENFORCEMENT: AN EMERGING SCIENCE 15, 16 (1980) (U.S.D.A. Forest Service, Southwestern Region).

tary's regulations, and violators are subject to prosecution."³¹⁴ The Director also noted that the Forest Service has successfully prosecuted archaeological resource destruction crimes with help from the United States Attorney.³¹⁵

Poethunters have been cited with violating Section 261.9(g) in Alaska, Arizona, Arkansas, California, New Mexico, and Oregon. Only in California was a significant sentence imposed. The California case involved three defendants who pled guilty to digging in an Indian burial site in Los Padres National Forest. Each defendant was fined \$1,000 and assessed an additional \$542.96 in estimated costs necessary to restore the burial site.³¹⁶

Problems with Forest Service administration of cultural resource management have arisen largely because of the agency's multiple use orientation. One directive to Forest Service personnel called for integration of "the cultural resources program into multiple use management of the National Forest System."³¹⁷ Unfortunately, however, the Forest Service tends to deemphasize cultural resources while overemphasizing timber production. This agency stance led directly to a civil lawsuit filed by Save the Jemez, the Sierra Club and the State of New Mexico against the Southwestern Region of the Forest Service.³¹⁸ These public interest groups and the state's attorney general sought to halt the negative impact of Forest Service logging activities on major archaeological sites in the area.³¹⁹

Partly in response to this litigation, which the Forest Service wisely settled, the Forest Service has stepped up its law enforcement activities. In testimony before a field hearing of the Senate Subcommittee on Public Lands, Reserved Water, and Resource Conservation in 1985, the Regional Forester claimed that in 1984, "3,000 citations were issued for violations of cultural resource laws and

³¹⁴ Letter from National Director of Recreation to Oregon Forest Manager (June 1982).

³¹⁵ *Id.*

³¹⁶ See Clayton, *Three Fined for Indian Burial Ground Violation*, U.S.F.S. PACIFIC/SOUTHWEST LOG, June 1982, at 1. The outcome of this case was, in all likelihood, due to the persistence of five eyewitnesses: "all members of an archaeological club, and familiar with the burial site . . . [who] came upon the three men digging. . . . Piles of what appeared to be human bones were around . . . [t]he five hikers took photographs . . . and reported the incident." *Id.*

³¹⁷ U.S. FOREST SERVICE, U.S. FOREST SERVICE MANUAL 2361 (1978).

³¹⁸ *New Mexico v. Block*, No. 84-1166BB (D.N.M. 1986); *Save the Jemez v. Block*, No. 84-1150HB (D.N.M. 1986); see also Weaver, *The Southwest's Ancient Treasure*, 5 FOREST PLANNING 11-15 (1984).

³¹⁹ *New Mexico v. Block*, No. 84-1166BB; *Save the Jemez*, No. 84-1150HB.

regulations, and 48 arrests were made in more serious incidents.³²⁰ Regardless of its desire to protect archaeological resources, the Forest Service is hampered by few personnel and vast patrol areas. According to one forest service employee, "there are so many historical sites in the national forests that policing them is impossible. But if we tried to be protective by putting fences around them, we would only point out their location to potential pothunters."³²¹ In *Smokey the Bear vs. Scofflaw*, bets should not be placed on the bear.

4. *United States Army Corps of Engineers*

The authority for the Army Corps of Engineers' (Corps) regulations³²² is based on the Secretary of Defense's responsibility to manage public use of water resource development projects.³²³ This code provision became effective approximately eight months prior to ARPA's enactment.

The penalty for violating the Corps' regulation against pothunting is similar to most C.F.R. provisions in this area; six months imprisonment or a five hundred dollar fine, or both.³²⁴ Although Corps personnel have no law enforcement authority, they can rely on the assistance of the FBI or local officers. The Corps has been diligent about pursuing interagency training and building bridges to those law enforcement agencies upon whom it must depend.³²⁵ Notwithstanding its lack of enforcement authority, the Corps has been among the most aggressive agencies in publicizing the plight of

³²⁰ See 45 THE FRIDAY NEWSLETTER, Oct. 25, 1985, at 2 (testimony of Forster Sotero Muniz regarding Forest Service's cultural resource management program). However, the basis for these calculations is unclear, as there are not that many recorded cases by all agencies combined in 1984. As of July 1986, the Forest Service only claimed 19 convictions under ARPA. See generally Brewer, *supra* note 275.

³²¹ 45 USDA NEWS, 1986, at 3 (quoting Mike Beckes, an archaeologist working in the Custer National Forest in North Dakota). In illustrating his point, Beckes explained that: "The Forest Service put a protective transparent cover over Initial Rock, a piece of soft sandstone where two of General Custer's soldiers carved their names on the way to the Battle of Little Bighorn. Someone shot holes in the cover." *Id.*

³²² 36 C.F.R. §§ 327.14, 327.25(a) (1987).

³²³ 16 U.S.C. § 460(d) (1982).

³²⁴ 36 C.F.R. § 327.25(a).

³²⁵ For example, the interagency training session held at The Dalles, Oregon, on November 18-19, 1986, included representatives from the FBI, Oregon State Police, Columbia River Inter-tribal Fish Commission, and county sheriffs. This course was taught by the author and Special Agent-in-Charge Lynell Schalk of the BLM.

vanishing archaeological resources located within its jurisdiction. A recent press release warned:

The United States Army Corps of Engineers intends to crack down on any persons illegally disturbing or removing artifacts from Government property. Surveillance will be increased and project authorities will monitor sensitive areas for any signs of resource disturbance Loss of our link with the past through vandalism, theft or other destructive acts is a crime against all Americans³²⁶

Part of the motivation for the Corps' strong public stand may be due to the vast destruction to archaeological sites caused by past Corps projects.³²⁷ Practically speaking, it would be ironic for the Corps to successfully prosecute an individual for digging up a small parcel of land, when Corps bulldozers or dynamite have been responsible for the razing or inundation of thousands of sites in the same area.³²⁸ Given the Corps' late appearance on the archaeological protection stage,³²⁹ its manager might be better off devoting more resources to public education programs and para-professional activities. This might include bringing together members of the public with staff archaeologists and using some of the agency's past depredations as learning experiences.

5. Bureau of Land Management

Despite the fact that the Bureau of Land Management (BLM) has one of the most knowledgeable law enforcement agents in cultural resource protection,³³⁰ its regulations³³¹ have not kept pace with its abilities. BLM regulations are so convoluted with cross-references that they are virtually unenforceable. In fact, there are no reported cases of citations being issued for cultural resource depredation under either BLM regulations or the Federal Land Policy and Management Act of 1976 (FLPMA).³³² The BLM must rely

³²⁶ News release of the U.S. Army Corps of Engineers, Walla Walla District, No. 83-02 (May 5, 1983).

³²⁷ See, e.g., sources cited *supra* note 78.

³²⁸ See sources cited *supra* note 78.

³²⁹ Somers, *supra* note 78, at 40-46.

³³⁰ Special Agent-in-Charge Lynell Schalk of the BLM Oregon State Office was selected among all federal agents in the nation to assist in the task force planning the FLET course.

³³¹ 43 C.F.R. §§ 3.1-.17 (1987); 43 C.F.R. § 9268.3(c)(2) (1986).

³³² 43 U.S.C. § 1733 (1982) provides a penalty of 12 months imprisonment and/or a \$1,000 fine for destroying defacing, injuring, or removing any object of antiquity in violation of 43 C.F.R. § 9268.3(c)(2)(i-iii), or using motorized equipment or explosives for collecting in violation of 43 C.F.R. § 9268.3(c)(2)(vii). 43 C.F.R.

on an outdated thirty-year-old version of the regulations based on the Antiquities Act for their enforcement efforts.³³³ Updated regulations would provide a useful supplement to ARPA, in that they could apply to the surface collection of arrowheads and also trigger ARPA's trafficking provisions.

Secretary of Interior Donald Hodel's spearheading of the Take Pride in America campaign provides some hope that more funds for protecting archaeological sites will be forthcoming.³³⁴ Despite these laudable efforts, the BLM is not immune to an Anderson-type expose either. In attacking a BLM "land treatment" plan for the San Juan Resource Area in Utah, one reporter decried:

In that area, the BLM is saying that there are a nationally significant number and quality of archaeological sites Yet the BLM gives no priority to protecting those sites Within this area, more than 100,000 acres are identified for potential land treatment [a BLM euphemism for destroying native vegetation to improve grazing]. They also identify . . . gravel pits in this area for road development. They give priority to firewood cutting and Christmas tree cutting The plan does not give priority for archaeological protection over mineral development The BLM admits that under its preferred alternative, 15,678 archaeological sites would be damaged.³³⁵

6. *United States Fish and Wildlife Service*

Like other agency regulations in the Department of Interior, Fish and Wildlife Service provisions³³⁶ are deficient in that they refer to "objects of antiquity"³³⁷ without further elaboration, and are con-

§ 9268.3(d)(v) also allows the temporary closure of BLM lands to "preserve areas having cultural or historical value"

³³³ The specific reservation of 43 C.F.R. § 9268.1 (1986), entitled "Cultural Resource Management" is an indication of this agency's intention to update. To avoid cross-referencing confusion, the BLM should eliminate its present regulations, and incorporate their proscriptions into the new section, citing FLPMA and ARPA as their statutory authority.

³³⁴ See generally BUREAU OF LAND MANAGEMENT, OPERATION S.A.V.E.: A PROPOSAL TO INCREASE CITIZENS AWARENESS AND ENFORCEMENT OF THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT IN THE PACIFIC NORTHWEST (1986). One Take Pride in America Campaign is already underway in Oregon and Washington. In November 1986, the BLM's Oregon State Office launched a multi-faceted program called Operation S.A.V.E. (Save Archaeological Values for Everyone). The program includes public education activities, aerial surveillance of sites, interagency training, and cooperative enforcement operations.

³³⁵ Bauman, *BLM 'land treatment' plan threatens Utah archaeological sites*, *Desert News*, Nov. 10, 1986, at 4, col. 1 (quoting Jim Catlin, Conservation Chairman for the Sierra Club's Utah Chapter).

³³⁶ 50 C.F.R. §§ 27.61-63 (1986).

³³⁷ *Id.* § 27.62.

fusingly cross-referenced to Title 433 section 3. The regulations prohibit the destruction or removal of objects from a refuge.³³⁸ This provision may be enforceable, given a clear set of facts. However, the novel language of section 27.62, prohibiting the search for antiquities, would never withstand judicial scrutiny. Technically, any tourist wandering about a refuge looking for an archaeological site to photograph would fall within the rule-makers ambit.

In addition, the Fish and Wildlife Service is not "off the hook" of agency misfeasance and malfeasance that creates problems for cultural resource prosecution. Two examples from a recent ARPA prosecution illustrate areas where management might improve. In *United States v. Jacques*,³³⁹ the defense attorney subpoenaed the former manager of the refuge where the violation occurred. The attorney stated that the reason he wanted to call the former manager was to ask about the manager's own collection of artifacts taken from refuge sites.³⁴⁰ In addition, the defense attorney also revealed that in order to protect the site, the refuge staff had sunk fence postholes into archaeological deposits.³⁴¹

Thus, it appears that no federal agency is quite able to purely cast the first stone in archaeological resource prosecutions. In light of the complicated legal twists of pre-ARPA laws and regulations which continue to confound jurists, the scant resources which hamstring law enforcement efforts, and the propensity for federal land management agencies to shoot themselves and each other in the feet, the hopes of archaeophiles are best pinned on heightening public awareness.

³³⁸ *Id.* § 27.61.

³³⁹ *United States v. Jaques*, No. 83-129-FR (D. Or. 1983).

³⁴⁰ In a recent article discussing a federal raid to recover Indian artifacts, a Denver Post journalist wrote:

The 'Great Pottery Raid of 1986' was not all it was cracked up to be. The massive, carefully coordinated searches netted more than 300 Indian artifacts allegedly taken from federal monuments, parks and historic sites They also evoked fear, anger and contempt among those whose property was searched, sparking a multimillion-dollar damage suit against the federal agents Today, eight months after the raid, federal prosecutors admit they haven't filed any of the criminal charges—and they are hesitant to do so, having lost a related case last fall One state official said he fears the raids actually may have encouraged further looting of Indian ruins

Miniclier, *Indian Artifacts Raid Turns Out Flop; No Charges Ever Filed*, Winter 1987, *THE INDIAN RELIC TRADER* at 26, 27.

³⁴¹ *Id.*

IV

CONCLUSION: ARARAT ACHIEVED OR
VISIGOTHS REVISITED?

With only a smattering of ARPA civil and criminal prosecutions and no published appellate interpretation of the Act, it is premature to label this stage of our cultural development. However, it is still apparent that most Americans do not recognize this nation's prehistory as their own.³⁴² Despite the FBI's upgrading of ARPA cases to the same level as bank robberies for statistical evaluation, they remain a low law enforcement priority.³⁴³

Archaeophiles must aim propaganda about this non-renewable resource *beyond* the archaeological community. It accomplishes nothing toward this end when archaeologists talk among themselves.³⁴⁴ Proselytizing law school seminars, such as the University of Oregon's and Lewis & Clark's "Forensic Archaeology" is one productive step. Just as beneficial would be travelling road shows displaying our cultural heritage, and elementary and high school prehistory units with "hands-on" excavation experience under professional supervision.³⁴⁵

Ideally, the objective of these efforts will be a proliferation of comprehensive state antiquities legislation.³⁴⁶ Students should be sent as missionaries within their own communities; to assess the cultural resource depredation problem locally; to draft model statutes and ordinances; and to assemble a lobbying force for their passage. State legislation would have its greatest impact in local prosecutions of cultural resource violations. This would alleviate the federal Big Brother vs. Hometown Hobbyist syndrome, which has led to jury nullification in federal pothunting cases.

These efforts would also spawn even more public education pro-

³⁴² *Id.*

³⁴³ Burton, *supra* note 204, at 1.

³⁴⁴ Wildesen, *Archaeology for the People: The Ethics of Public Archaeology*, 5 ASCA NEWSLETTER 2, 2-5 (June 1978).

³⁴⁵ The BLM's Anasazi Heritage Center in Colorado has the makings of a model program in this regard. Forest Service archaeologist Peter Pilles of the Coconino National Forest in Flagstaff has won national recognition for his public archaeology multimedia programs and work with children and paraprofessionals at Eldon Pueblo.

³⁴⁶ Arizona, New Mexico and Oregon have enacted laws which are, in some respects, even stricter than ARPA. See, ARIZ. REV. STAT. ANN. §§ 41-841 to 41-846 (1988) and § 13-3702.01 (1987); N.M. STAT. ANN. §§ 30-15-5 to 30-15-6 (1987); OR. REV. STAT. §§ 359.905-955 (1987).

grams and opportunities to participate in preservation. Organizations such as the Archaeological Conservancy, state archaeological societies with paraprofessional programs, Earthwatch expeditions with amateurs travelling worldwide to assist in research under professional supervision, and local governmental task forces commissioned to promote archaeophiles' aims, would all experience a surge of membership support.³⁴⁷

Increased public awareness of our archaeological values will also prompt governmental agencies to address internal misfeasance and malfeasance. Finally, a newly-aroused constituency may convince Congress to amend ARPA to eliminate: (1) the \$5,000 threshold for felonies; (2) the 'laundry list' approach and the one hundred year age limit used to determine archaeological items covered by ARPA; and, (3) the subjective phrase "of archaeological interest." In fact, a discussion draft incorporating some of those ideas is now being circulated among members of the House.³⁴⁸ Ideally, all this might eventually land us at Ararat. But, for now, the floods ravaging the archaeophiles' ark have yet to show signs of receding.

³⁴⁷ For example, former Governor Bruce Babbitt of Arizona began a public education campaign when he created the governor's Archaeology Advisory Group in 1980. He proclaimed the first annual "Arizona Archaeology Week" from January 30-February 5, 1983. Governor Neil Goldschmidt of Oregon followed suit with a proclamation in conjunction with BLM's Operation S.A.V.E. for the week of July 13, 1987.

³⁴⁸ Archaeological Resources Protection Act of 1979 Amendments, 100th Cong., 1st Sess. (Nov. 23, 1987) (Discussion Draft) (copy on file in the offices of the JOURNAL OF ENVIRONMENTAL LAW & LITIGATION). At present, Congress has failed to pass legislation asserting federal ownership of all archaeological resources whether found on public or private lands or in the ocean. The United States is now one of the few nations in the world which does not lay claim to all its cultural heritage, wherever found. For a full report see *Hearings on the Archaeological Resources Protection Act Before the Subcomm. on General Oversight and Investigations of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. (1987) (copy on file in the offices of the JOURNAL OF ENVIRONMENTAL LAW & LITIGATION). The author testified at the hearings upon invitation of the committee and has been consulting with committee staff in developing language for the bill.



LEGAL BACKGROUND of ARCHEOLOGICAL RESOURCES PROTECTION

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This Technical Brief describes the legal background and case histories for archeological protection. Its purpose is to provide a convenient summary of archeological protection and preservation as an issue in law and jurisprudence that will be of use to jurists who may need assistance in casework.

Portions of this technical brief depart from the standard format for reference citations, i.e., American Antiquity style, in favor of endnotes and legal usages, standard legal citation format, which are more helpful to attorneys and judges. Also, the standardized Federal government spelling of "archeology" is used throughout, except in titles and direct references to the Archaeological Resources Protection Act where it is spelled "archaeology."

Introduction

Despite a variety of Federal, Tribal, State and even local laws passed over the last 85 years, the amount of looting and vandalism of irreplaceable archeological resources continues to increase. Archeological sites are located on both public and private lands. Many of the areas are remote and difficult to patrol,¹ although considerable numbers of archeological sites are also to be found in more densely populated areas such as New England, the Midwest, Southeast, and the West Coast.

This technical brief examines: (1) the current profile of civil and criminal actions brought since passage of the Archaeological Resources Protection Act (ARPA);² (2) the potential areas of application for ARPA; (3) other laws and regulations that afford protection to archeological resources; and (4) case patterns through an overview of LOOT information currently available.

History and Purpose

Statutes Prior to ARPA

Federal preservation law dates from the early 19th century, when its primary focus was to document informa-

tion and collect items of importance in connection with national public figures and historic military events.³ The extended efforts beginning in the mid-19th century to save George Washington's home, Mt. Vernon, and protect the archeological remains and monumental architecture of Southwest sites such as Casa Grande Ruins exemplify such early preservation measures, most of which resulted in cases involving the taking of public property for preservation or beautification purposes.⁴ The first case in which the Supreme Court recognized that the Federal government had the power to condemn private⁵ property in order to preserve an historic site was *United States v. Gettysburg Electric Railway Co.* (1896), which allowed the creation of Gettysburg Battlefield Memorial.⁶ In its decision the Court refused to adopt a narrow constitutional interpretation offered by the railroad, which would have placed the condemnation of its property outside the definition of a taking for a "public purpose" necessary for government condemnation of property. The Court did not discuss whether the government could utilize regulatory schemes to facilitate historic preservation, nor did it address the question of whether the government could extend its efforts to condemn and acquire sites with no apparent historical connections—issues which would be extremely important in the future development of preservation law.

Around the turn of the century, local governments began to adopt a European approach to land use and zoning regulation for the purpose of preserving the "local character" of their towns. The City of Baltimore, for example, adopted a 70-foot maximum height regulation to maintain the character of its residential and commercial areas. A similar regulation was adopted the same year by the city of Boston. The Baltimore regulation was challenged in *Cochran v. Preston* (1908)⁷ and upheld by the Court of Appeals on the ground that it was designed to reduce fire hazards in addition to containing an aesthetic preservation goal. The Boston ordinance was also challenged, and ended up before the Supreme Court in 1909.⁸ The Court upheld the ordinance as being reasonably related to public health and safety, primarily in the area of fire prevention. Still, the Court did not address the issue of whether government regulation could be justified under constitutional substantive due process standards for preservation reasons. It would be 1978 before that question would be answered in the affirmative.⁹

Antiquities Act

Federal policy to preserve historic and prehistoric sites on Federal lands was first embodied in the Antiquities Act of 1906,¹⁰ which authorizes a permit system for investigation of archeological sites on Federal and Indian lands, and gives the President the power to establish national monuments on Federal lands for the purpose of protecting historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest. The Antiquities Act specifies protection of antiquities on all lands owned or controlled by the Federal government and gives authority for their proper care and management to the Departments having jurisdiction. This means that Indian lands, forest preserves, and military reservations are included. The statute has no felony provisions, and penalties limited to criminal misdemeanor charges with fines up to \$500 and/or 90 days imprisonment, are imposed upon those "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 Federal government unless they have a permit¹¹ issued through the Secretary of the Department having jurisdiction.¹² Previously, specific legislative authorization was required for each designation. Although the authority to regulate the excavation or collection of archeological remains from federally controlled lands now rests principally with ARPA, monuments still are created under the Antiquities Act, and that statute limits monuments to "the smallest area compatible with the proper care and management of the objects to be protected."¹³

Historic Sites Act

The Historic Sites Act,¹⁴ enacted in 1935, declared a Federal policy to preserve historic and prehistoric properties of national significance. It gives the Secretary of the Interior authority to make historic surveys, as well as other broad powers to protect historic properties, and establishes the National Historic Landmarks Program. This legislation sets standards for identification and preservation of National Historic Landmarks. It does not contain any sections that address enforcement.¹⁵

National Historic Preservation Act (NHPA)

NHPA was originally passed by Congress in 1966¹⁶ and established a Federal policy of cooperation with other nations, Tribes, States, and local governments to protect historic sites and values. Together with its implementing regulations, NHPA authorizes the National Register of Historic Places,¹⁷ creates the Advisory Council on Historic Preservation,¹⁸ provides further considerations for National Historic Landmarks,¹⁹ and creates procedures for approved State and Local Government Programs.²⁰ The National Register of Historic Places criteria for evaluation of properties to be nominated are found at 36 CFR Part 60.4. Consideration is given to "districts, sites, buildings, structures and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association" and that are (a) related to events that have made a significant contribution to the broad patterns of our history; or that are (b) associated with the

lives of persons significant in our past; or that (c) bear a pattern of distinctive characteristics of historic, architectural, archeological, engineering or cultural significance; or that (d) have yielded or may in the future yield important information as to our history or prehistory.

Regulatory provisions accompanying NHPA require the State Historic Preservation Officers (SHPOs) to prepare and implement State historic preservation plans.²¹ Protection of identified historic sites is facilitated through implementation of NHPA Section 106 review, which is a five-step process designed to ensure that historic properties are considered during the planning and execution of Federal projects.²²

The major amendments to NHPA, passed in 1980,²³ provide support for archeological resources protection because they codify those portions of Executive Order 11593²⁴ requiring Federal agencies to develop programs to inventory and evaluate historic resources. The amendments also authorize Federal agencies to charge reasonable costs for such activities to Federal permittees and licensees.²⁵

Archeological and Historic Preservation Act²⁶ (AHPA)

Though it has been called the Archeological Recovery Act and the Reservoir Salvage Act, AHPA has no official short title. Most importantly, it requires Federal agencies to preserve historic and archeological data, including the objects and materials collected from archeological sites, which may otherwise be lost or destroyed as a result of "any Federal construction project or federally licensed activity or program." Up to 1 percent of project funds may be appropriated to conduct archeological data recovery activities, in addition to any costs for archeological work required for project planning.²⁷

Archaeological Resources Protection Act (ARPA)

Of the laws currently in place for protecting archeological resources, one of the most far-reaching is the Archaeological Resources Protection Act of 1979 (ARPA)²⁸ with its subsequent amendments of 1988.²⁹ This is particularly true since adoption in 1984 of uniform regulations by which many aspects of ARPA are enforced.³⁰ Under Section 6 of ARPA the first significant criminal penalties can now be imposed for the vandalism, alteration, or destruction of historic and prehistoric sites³¹ or Federal and Indian lands, as well as for the sale, purchase, exchange, transport, or receipt of any archeological resource if that resource was excavated or removed from public lands or Indian lands or in violation of State or local law. The penalties include up to \$250,000 in fines and up to five years imprisonment.³² In addition, ARPA provides civil penalties for the acts prohibited under Section 6, as well as for violations of ARPA permits.³³ The penalties include the forfeiture of property used for illegal site disturbances or destruction and forfeiture of illegally obtained artifacts.³⁴

The critical provisions of ARPA make it illegal to excavate or remove any archeological resources from Federal or Indian lands without a permit from the Federal land manager. Permits for archeological work on Indian lands may be granted only after obtaining consent of the Indian allottee or Indian Tribe owning or having jurisdiction over such lands. One of the conditions for issuance of a permit is that the applicant demonstrate that proposed activities will provide increased knowledge of archeological resources. A primary purpose of the statute is to increase the exchange of information and general communication among governmental entities, professional archeologists, and the public. Finally, ARPA requires uniform regulations to be promulgated by the Secretaries of the Interior, Defense, and Agriculture and the Chairman of the Tennessee Valley Authority. Federal land managers, as defined in ARPA, may promulgate additional regulations, consistent with the uniform regulations, which may be needed by their agencies.

Currently there are a few State statutes that address protecting archeologically significant sites located on private lands but there are no comparable Federal statutes. Unlike the European nations, the United States has not embraced the concept of a national cultural heritage law that protects significant resources within the boundaries of private ownership of land.

Although the most recent amendments to ARPA will improve the effectiveness of the anti-looting portions of the statute via interagency cooperation, there are certain areas in which the only effective remedy will be increased involvement of the law enforcement community. This community includes local, State, and Federal law enforcement personnel, attorneys, and the judiciary involved at each level of prosecution. At present many of these individuals do not know that the statute exists, or if they are aware of it, they still prefer to utilize more familiar State and local laws that prohibit theft, vandalism, or trespass. Although such laws do take care of some of the problems, they do not deal effectively with the destruction of cultural resources and information because the focus is in punishing specific common law offenses.³⁵ Because these laws are also more familiar to the members of juries, as well as the judges, who may be deciding the cases, prosecutors often see a strategic advantage in presenting a cause of action that will not be misunderstood.

When Congress passed ARPA in 1979, legislators and preservationists hoped that it would result in a reduction of vandalism and looting of the nation's prehistoric and historic archeological sites. They looked to ARPA as a vehicle for education that would lead to a heightened public awareness of the problem as well as provide a major deterrent to looters and illegal commercial traffickers through its substantial penalty provisions.³⁶ This continues to be the case, as ARPA was strengthened by the 1988 amendments with requirements that Federal agencies develop plans for surveying lands not scheduled for projects, develop and implement systems for reporting and recording archeological violations, and develop

public awareness programs. The amendments also provide for a lower felony threshold, reduced from \$5,000 to \$500 damage caused, and prohibit attempts to damage archeological resources.³⁷ Today, the successful enforcement of ARPA depends upon a variety of interrelated factors:

- (1) Education of the professional communities, including archeologists, agency managers, law enforcement personnel, and jurists, particularly in the areas of preservation law, policy and technology;
- (2) Education of the citizenry at large to foster awareness and appreciation of both historic and prehistoric cultural resources and the importance of protecting and preserving those resources;
- (3) A team approach to collection of data and evidence in investigative casework;
- (4) Communication and cooperation among the agencies that, under the statute, are responsible for the joint administration of the law, including,
 - (a) Effective monitoring of the condition of archeological resources by land managing agencies, and
 - (b) Effective cooperation between law enforcement and cultural resource personnel in managing these resources; and
- (5) Research and development of more effective protection measures.³⁸

Related Federal Legislation

In addition to the statutes that specifically address cultural resources preservation, other legislation also recognizes the importance of historic and prehistoric site protection. While the preservation statutes themselves may be limited by weaknesses in certain areas, their enforcement potential may be increased by their function in tandem with other laws:

*Department of Transportation Act (DOTA)*³⁹

No program undertaken by the Federal Highway Administration, Federal Aviation Administration, Urban Mass Transit Administration, or the U.S. Coast Guard will be approved when it requires use of land from a historic site, whether of national, State, or local significance, *unless there is no feasible and prudent alternative but to use such lands, and unless the program includes all possible planning to minimize harm to the historic properties* (emphasis added).⁴⁰

*National Environmental Policy Act (NEPA)*⁴¹

Because NEPA's Environmental Impact Statement (EIS) requirement applies to all proposed major Federal actions that may significantly affect the quality of the human environment, it has become an effective procedural

statute that is applicable to cultural resources preservation.⁴² The EIS must be prepared prior to such proposed actions. Both NEPA and NHPA apply only to Federal actions, and although these statutes neither specifically prohibit activities that may ultimately result in damage to or destruction of archeological resources nor require actions to preserve cultural resources, the courts have usually considered NEPA applicable to such resources, in that the natural environment includes our "historic and cultural heritage".⁴³

American Indian Religious Freedom Act (AIRFA)⁴⁴

This Act seeks to protect and preserve traditional Native American, Eskimo, Aleut, and Hawaiian spiritual beliefs and practices by providing access to ancient sites for these Native peoples. AIRFA also provides for the use and possession of sacred objects by members of the Native American Tribes. Archeological site protection is a Federal activity related to AIRFA, since it directs the various agencies to consult with Native traditional religious leaders in a cooperative effort to develop and implement policies and procedures that will aid in determining how to protect and preserve Native American cultural and spiritual traditions. Section 10(a) of ARPA requires that uniform regulations be promulgated for ARPA after consideration of AIRFA.

Federal Collections Act of 1966⁴⁵

This Act requires that Federal agencies attempt collection of all claims for money or property damage arising out of activities on Federal lands, including claims resulting from unauthorized or illegal activities that damage or destroy cultural resources. Historic and prehistoric sites have clearly been defined as "resources" under the Antiquities Act, NHPA, and ARPA, and collection requires careful analysis by a professional archeologist whose training includes methods of site appraisal, such as provided in the uniform regulations for ARPA, that will translate site damage into monetary terms and satisfy the evidentiary requirements of a court case.⁴⁶

18 U.S.C. 641, Embezzlement and Theft⁴⁷

This statute provides that, "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, . . . or thing of value of the United States or of 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 10 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." This statute, together with the malicious mischief statute, may be used in coordination with ARPA to establish liability of looters as well as their connected commercial agents or dealers in artifacts.⁴⁸

18 U.S.C. 1361, Destruction of Government Property (Malicious Mischief)

This statute provides: "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."

The advantages to including this statute when litigating against looters and vandals is clear, since its penalties may be applied to partial site destruction or to destruction and/or removal of smaller non-replaceable resources such as portions of pots, chipping tools, and fabric remnants.⁴⁹

18 U.S.C. 1163, Embezzlement and Theft from Indian Tribal Organizations

This statute is similar to 18 U.S.C. 641, described above, but it applies specifically to embezzlement and theft from Indian Tribes.

Alternative fines are also applicable to both the malicious mischief and embezzlement/theft statutes. Pursuant to 18 U.S.C. 3571, maximum fines may be imposed for convictions under 18 U.S.C. 1163, 18 U.S.C. 641, and 18 U.S.C. 1361, as follows:

Misdemeanor conviction, value less than \$100.00, up to \$100,000 maximum fine. Felony conviction, value exceeds \$100,000, maximum fine up to \$250,000.

If the defendant is an organization, the maximum fine rates are doubled, although no term of imprisonment can be imposed.

18 U.S.C. 371, Conspiracy to Commit Offense or Defraud the States

For a discussion of the application of the Fifth Amendment double jeopardy clause to subsequent criminal prosecutions and the possibility of bar as to "same offense" charges, see *Grady v. Corbin*, 110 S. Ct. 2084 (decided May 29, 1990).

Companion State Statutes

Research into existing State statutes that are applicable to archeological resources protection was begun by examining a collection of State laws contained in National Park Service (NPS) files. The list obtained was expanded through a search of the LEXIS and the WESTLAW computer services. Additional information was provided through correspondence with participants in the NPS, Forest Service, and Federal Law Enforcement Training Center who provided LOOT Clearinghouse information (see discussion of LOOT Clearinghouse below). The chart of State statutes (Figure 1) represents the several categories that were needed to identify statutes ap-

plicable to cultural resources protection. Use of these categories was particularly important in the computer searches because there are no generalized cultural resources headings under which these laws can be principally found. Finding these laws depends upon how an individual State categorizes the nature of the protection or the type of offense committed. The laws covering archeological resources protection rarely are codified under a single heading. Additionally, it is likely that new laws have been passed in State legislatures and existing laws may have been re-titled or consolidated since June 1990, the date of this research.

State statutes in force as of July 1990, fall into five categories that reinforce or complement ARPA (See Figure 1):

1. Restrictions on sales of antiquities or forgeries (14 States);
2. Laws to discourage activities that damage archeological resources on private land (11 States);
3. Mirror ARPA statutes, including penalty provisions (37 States);
4. Penalties for disturbances of marked and unmarked burial sites (11 States). Eight states have reinterment statutes, but only two of these also have an anti-disturbance statute; and
5. Statutes providing for acquisition of real property or artifacts.⁵⁰

An additional seven states had pending legislation for 1989-90 sessions in one or more of the five categories, with the emphasis of proposed legislation upon marked and unmarked burial sites. In addition, several States have statutes providing protection to specific areas, such as underwater salvage sites (10 States), caves (4 States), earthworks (2 States), forts (2 States), ghost-towns (Colorado only), petroglyphs or rock art (3 States), and State preserves (Iowa only).

Many States have statutes that establish State archeologists, State historical agencies, involvement in cultural resources issues by Native Americans through established advisory councils, and State registers of historic places. There are also statutes that provide for State cultural resources surveys, regulatory issuance of permits for field investigations, obligations to report discoveries that may have historic or prehistoric archeological significance, and protection of the confidentiality of site locations.

Survey of SHPO Resources Protection Activities

During preliminary research for this Technical Brief it was determined that, while it was important to understand the regional context of archeological resources protection at other levels of government, little information actually was available about such programs at State Historic Preservation Offices (SHPO). Therefore, a survey was conducted between January and August 1990, to query 59 State Historic Preservation Officers and 14 of their deputies about a wide range of protection activities. There were 41 responses (56 %).

The results of the survey show that SHPOs are active in the following areas (numbers of affirmative SHPO responses shown in parentheses).

Casework

Some SHPOs have provided assistance in archeological protection under the Antiquities Act (6) and ARPA (13). Many SHPOs listed activities within the Section 106 procedures of NHPA as their primary source of involvement under Federal law.

Some SHPOs reported assisting with archeological protection pursuant to a variety of State statutes, including theft (4), trespass (5), vandalism (11), site disturbances, including burials and confidentiality of site locations (17), permit violations (10), sales of forged artifacts (4), and archeological surveys or salvage excavations on State lands (1).

Responses from 14 SHPOs documented direct assistance in 17 archeological protection cases prosecuted between 1985 and 1990, with some of those cases still pending resolution. Seven of the cases were prosecuted under ARPA, either alone or in conjunction with other statutes.

SHPO assistance in case preparation has included gathering information or evidence on-site (13), consultation with attorneys (8) and law enforcement personnel (10), giving testimony at trials (9) or hearings (3), and participation in courtmartial proceedings (1).

Legislative and Administrative Assistance

SHPOs reported infrequent participation in legislative activities. However, such activity by preservationists is extremely important because cases are often won or lost on the strength of a statute. One of the most powerful ways to increase protection of archeological resources is through implementation of effective State statutes. The courts are the interpreters of the law, and when there exists a preservation statute that the court may appropriately apply, case preparation may be approached from a much stronger position. For example, SHPO expertise and input were instrumental in the draft-

STATE STATUTES PROMOTING ARCH

	AL	AK	AZ	AR	CA	CO	CT	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	MD	ME	MI	MN	MO	MS	MT	NC	ND	NH	NJ	NM	NV	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VA	VT	WA	WI	WV	WY							
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LOGICAL RESOURCES PROTECTION

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Geological Resources Protection

ing and subsequent enactment of State legislation in Arizona to protect and preserve ancient burial sites on private land.⁵¹

SHPO legislative efforts necessarily include the building of a constituency that will be available for future legislative activities in related areas. The SHPO survey documented the following legislative and administrative activities: drafting bills (1); legislative task force membership (3); and Federal grant project reviews (1).

Training

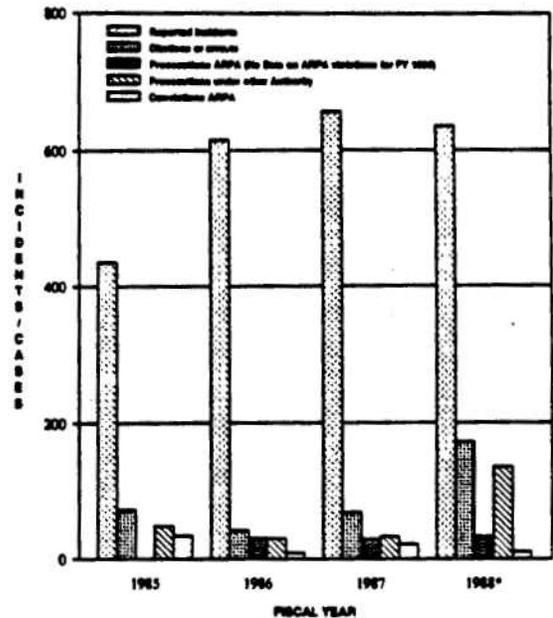
SHPOs also recognized their participation in training programs for archeological resources protection. SHPOs were both students (19) and teachers (13) in various programs including the 40-hour skills development course sponsored by the Federal Law Enforcement Training Center, the 12-hour overview of archeological protection programs sponsored by NPS, public awareness programs, and inhouse workshops. Eleven SHPOs indicated that there had been no participation in preservation law training.

Results of the survey confirm that SHPOs are a potentially valuable resource in expanding efforts to enforce preservation laws and educate the general public about archeological resources protection. While most enforcement activities continue to be conducted by Federal agencies, significant public awareness efforts are conducted by States, especially during "archeology weeks." When these are coupled with improved cooperation among law enforcement jurisdictions, there can be an important impact in reducing site vandalism.

Application of ARPA

Federal and Indian lands are the clear province of ARPA, and the statute requires four agencies, the Departments of the Interior, Agriculture, and Defense, and the Tennessee Valley Authority, to provide uniform regulations for its implementation. Federal agencies also may adopt supplementary regulations, as long as these are consistent with the uniform regulations. In addition, the Secretary of the Interior is charged with reporting to Congress on the Federal archeology program and activities conducted pursuant to ARPA. This function is completed by Interior's Departmental Consulting Archeologist (DCA), who receives staff support from the NPS Archeological Assistance Division. Annually, Federal agencies cooperate to provide information about their programs to the DCA, and this includes information related to enforcement of archeological protection laws.⁵²

Collection of information about enforcement reflects only activity at known archeological sites. The majority of sites that probably exist on federally controlled lands have yet to be inventoried or evaluated. Congress recognized the need to conduct broader archeological surveys



* Includes 1988 data on file as of December 1990. Pending prosecutions and convictions at time information was submitted have not been included.

Figure 2. Vandalism and looting statistics, FY 1985 and FY 1986.

to complement project-specific archeological work by adding Section 14 to ARPA in 1988. The latest available information indicates that, overall, Federal agencies estimate that less than 8 percent of the lands they manage have been investigated for possible archeological sites. The magnitude of site looting and vandalism is more easily understood by looking at one area, the "Four Corners" of the Southwest,⁵³ wherein significant percentages of the known archeological sites have been damaged or destroyed by either casual or unintentional disturbance or by systematic commercial looting.⁵⁴

Between 1985 and 1987, a total of 1,720 incidents of archeological looting were reported by Federal agencies. These incidents resulted in a total of 134 citations, 49 arrests, 57 criminal misdemeanor convictions under ARPA, 16 felony convictions under ARPA, and 17 civil penalties under ARPA.⁵⁵ The largest number of cases actually prosecuted were brought under other authorities, such as other Federal statutes, State statutes, or agency-specific regulations.⁵⁶

Archeological site monitoring throughout the vast Federal lands areas is difficult, at best.⁵⁷ In addition to the inadequate number of personnel available for site patrol, many known sites are virtually undetectable to the untrained eye, and damage may be undiscovered or unnoticed for long periods of time. Consequently, timely discoveries of looting have been one problem for enforcement.⁵⁸ The 1988 Federal agency information indicates that only 15 percent of the reported incidents were

found in time to issue citations or perform an arrest. Also, convictions reported for a given year may be for prosecutions begun two to five years earlier.⁵⁹ (See Figure 2)

Protection strategies on federally controlled lands have included increased patrols, site monitoring, including surveillance technology such as hidden alarm mechanisms, and remote sensing, and interagency cooperation. The result has been a significant increase in reported ARPA violations, but there has yet to be a correspondingly dramatic increase in citations, arrests, prosecutions, or convictions under the statute. It is also evident that actual looting and trafficking in artifacts far exceeds the number of reported incidents.

LOOT Clearinghouse Cases

Another source of information about archeological protection is the Listing of Outlaw Treachery (LOOT) Clearinghouse, created by the NPS Archeological Assistance Division. It contains voluntarily submitted reports for cases of archeological looting and vandalism. Its objectives are to improve the quality of information available about archeological protection, increase the effective use of that information for future enforcement efforts, and expedite the communication of case strategies and results among the many government agencies. Case-specific information for the LOOT Clearinghouse is collected on a form that is distributed to Federal agencies along with the questionnaire requesting data on Federal archeology programs for the annual report to Congress.⁶⁰ Respondents are asked to supply information on cases that have been completed, not about ongoing investigations. Others concerned with archeological protection, such as attorneys, law enforcement officials, or professional archeological consultants, also are asked to submit information on completed cases with which they are familiar.

Table 1 compares the programmatic data gathered as part of the annual report on the Federal archeology program with the case-specific data reported on individual LOOT forms. The discrepancy in numbers is a result of the way in which cases and incidents are grouped, how many LOOT forms document the resolution of cases, and whether or not cases brought under statutes other than ARPA are included in either the annual report data or the LOOT data.

Although the primary purpose of LOOT is to provide "a central place for those seeking information on prosecutions of looting and vandalism,"⁶¹ it also reflects how often and with what success such prosecutions are brought under ARPA, either alone or in combination with other statutes. The LOOT Clearinghouse presently contains information on approximately 100 cases; 23 of these predate the passage of ARPA, while another 24 predate the adoption of ARPA's implementing regulations.⁶² All but a few entries predate the 1988 amendments to ARPA, which make it easier for prosecutors to build strong cases.

A brief discussion of pre-regulations cases may be necessary to the understanding of ARPA's development, but the effectiveness of ARPA should be viewed in light of the past five years that these regulations have been in place. In addition, the 1988 amendments to ARPA provide three important changes in favor of enforcement. These include: (1) reduction of the damage amount that establishes the criminal offense from \$5,000 to \$500;⁶³ (2) insertion of language into Section 6(a), which makes it a criminal offense to "... attempt to excavate, remove, damage, or otherwise alter or deface" any archaeological resources on federally controlled lands,⁶⁴ and (3) development of a reporting system to document suspected violations under ARPA.⁶⁵

Category	Report questionnaire	LOOT Clearinghouse
Incidents	2,350 (includes cases and incidents)	47 (includes cases only)
Arrests	91 (with or without further action)	19 (arrests followed by trial or hearing)
Citations	256 (with or without further action)	7 (citations resulting in trial)
Prosecutions	119 (no details)	50 (disposition documentation incomplete)
Convictions		
Felony	19	Unspecified
Misdemeanor	57	Unspecified
Civil Penalty	27	Unspecified
Other Statutes	190 (no indication whether case is pending, dropped, settled, or tried)	15

Table 1. Archeological Protection Case Data Comparison

Prosecutions under ARPA prior to regulations were limited because the statute did not designate civil penalties and also because of the more narrow definitions of "archaeological resource" provided in ARPA itself. ARPA felony criminal prosecutions now require four elements of proof:

- (1) that defendant did knowingly excavate, remove, damage, alter, or deface an archeological resource;
- (2) that said resource was located on public and Indian lands;
- (3) that the defendant acted without a permit;⁶⁶ and
- (4) that the archeological value or commercial value and cost of restoration and repair exceeded \$500.⁶⁷

Despite temporary limitations prior to 1984 due to the need for implementing regulations, seven prosecutions under ARPA were instituted during the first few months after it became law. The ARPA count was usually accompanied by a separate count under 18 U.S.C. 1361, Destruction of Government Property, and the cases were heard either in U.S. District Court or brought before the appropriate Federal Magistrate. Representative convictions from these cases include *United States v. Palmer* (D. Utah, April, 1980), for illegal excavation (\$200 fine, 2-year probation, plus \$300 fine assessed in lieu of confiscation of a vehicle); *United States v. Brady* (D. Arizona, November, 1979), for excavation and damage to a prehistoric site (6 months suspended sentence; 3-year probation); and *United States v. Shumway*, No. Cr-80-5 W (D. Utah, November, 1979) for illegal excavation and destruction of government property (\$750 fine; 3 years suspended sentence with 3 years probation).⁶⁸ In one early case, the defendants even petitioned for prosecution under ARPA, although their original offense was committed prior to ARPA's enactment. The plea was granted, and on May 19, 1980, the first sentences under ARPA's felony provisions were imposed.⁶⁹

For the period between 1980 and the adoption of ARPA uniform regulations in 1984 the LOOT clearinghouse documents 19 additional ARPA prosecutions. The pattern emerging from the remainder of these pre-regulation cases shows guilty verdicts by either judge/magistrate or jury for all but one defendant. Prison sentences were usually completely suspended, though one defendant did serve 6 months imprisonment, with supervised probation of 2 to 3 years being imposed instead of jail time. Community service hours were imposed on one defendant. Fines were imposed in less than 50 percent of the cases. Some of the fines were later declared uncollectible by the Justice Department, and most fines did not reflect the actual damage amounts presented by the government after damage assessments and analysis by expert archeologists.⁷⁰ Lack of ARPA regulations resulted in the only complete acquittal during this period. In that case,⁷¹ defendants were found not guilty of causing \$9,000 in damages to a rock shelter because it was not clearly

demonstrated that a rock shelter is an archeological resource.

ARPA uniform and supplementary regulations have clarified uncertainties as to the statute's application and have enhanced the prosecutor's ability to cover a wide range of activities that have resulted in damage to or destruction of archeological resources. ARPA focuses on those activities that have been categorized as "predatory or malicious," which include collecting for personal or commercial gain and wanton property destruction with or without commercial or personal motive. Such looting and vandalism occurs: through digging, also commonly called "pot-hunting", and use of heavy machinery; carving, chipping, scratching, or other general defacement; surface collection of artifacts from archeological sites; theft of artifacts from historic or prehistoric structures; removal of all or portions of a structure; arson; climbing or walking on resources; breaking artifacts, objects, or windows; knocking structures over; throwing rocks and other debris into excavated ruins; or simply handling or touching the structure or contents of sites.⁷² It should be emphasized that although surface collection of arrowheads is not prohibited under ARPA, such activity does violate both the Antiquities Act (See Page 2), and the Theft of Government Property statute 18 U.S.C. 641.

The LOOT Clearinghouse contains reports on 60 cases dating from the time of adoption of ARPA regulations, but only 28 of those included ARPA counts for prosecution.⁷³ Only 16 defendants were prosecuted solely under ARPA. Those activities successfully prosecuted included theft of Civil War relics from public lands, site disturbances—digging or sifting for artifacts—on public lands, removal of material remains or artifacts from prehistoric Indian burial sites, looting of historic shipwrecks in national reserve waters, and trafficking in stolen artifacts illegally obtained from public lands.

Successful prosecutions do not necessarily mean automatic imposition of appropriate fines or other penalties. LOOT reflects only \$270 collected in civil fines,⁷⁴ although the number of substantial forfeitures has increased. Items forfeited usually include all tools and equipment used in search and removal efforts, digging tools, metal detectors, diving equipment, and even vehicles such as trucks and boats. Of course, all artifacts in the possession of the defendants are usually confiscated and, upon conviction, those items are forfeited. Defendants who actually serve prison time for ARPA violations continue to be the exception because these sentences often are suspended by the court or magistrate in favor of supervised probation and fines. The amounts of criminal fines imposed continue to be far less than the statutory allowances, with the exception of one \$10,000 fine⁷⁵ and one \$21,000 fine, which was assessed under another statute. Another notable exception was the assessment of \$132,000 in civil penalties against seven individuals who looted shipwrecks within a National Park and a National Marine Sanctuary.⁷⁶ Typically, however, the average fine imposed is under \$500, but hours of

community service also are required. Denial of access to public lands or monuments is imposed on many defendants during their probationary periods.⁷⁷

If a general trend can be seen through analysis of the LOOT Clearinghouse cases thus far, it is clear that ARPA prosecutions are increasing, but it is less likely that a prosecution is brought under ARPA alone.⁷⁸ Federal statutes governing theft and embezzlement of government property or destruction of government property (See Page 4) usually are included along with the ARPA counts. Attorneys may be more willing to prosecute exclusively under ARPA where the defendant has a prior ARPA conviction, whether felony or misdemeanor, since after one conviction there is no felony threshold with regard to damage to the archeological resource, and the maximum penalty is now up to five years imprisonment and/or as much as \$250,000 in fines.

There still appears to be a reluctance on the part of prosecuting attorneys to include the additional civil damages that are available under ARPA. In one case, although information as to civil liability was presented in detail to the Grand Jury, the attorneys on the case elected not to pursue civil prosecution. The defendants escaped fines of several thousand dollars, paying only the criminal fines and receiving suspended sentences in favor of 5 years probation with 100 hours of community service to be performed. In another case involving an underwater site, the attorney elected not to prosecute under ARPA at all, rationalizing that the court might not consider "diving" for artifacts to be covered under the statute, which speaks to "digging." The LOOT report correctly pointed out that such a rationale would not have prevented prosecution under the National Historic Preservation Act, (See Page 2), which makes it a violation to remove artifacts from Federal property in any manner. Pre-trial agreements or plea bargaining also account for the dropping of ARPA counts in exchange for guilty pleas to lesser offenses. There are two possible explanations for this. Perhaps United States Attorneys continue to have doubts about prosecuting under ARPA because of possible negative statutory interpretations or questions about whether the defendants' activities would really satisfy requirements for an ARPA violation. Alternatively, the potential for violators to receive significant criminal penalties under ARPA may have been shown to be a useful element in effective plea bargaining.

A note of caution is appropriate here. Several factors greatly influence the quality and accuracy of current ARPA enforcement documentation. A large number of Federal agencies are required to respond to the annual NPS questionnaire,⁷⁹ and the accuracy and completeness of those responses vary widely depending upon the interest and expertise of the person filling out the form. Cumulative figures are skewed because neither the Department of Transportation nor the Justice Depart-

ment provides responses to the questionnaire that corroborate media reports and other independent information about their activities relative to ARPA violations⁸⁰ and prosecutions. The LOOT case forms usually are completed and submitted⁸¹ by Forest Rangers, Park Rangers, and Regional or State Archeologists, who, in turn, are getting their information from agency patrol reports, United States Attorneys, newspaper or magazine articles, and, occasionally, court records.⁸² The case reports are limited to known archeological sites.

Interpretation of what constitutes a "case" in the LOOT forms also depends upon the informant. LOOT reports include "incidents" that resulted in the assessment of fines—an occurrence that requires some sort of formal procedure—yet the report is silent as to dates of arrest, indictment, hearing, or trial. Conversely, there are LOOT reports that clearly reflect that a hearing or trial has taken place, but there is no information as to the forum of that proceeding or as to whether the penalties assessed were civil or criminal in nature. Furthermore, even when distinction is made between criminal and civil penalties, the nature of the criminal punishments—felony or misdemeanor—are omitted. ARPA violations are often documented, but many of the LOOT reports do not indicate if the actual charges brought were under ARPA or another statute or both. When statutes are cited, there are often omissions as to which counts were dropped during plea bargaining or which counts are included in the resulting guilty verdicts. Amounts that are listed as "fines" are sometimes really the value of items forfeited, and there is confusion among the individual reporters as to what is meant by the terms "restitution," "fine," "forfeiture," and "court costs." On occasion, an agency will have so many violations that it literally stops counting and begins generalizing.⁸³

Conclusion

The legal background of archeological resources protection is long, reflecting more than 100 years of public concern to preserve the material evidence of the nation's past. That concern has changed over time, and since the late 1970s efforts to integrate research, public education, and law enforcement to further safeguard these irreplaceable parts of our heritage have increased. The enactment of ARPA was a major result. Along with ARPA, there now is a significant body of law available to those who are responsible for protecting archeological resources from looting and vandalism. Case histories demonstrate that effective enforcement has increased, especially when conducted as part of a larger program of archeological resources stewardship and public awareness. Often, these cases have inspired the public's interest in its heritage and fostered a wider understanding of its rich cultural past.

Endnotes

1. Some of the areas in the Southwest, Pacific Northwest, and Alaska, in particular, cover many hundreds of square miles, over terrain with high levels of inaccessibility.
2. P.L. 96-95, as amended by P.L. 100-555 and 100-588; 16 U.S.C. 470aa-mm. (1988).
3. Duerksen, Christopher J., editor, *A Handbook on Historic Preservation Law*, The Conservation Foundation and The National Center for Preservation Law, Washington, DC, 1983, p. 193.
4. *Ibid.*, p. 3.
5. The Fifth Amendment to the Constitution specifies the procedural protection in its "taking clause": "nor shall private property be taken for public use, without just compensation."
6. 160 U.S. 668 (1896).
7. 108 Md. 220, 70 A. 113 (1908).
8. *Weich v. Sawney*, 214 U.S. 91 (1909).
9. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). An earlier Supreme Court case, *Berman v. Parker*, 348 U.S. 26 (1954), gave strong support in *dicta* to the concept of governmental condemnation action for aesthetic purposes when Justice Douglas wrote: "The values [public welfare] represented are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully policed. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. . . the means by which it will be attained is also for Congress to determine" (348 U.S. 26, p. 33). However, *Berman* dealt with local historic District of Columbia ordinances and recognized that the ordinance in question considered aesthetic values as one of many criteria encompassed by the term "public welfare." The *Penn Central* decision made it clear that individual landmarks as well as historic districts could be protected. Justice Brennan, writing for the Majority, stated: "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people. New York City, responding to similar concerns and acting pursuant to a New York State Enabling Act, adopted its Landmarks Preservation Law in 1965. . . The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users" (438 U.S. 108-111 (1977)). The court concluded that "the restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper, but also other properties" (438 U.S. 138 (1977)).
10. P.L. 59-209, 16 U.S.C. 431-433 (1906). The historical background of this law is the topic of *The Antiquities Act of 1906*, by Ronald F. Lee, National Park Service, Washington, DC, 1970 (NTIS order number PB284061). See also Hal Rothman, *Preserving Different Pasts: The American National Monuments*, University of Illinois Press, Chicago, IL, 1989.
11. Section 432 of the Antiquities Act provides that permits will be issued for examinations, excavations and gatherings of objects when such activities are undertaken "for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums." Currently, most Federal agency permits are issued under the authority of ARPA.
12. Maximum fine of \$500 or 90 days in prison, or both. *Ibid.*, Sec. 1.
13. 16 U.S.C. 431, § 2.
14. P.L. 74-292, 16 U.S.C. 461-467 (1935).
15. Regulations for the National Historic Landmarks Program are found at 36 CFR Part 65.
16. P.L. 89-665, 16 U.S.C. 470-470t (1966). Those responsible for Federal historic preservation programs and projects are encouraged to conduct them according to the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, September 29, 1983 (48 F.R. 44716-44742).
17. *Ibid.*, page 336 C.F.R. Part 60.
18. 36 C.F.R. Part 800.
19. 36 C.F.R. Part 65.

20. 36 C.F.R. Part 61.

21. 36 C.F.R. Part 60, in conjunction with Exec. Order No. 11593, Protection and Enhancement of the Cultural Environment, May 13, 1971 (36 F.R. 8921), implements the necessary cooperation between State and Federal agencies to inventory and ensure the preservation of non-federally owned "sites, structures, and objects of historical, architectural, or archeological significance."

22. 36 C.F.R. Part 800 includes the regulations published by the Advisory Council on Historic Preservation to implement Section 106 of NHPA. Federal "undertakings" range from construction, rehabilitation, and repair projects to transfers or demolition of Federal properties. Assessments result in one of three determinations: (a) no effect; (b) no adverse effect, i.e., one or more historic properties will be affected, but the historic qualities that make them significant will not be harmed; or (c) adverse effect, i.e., the undertaking will cause harm to one or more historic properties. See the Advisory Council on Historic Preservation publication: *Fact Sheet Working with Section 106*, Washington, DC, revised September, 1988, pp. 3-4. The basic steps to arrive at a determination are: (1) identification and evaluation of historic properties, with the possibility of further studies to evaluate places that may have been considered eligible for inclusion in the National Register but were not so registered; (2) assessment of the effects that the Federal undertaking may have on the identified properties; (3) consultation on adverse effects with the SHPO, Indian Tribes, property owners, and others resulting in an agreement outlining measures to reduce, avoid, or mitigate any adverse effect; (4) a period of time for comment by the Advisory Council on Historic Preservation; and (5) implementation of the particular Federal project under the terms of the agreement.

If there is a memorandum of agreement (MOA) developed during Step 3 of the Section 106 process, ACHP may review and accept it, request changes, or decide to issue written comments. If previously unknown archeological remains are discovered after the project has begun, the Federal agency may choose to re-start the Section 106 process or notify the Secretary of the Interior according to Section 4(a) of P.L. 93-291.

23. P.L. 95-515. These amendments codify the requirement that Federal agencies assume the responsibilities for preservation of the historic properties, including the inventory and evaluation of archeological sites that are owned or controlled by them. Appearing as Section 110, this requirement is to ensure that historic preservation is fully integrated into the ongoing programs and missions of Federal agencies and to ensure that they exercise caution so that their activities do not destroy uninventoried sites. Section 110 guidelines are located at 53 F.R. 4727-4746 (February 17, 1988).

24. 36 F.R. 8921 (1971), reprinted in 16 U.S.C. 470h-2 (Supp. IV 1980).

25. This settles the question of whether private interests could be required to pay costs of protecting archeological or historical resources that would otherwise be destroyed by their activities.

26. P.L. 86-523, as amended by P.L. 93-291; 16 U.S.C. 469-469c (1974).

27. The NHPA (Note 26) also authorizes project and project planning funds to be used in this manner. A Federal agency may exceed the 1 percent limitation with the concurrence of the Secretary of the Interior, which is based upon a review by Interior's Departmental Consulting Archeologist.

28. P.L. 96-95, 16 U.S.C. 470aa-II (1979).

29. P.L. 100-555, approved October 28, 1988; P.L. 100-588, approved November 3, 1988; 16 U.S.C. 470aa-mm.

30. 43 C.F.R. Part 7, Department of the Interior; 36 C.F.R. Part 296, Department of Agriculture; 18 C.F.R. Part 1312, Tennessee Valley Authority; 32 C.F.R. Part 229, Department of Defense.

31. Neither ARPA itself nor its implementing regulations provide precise definitions of "historic" and "prehistoric." Rather, the emphasis is on the statutory definition of "archaeological resource," which means "any material remains of human life or activities which are of archaeological interest [and] at least 100 years of age." "Archaeological interest" is defined in the uniform regulations as "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics"; and "material remains" is defined as "physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated." There follows an extensive list of classes of material remains, which will be considered archeological resources, but it should be understood that the list is not all-inclusive. 18 C.F.R. Part 1312.3 (1984).

32. 16 U.S.C. 470ee(d).

33. 18 C.F.R. Part 1312.4 and 1312.15 (1984).

34. 16 U.S.C. 470ff-gg.

35. For a state-by-state analysis of alternative statutes see Figure 1.

36. Although there is considerable documentation in some Federal agency files, e.g., NPS and USDA Forest Service records, as to Antiquities Act violations, the citations for those violations appear to be the exception rather than the norm. In fact, it is not clear as to how the various agencies have coordinated their activities in order to enforce the Antiquities Act, and there is some confusion as to what has actually constituted a violation. See the NPS Antiquities Act files, W34, 1949 - 1981, with accompanying correspondence. Thus, a legislative objective for ARPA was to provide improved enforcement authority.

For an anecdotal, yet thorough discussion of ARPA in legislative process, see Janet L. Friedman, "A Drama in Three Acts," and Laura L. Beatty, "ARPA Enacted: The Legislative Process," both in an edition of *American Archaeology* devoted to "A History of the Archaeological Resources Protection Act: Law and Regulations," Vol 5, No.2, 1985, pp. 82 and 90.

Final Uniform Regulations were issued at 43 C.F.R. Part 7 (Department of the Interior), 36 C.F.R. Part 296 (Department of Agriculture), 18 C.F.R. Part 1312 (Tennessee Valley Authority), and 32 C.F.R. Part 229 (Department of Defense), first published at 49 F.R. 1017-1034 (1984); Supplemental Regulations at 52 F.R. 9165-9170 (Department of the Interior) (1987); and amendments to the uniform regulations at 52 F.R. 47720-47722 (1987).

37. P.L. 100-555 and P.L. 100-588 (1988).

38. See, generally: *CRM Bulletin*, Vol. 11, Special Issue: Archeology and the Federal Government, compiled by George S. Smith, Francis P. McManamon, Ronald D. Anzalone, James W. Hand, and James C. Maxon, National Park Service, Washington, DC, 1988; *Saving the Past for the Future, Actions for the 90s: Final Report, Taos Working Conference on Preventing Archaeological Looting and Vandalism*, Society for American Archaeology, Office of Government Relations, Washington, DC, 1990; and *Federal Archeology Report*, Vol. 3, No. 2, p. 1, National Strategy for Federal Archeology, Secretary of the Interior, 1990.

39. P.L. 89-670, 49 U.S.C. 1651-1659 (1976).

40. The DOTA Section on Preservation of Public Areas [49 U.S.C. 1653(f)] does not specifically define "historic site," but in *Stop H-3 Association v. Coleman* [(1976, CA9 Hawaii) 533 F2d 434, denied 429 US 999, 97 S. Ct. 526, 50 L. Ed 2d 610], the Court held that the determination made by the Secretary of the Interior that a site "may be eligible for inclusion in the National Register of Historic Places" was sufficient to establish historic significance so as to have the site come under the mandates of 49 U.S.C. 1653(f) and 23 U.S.C. 138. Section 1653(f) requires that the Secretary of Transportation "shall cooperate and consult with the Secretaries of Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed... with the stipulation that the Secretary of Transportation not approve programs which will require the use of any publicly owned land from... an historic site of national, State or local significance."

41. P.L. 91-190, 42 U.S.C. 4321-4361 (1976).

42. 42 U.S.C. 4332(1) of NEPA specifically identifies such considerations for the EIS as "aesthetically and culturally pleasing surroundings... preservation of important historic, cultural and natural aspects of our national heritage... and an approach to the maximum attainable recycling of depletable resources."

43. *Ely v. Velde*, 451 F. 2d 1130 (4th Cir. 1971). See also *Stop H-3 v. Brinegar*, 389 F. Supp. 1102, 1110 (D. Hawaii 1974); *Save the Courthouse v. Lynn*, 408 F. Supp. 1323, 1340 (S.D.N.Y. 1975).

44. P.L. 95-341 (1978). Applicable regulations promulgated pursuant to Section 10(a) are located at 43 C.F.R. Part 7.7 and 7.35, regarding ARPA permits. Specific details regarding consultation, permits, and notifications to Indian Tribes are located at 25 C.F.R. Part 262, Protection of Archaeological Resources, Bureau of Indian Affairs. These regulations were proposed on January 25, 1990 (55 F.R. 2580-2583) and are expected to be published in final in 1991.

45. P.L. 89-508, 80 Stat. 309, 4 C.F.R. Part 2.

46. For a detailed treatment of site damage assessment see: D. Lear, "Civil Responsibilities Under the Federal Collections Act of 1966," background paper in *Cultural Resources Law Enforcement*, compiled by P. Davis and D. Green, Second Edition, Forest Service, Southwestern Region, Albuquerque, NM, 1981; also, H. Christensen, K. Mabery, M. McAllister, and D. McCormick, "Cultural Resources Protection: A Predictive Framework for Identifying Site Vulnerability, Protection Priorities, and Effective Protection Strategies," *Symposium Proceedings, Tools to Manage the Past*, edited by J. Tainter and R. Hamre, May 2-6, 1988, Grand Canyon, AZ, pp. 68-80; also Linda F. Carnes, Roy S. Dickens, Jr., Linda France, and Ann Long, *Cost Analysis of Archeological Activities at Eight Southeastern Sites*, National Park Service, Washington, DC, 1986. Regulations for determinations of archeological or commercial value and cost of restoration and repair in penalties assessments for violations of ARPA are located at 43 C.F.R. Part 7.14.

47. Act, March 3^d 1875, c. 144 Section 2, 18 Stat. 99; amendments: P.L. 93-203, Title VII Section 711(b), [formerly Title V, Section 611(b)], Dec. 28, 1973; 87 Stat. 882, renumbered P.L. 93-567, Title I Section 101, Dec. 31, 1974, 88 Stat. 1845, added item 665.

48. See *United States v. Cowan* (D. Az. November, 1987).

49. The LOOT Clearinghouse provides case reports relevant to this statute. 18 U.S.C. 1632 also provides penalties for those who aid and abet activities covered under 18 U.S.C. 1631.

50. Statutes such as these do not contain language specifying that artifacts must be found on the property; the language simply authorizes the State "by gift or purchase" to acquire private land that is deemed to be of historic significance. See, for example: Alaska c. 35, s. 41.35.060; or N.M. 18-6-6D and 18-6-10C.

51. A.R.S. 41-865 and A.R.S. 41-866 (effective July 5, 1990). Amendments also were made to the existing public health statutes governing disinterments of dead bodies to harmonize existing law with the new laws (A.R.S. 36-861, effective July 5, 1990).

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52. The annual report to Congress on the Federal archeology program is based upon Federal agency responses to a questionnaire distributed at the end of each fiscal year. The most recent publication, *Federal Archeology: The Current Program* (Department of the Interior, Washington, DC, 1989 GPO order number S/N 024-005-010-572), covers activities in fiscal years 1985 and 1986. A draft report, *Federal Archeology: 1987 Activities and Results*, covering activities through fiscal year 1987 is nearing completion. See Ch. 5, p. 2. Statistics for subsequent years have been compiled for use in this Technical Brief.

53. "Four Corners" refers to the place where the State lines of New Mexico, Utah, Colorado, and Arizona intersect. It is an area rich in prehistoric sites from the archeological periods known as Pueblo I, II, and III. Included in these kinds of sites are National Park Service units such as Mesa Verde and Chaco Canyon.

54. Carol A. Bassett, "The Culture Thieves", *Science* 86, July/August, 1986, p.22. See *Problems Protecting and Preserving Federal Archeological Resources*, General Accounting Office Report GAO/RCED-88-3, Washington, DC, 1988; and the legislative history for the 1988 amendments to ARPA, House Reports No. 100-791, Pt. 1 (Committee on Interior and Insular Affairs) and Senate Reports Nos. 100-566 and 100-569 (Committee on Energy and Natural Resources).

55. *Federal Archeology: The Current Program*, Ch. 5, p. 30 (1989), and the draft report for fiscal year 1987, Ch. 5, pp 2-3.

56. Examples of such authorities are State statutes for trespass or cultural properties protection statutes, Federal criminal statutes such as 18 U.S.C. 1361, Damage to Government Property, or National Park Service and USDA Forest Service regulations such as 36 C.F.R. Part 2.1(a)(1)(i), taking of potsherds from public land, or 36 C.F.R. Part 2.10(B)(10), camping outside a designated area.

57. In total, the Forest Service, Bureau of Land Management, Fish and Wildlife Service, and National Park Service manage nearly 700 million acres of Federal land.

58. Note 54, page 33.

59. *United States v. Jacques*, CR 83-129-FR (D. Or., 1983), lasting three years. See also, the Channel Islands case listed in the LOOT clearinghouse that began in 1987 and involved more than 20 defendants (See Note 78).

60. Authority for the annual report is provided by the Reservoir Salvage Act of 1960 (P.L. 86-523; 74 Stat. 220, 221; 16 U.S.C. 469) as amended by the Archeological and Historic Preservation Act of 1974 (P.L. 93-291; 88 Stat. 174; 16 U.S.C. 469). Under this Act the Secretary of the Interior is to prepare and submit an annual report to the Congress each fiscal year on the projects, results and costs undertaken in the Federal archeology program. In addition, the National Historic Preservation Act of 1966 (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) as amended (P.L. 91-243; P.L. 93-54, P.L. 94-422, P.L. 94-458, P.L. 96-199, P.L. 96-244, P.L. 96-515) requires Federal agencies, to the extent permitted by law and within available funds, to provide information, suggestions, estimates, and statistics to further the purposes of the Act. The report also is mandated by the Federal Land Policy and Management Act of 1976 (P.L. 94-579; 90 Stat. 2743; 43 U.S.C. 1701), which is the primary basis for managing cultural resources on the public lands. Finally, ARPA directs the Secretary of the Interior to provide a separate component of the annual report that deals specifically with its provisions, including the permitted and unauthorized uses of archeological resources on public lands.

61. Briefing Statement, NPS Archeological Assistance Division, January 27, 1989, page 3.

62. The regulations were adopted in February 1984, (See Notes 29 and 30).

63. 16 U.S.C. 470cc amended at 102 Stat. 2983 (Nov. 3, 1988).

64. *Ibid.*

65. 16 U.S.C. 470mm, adding Section 14 to ARPA.

66. Prior to the issuance of ARPA uniform regulations, this section to some extent created a due process problem since there were no mechanisms for the issuance of permits. Therefore, agencies published notices in the Federal Register clarifying that permits pending ARPA regulations would continue to be processed under the applicable sections of the Antiquities Act. Such publication also served as a reminder that ARPA neither amended nor replaced the Antiquities Act. See D. Green, "Prosecuting Under ARPA: What to Do Until the Regulations Arrive," in *Cultural Resources Law Enforcement*, p. 64, note 49.

67. This fourth proof defines the line between a felony and a misdemeanor, the later involving damages of \$500 or less. Felony convictions for ARPA violations through 1984 carry a fine of up to \$20,000 and two years in prison, or both, for the first offense. After 1984 the Comprehensive Crime Control Act (18 U.S.C. 3623) standardized maximum penalty amounts, allowing up to \$100,000 for the first misdemeanor offense, and up to \$250,000 for the first felony offense committed by individuals. The respective amounts are doubled when an organization, rather than an individual, has committed the violation. Although ARPA exempts arrowheads from surface collection, such collection is still in violation of the Antiquities Act, except in the Ninth Circuit under *Diaz*, as well as under the Theft of Government Property statute, 18 U.S.C. 641, (See Note 50).

68. In this case, Shumway was found not guilty as to the two felony ARPA counts, but guilty as to destruction of government property.

69. K. Jones and Guevara were sentenced each to 1 year in jail and a \$1,000 fine; while T. Jones received an 18-month jail sentence and \$1,000 fine.

70. Civil fines based upon site damage assessments were levied in *Brady* (See page 7), but the \$38,479.42 was declared uncollectible in 1982. Collection of another civil fine of \$18,216 for damage to 11 separate areas in a 1981 case (See LOOT Clearinghouse) was attempted under the Federal Collections Act and declared uncollectible in 1984.

71. See LOOT Clearinghouse case, November, 1981.

72. P. Nickens, S. Larralde, and G. Tucker, Jr., "A Survey of Vandalism to Archaeological Resources in Southwestern Colorado," Bureau of Land Management Cultural Resources Series, No. 11, Denver, Colorado, 1981, pp. 12, 24.

73. These figures are misleading to some extent, since in one case prosecuted under another statute there were a total of 20 defendants. See LOOT Clearinghouse report on the Channel Islands shipwreck case prosecuted under NOAA regulations and the California Penal Code (See Note 76).

74. In the Lower Suwanee digging case (November 5, 1987, LOOT Clearinghouse report) the judge reduced the \$200 civil fine on each defendant to \$60 "because they didn't find anything."

75. St. Francis National Forest case (January, 1987, LOOT Clearinghouse report).

76. "Shipwreck Looters Fined \$132,000 in History's Biggest Case," Channel Islands National Marine Sanctuary Press Release, October 25, 1990. Altogether in this case, 20 individuals were charged with 52 civil and criminal violations of Federal and State laws. The largest single civil fine was \$100,000 assessed against the dive boat operator for violating National Oceanic and Atmospheric Administration regulations regarding historic shipwrecks within a National Marine Sanctuary.

77. Lack of access aside, some known offenders will not be deterred. Convicted looters and vandals simply move their activities into other States.

78. It is important to note that the second jury trial felony conviction under ARPA occurred in 1990. The "Dry Hill" case involved 10 defendants who looted an unrecorded site in the Cherokee National Forest that contained burial remains of the Eastern Band of the Cherokee. The case resulted in 10 felony convictions, 4 misdemeanor criminal convictions, \$3,290.62 assessed in fines, \$11,500 ordered in restitution, and prison sentences varying from 6 months to 22 months for some of the defendants. Additional penalties included probationary periods of up to 5 years, with 3 defendants required to provide 300 hours each in community service. All defendants were banned from the National Forest for their respective probationary periods. [*United States v. Charlton*, No. 290-73, E.D. Tennessee, October 1990].

79. Among the agencies required to respond are the Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, Mineral Management Service, National Park Service, Territorial and Insular Affairs, Department of Justice, Department of Labor, National Air and Space Administration, National Capitol Planning Commission, Pennsylvania Avenue Development Corporation, Tennessee Valley Authority, Federal Aviation Administration, Federal Railroad Administration, Urban Mass Transit Administration, Veterans Administration, Department of Education, Department of Energy, Federal Energy Regulatory Commission, Environmental Protection Agency, Federal Communications Commission, General Services Administration, Department of Health and Human Services, Department of Housing and Urban Development, Bureau of Indian Affairs, Forest Service, Rural Electrification Administration, Soil Conservation Service, Economic Development Administration, the Army, Navy, and Air Force, and the Army Corps of Engineers.

80. Although the Department of Justice audits the 192 United States Attorneys on a monthly basis, there is no section of the audit that references cultural resources crimes.

81. Sometimes a group of LOOT forms accompany the annual report questionnaire, but often these are sent separately to NPS throughout the year.

82. LOOT Clearinghouse, Preliminary Draft prepared for the Society for American Archaeology Anti-Looting Working Conference, Taos, New Mexico, May 7-12, 1989, by the NPS Departmental Consulting Archeologist, Archeological Assistance Division, Washington, DC.

83. The 1988 report on the annual questionnaire from TVA states the frustration: "We have hundreds of sites being looted. We are documenting the destruction, but we are seldom able to document the individuals doing the digging, or how many acts of digging have produced the appalling conditions we document."

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PROTECTING THE PAST

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and
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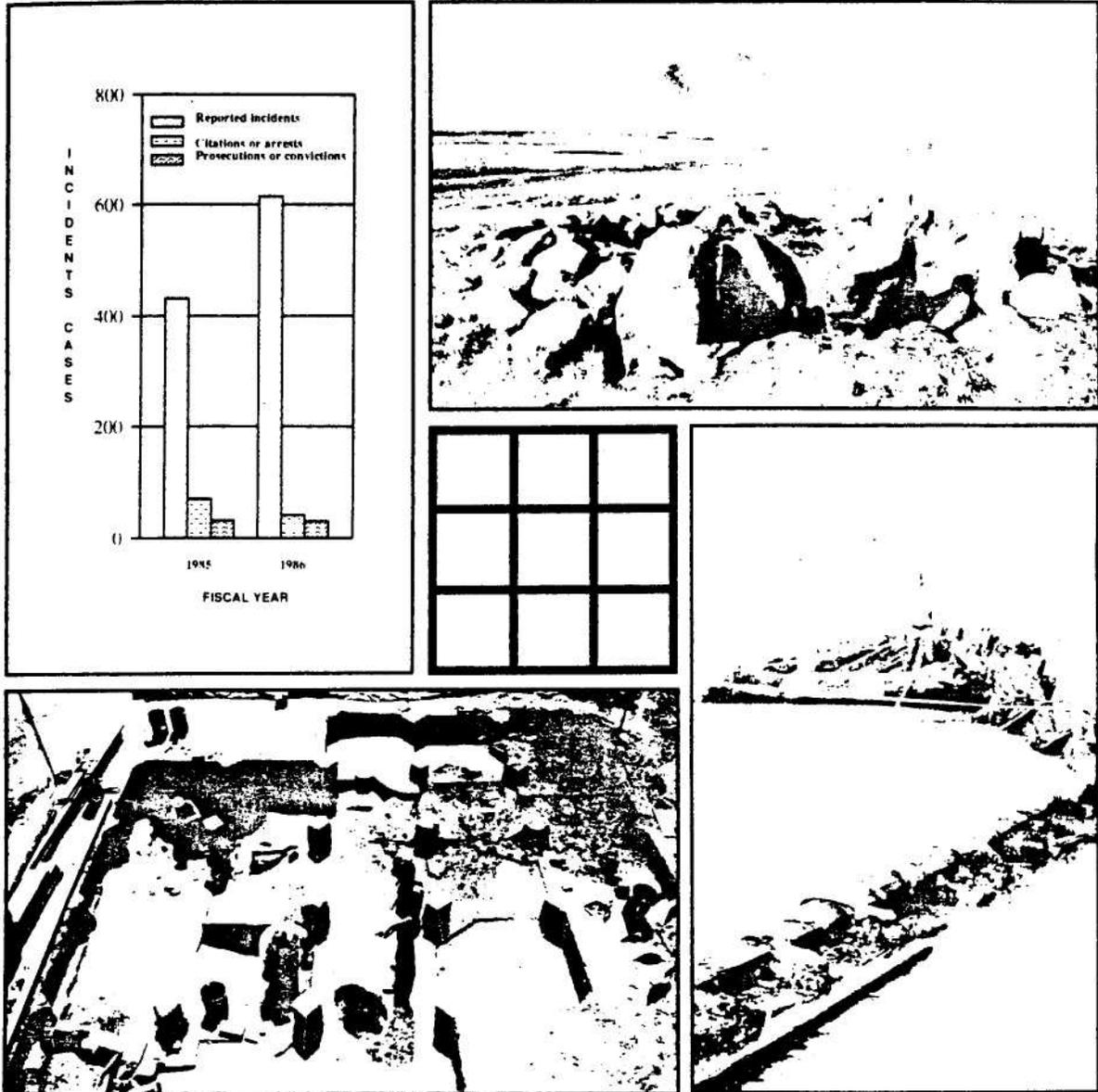
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FEDERAL ARCHEOLOGY

The Current Program



Department of the Interior
National Park Service
1989

FEDERAL ARCHEOLOGY: THE CURRENT PROGRAM

ANNUAL REPORT TO CONGRESS ON THE
FEDERAL ARCHEOLOGY PROGRAM
FY 1985 and FY 1986



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1989

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THE ARCHAEOLOGICAL RESOURCES PROTECTION
ACT OF 1979: PROTECTING PREHISTORY
FOR THE FUTURE

Lorrie D. Northey*

The nation's archaeological resources are an endangered species. Construction, agriculture, and mining destroy many archaeological sites each year.¹ Other resources are destroyed or damaged by illegal excavation, removal, or vandalism.²

Federal and state laws protecting archaeological resources have failed because their enforcement provisions are inadequate.³ In partic-

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1. "All these nonrenewable sources of data are disappearing at a rate that has increased almost geometrically since World War II . . ." Davis, *The Crisis in American Archaeology*, 175 Sci. 267 (1972).

The land grading techniques used in modern construction and agriculture destroy many archaeological sites. In the Mississippi River Valley, for example, hundreds of thousands of acres have been cleared in the last 20 years to create "new" farmland, and many little knolls and levees containing archaeological sites have been levelled in the process. *Id.* at 268-69.

Professor Davis cites other examples of the destruction that has occurred since World War II. On the island of Oahu, 65% of the known archaeological sites have been destroyed, largely by urban expansion and agricultural development. *Id.* at 269. Around the northern Great Lakes, resort development has ravaged untold numbers of important prehistoric sites. A Michigan developer advertised in the *Detroit News* on Feb. 21, 1971: "140 acres, historical Indian grounds, stone carvings, lore, artifacts. Adjoins . . . Michigan's only known petroglyph site. Top-notch land development." *Id.* And in Vermont, a large prehistoric site rich in information and artifacts was "bulldozed into oblivion sometime between 1960 and 1965 for a housing development." *Id.* (quoting personal communication with W. Haviland).

See also Hochfield, *Plundering Our Heritage*, ART NEWS, Summer 1975, at 30.

2. See, e.g., *Vandalizing America's Heritage*, U.S. NEWS & WORLD REP., Nov. 19, 1979, at 76.

A recent newspaper article quoted the following observation of an Arizona archaeologist: "We're losing our archaeological heritage so fast that . . . in 10 or 20 years we won't have any sites left except protected national monuments. . . . It's not just backpackers picking up a few arrowheads. What's occurring is systematic looting for commercial purposes . . ." N.Y. Times, June 17, 1979, § 4, at 20, col. 3.

3. All 50 states have passed laws affording some protection to their archaeological resources. At least 43 states prohibit excavation, damage or removal of archaeological resources on state lands except as authorized by state officials. State regulations have had little deterrent effect, however, on the illegal activities of pothunters, treasure hunters and vandals. See *Vandalizing America's Heritage*, *supra* note 2. In general, this ineffectiveness derives from insufficient penalties and limited enforcement. Violations are merely misdemeanors and fines are small, ranging from \$100 or 30 days in jail or both in Delaware, DEL. CODE ANN. tit. 7, § 5306 (1974), to \$1000 plus the value of the lost or damaged

ular, the Antiquities Act of 1906,⁴ which has provided the primary protection for archaeological resources on federal lands, was rendered virtually unenforceable by *United States v. Diaz*,⁵ which held that the Act's penalty provisions were unconstitutionally vague.

Congress recognized the need for more effective protection for the nation's archaeological resources, and, in 1979, enacted the Archaeological Resources Protection Act⁶ (ARPA). ARPA is designed to overcome the deficiencies of the Antiquities Act; it authorizes stiff criminal penalties for illegal disturbance of archaeological resources and provides a framework for the protection and development of the nation's archaeological resources.⁷ Several federal agencies are presently writing a set of regulations to implement ARPA.⁸

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

I. THE PROBLEM OF ARCHAEOLOGICAL RESOURCE PROTECTION

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

An archaeological resource is evidence from which an archaeologist can extract information concerning past human life.⁹ The most obvious

property in Hawaii, HAWAII REV. STAT. § 6E-11 (1976). The penalty provisions are often not enforced. See Moratto, *Archaeology in the Far West*, MO. ARCHAEOLOGIST, Jan.-June 1973, at 19, 23-25.

4. 16 U.S.C. §§ 431-433 (1976 & Supp. III 1979).

5. 499 F.2d 113 (9th Cir. 1974).

6. 16 U.S.C. §§ 470aa-470ll (Supp. III 1979).

7. *Id.* § 470aa. See also H.R. REP. NO. 311, 96th Cong., 1st Sess. 7, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 1709, 1710 [hereinafter cited as HOUSE REPORT].

8. Uniform regulations are being promulgated by the Secretaries of the Interior, Agriculture and Defense and the Chairman of the Tennessee Valley Authority in consultation with other federal agencies, the states and Native Americans pursuant to § 10(a) of ARPA, 16 U.S.C. § 470ii (Supp. III 1979). Because various agencies participate in public land management, Congress saw a need for a set of uniform regulations applicable to all federal lands and easily comprehensible to the public. HOUSE REPORT, *supra* note 7, at 12, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1715. Each federal land manager may promulgate additional rules and regulations as needed so long as they are not inconsistent with the uniform regulatory scheme. 16 U.S.C. § 470ii(b) (Supp. III 1979).

9. The following discussion from F. HOLE & R. HEIZER, AN INTRODUCTION TO PREHISTORIC ARCHAEOLOGY (3d ed. 1973) is instructive on the meaning of the term "archaeological resource":

Archaeological data consist of mud, clay, stone, bone, and fibrous objects, and so they will remain unless they are given a cultural interpretation. Then they become bricks, pottery, projectile points, remains of meals, and basketry, used and discarded by living peoples in the normal routine of gaining a livelihood

example of an archaeological resource is an artifact, which is "anything which exhibits any physical attributes that can be assumed to be the results of human activity."¹⁰ Artifacts may be objects manufactured or modified by man, such as tools, baskets, pottery, jewelry, rock paintings, or they may be other physical evidence of past human activity such as food refuse, hearths, kilns, storage pits, structural remains, postholes, pithouses, or irrigation canals.¹¹ Other examples of archaeological resources include human remains, which can answer many questions concerning past human life.¹² The sites in which artifacts and human remains are found are themselves archaeological resources.¹³ The relationship of artifacts to one another in a site, a site's location in relation to other sites, and a site's sediment deposits, floral and faunal remains, and physical environment all can provide information about the activities of its inhabitants.¹⁴ When archaeologists turn to other disciplines in their attempt to understand the past,¹⁵ other kinds of evidence become necessary. Geological formations, non-human paleontological sites, sediment cores from lake bottoms, and other environmental evidence all contribute to an understanding of human adaptation to environmental changes.¹⁶

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

Id. at 308.

10. R. DUNNELL, SYSTEMATICS IN PREHISTORY 117 (1971).

11. See F. HOLE & R. HEIZER, *supra* note 9, at 308.

12. Osteological analysis of human remains can produce a wealth of information about demographic composition, disease and nutrition. See G. ACSADI & J. NEMESKERI, HISTORY OF HUMAN LIFE SPAN AND MORTALITY (1970); D. BROTHWELL, DIGGING UP BONES (1963). From this information we may draw inferences regarding social structure, see, e.g., Tainter, *Behavior and Status in a Middle Woodland Mortuary Population from the Illinois Valley*, 45 AM. ANTIQUITY 308 (1980); Rothschild, *Mortuary Behavior and Social Organization at Indian Knoll and Dickson Mounds*, 44 AM. ANTIQUITY 658 (1979), or cultural conflict, see, e.g., Owsley, Berryman & Bass, *Demographic and Osteological Evidence for Warfare at the Larson Site, South Dakota*, PLAINS ANTHROPOLOGIST MEMOIRS, Nov. 1977, at 119.

13. F. HOLE & R. HEIZER, *supra*, note 9, at 308.

14. *Id.* For further discussion of the way archaeologists reconstruct past behavior from archaeological remains see generally M. SCHIFFER, BEHAVIORAL ARCHAEOLOGY (1976).

Study of a site's sediment deposits may reveal its stratigraphic and hence chronological position, and information concerning its formation and growth. Renfrew, *Archaeology and the Earth Sciences*, in GEOARCHAEOLOGY 1, 3-4 (D. Davidson & M. Shackley eds. 1976). Study of a site's location may also reveal the resource exploitation strategy of its inhabitants. *Id.* at 5. See also K. BUTZER, ENVIRONMENT AND ARCHAEOLOGY (2d ed. 1971) for a comprehensive discussion of the reconstruction of past environments and the use of that information in archaeological investigation.

15. See F. HOLE & R. HEIZER, *supra* note 9, at 25-39.

16. Although not strictly speaking "archaeological data" under the common definitions, see *supra* note 9, archaeologists make increasing use of these resources. See *supra* note 14.

By studying and analyzing these resources, archaeologists can reconstruct how North America's early inhabitants lived. They can examine the technological development, social structure, warfare, subsistence strategies, reaction to climatic change or population growth, diseases, migration, or art of particular sites, cultures, or man in general.¹⁷ The unexplored questions and the types of archaeological resources that can be used to answer them are by no means fixed; they both expand as the knowledge of past human life and archaeological technology and methodology improve.¹⁸

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

¹⁷ "Archaeologists have always been ready to exploit the natural sciences in order to make the material remains of the past yield more information about human activities and human history." Renfrew, *supra* note 14, at 1.

¹⁸ See F. HOLE & R. HEIZER, *supra* note 9, at 303-467.

¹⁹ What is archaeological evidence to one excavator, or at one time, may not be considered as such for another. Thus carbonized wood was not usually saved as data for dating until the radiocarbon process was invented. Similarly, until techniques of flotation were developed, archaeologists overlooked the seeds that might occur in the soil. What constitutes data thus depends on what the archaeologist thinks is data as well as on its actual occurrence.

²⁰ F. HOLE & R. HEIZER, *supra* note 9, at 87.

²¹ See J. JENNINGS, *PREHISTORY OF NORTH AMERICA* 47-70 (2d ed. 1974); Haynes, *The Earliest Americans*, 166 *SCI.* 709 (1969).

²² See J. JENNINGS, *supra* note 19, at 81-125; I. G. WILLEY, *AN INTRODUCTION TO AMERICAN ARCHAEOLOGY*, 37-51 (1966). For an interesting discussion of the discovery of the Manis Mastodon site at Sequim, Washington see R. KIRK & R. DAUGHERTY, *EXPLORING WASHINGTON ARCHAEOLOGY* 24-43 (1978).

²³ See, e.g., Whalen, *Cultural-ecological Aspects of the Pit-house-to-Pueblo Transition in a Portion of the Southwest*, 46 *AM. ANTIQUITY* 75 (1981). See generally J. JENNINGS, *supra* note 19, at 281-322; G. WILLEY, *supra* note 20, at 178-245.

²⁴ See, e.g., Harn, *Cahokia and the Missippian Emergence in the Spoon River Area of Illinois*, 68 *TRANSACTIONS ILL. ST. ACAD. SCI.* 414 (1975). See generally J. JENNINGS, *supra* note 19, at 220-80; G. WILLEY, *supra* note 20, at 246-341.

²⁵ See G. WILLEY, *supra* note 20, at 343-56. See also Thomas, *A Computer Sim-*

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

B. Damage and Destruction of Archaeological Resources

No one knows how many archaeological sites there are in the United States, or how many have already been destroyed, because archaeologists have surveyed only a small part of the country and have only incomplete records of the destruction of sites.²⁷ Archaeologists in several western states, however, estimate that fifty percent of the archaeological sites in their states have been destroyed,²⁸ and it is likely that an equal

ulation Model of Great Basin Shoshonean Subsistence and Settlement Patterns in MODELS IN ARCHAEOLOGY 671 (D. Clarke ed. 1972) and Thomas, *An Empirical Test for Steward's Model of Great Basin Settlement Patterns*, 38 *AM. ANTIQUITY* 155 (1973) for an interesting approach to investigating the seasonal rounds of Great Basin hunters and gatherers.

²⁴ See *supra* text accompanying notes 19-23.

²⁵ See *supra* text accompanying note 17.

²⁶ Native Americans treat many of these sites in a way alien to the Anglo-American tradition. As one commentator recently observed:

Anglo-Americans in general consider Indian cultural locations as merely another form of property (i.e., a commodity) which can be bought, sold, demolished, used as visitor displays, or otherwise manipulated by our market economy. This approach is not at all inconsistent with our treatment of our own heritage materials, whether they are antiques, national monuments, or churches. Even archaeologists have accepted this approach, since we perceive Indian sites and other archaeological locations as 'cultural resources' which can be 'managed.' They are valuable sources of scientific data. They can also be destroyed, after we have removed the information that is relevant to our research designs. Nothing could be more foreign to many Indian groups, especially to those that consider their cultural sites to be sacred ground or communal land which ultimately belongs to the culture as a whole and therefore cannot be disposed of. Nor can these sites be scientifically investigated by archaeologists, unless the research is done with the utmost of care and the consent of the local community.

Winter, *Indian Heritage Preservation and Archaeologists*, 45 *AM. ANTIQUITY* 121, 124 (1980).

²⁷ Surveys of archaeological resources on federal lands, although mandated by Exec. Order No. 11,593, 3 C.F.R. § 154 (1971), reprinted in 16 U.S.C. § 470 app. at 27-28 (1976), have never been completed. U.S. GEN. ACCOUNTING OFFICE, *ARE AGENCIES DOING ENOUGH OR TOO MUCH FOR ARCHAEOLOGICAL PRESERVATION? GUIDANCE NEEDED* 11 (1981). The Bureau of Land Management has surveyed less than 10% of the 480 million acres of public lands that it administers. *Id.* at 12. The Water and Power Resources Service has surveyed less than 10,000 of the 7.5 million acres under its control. *Id.* The Forest Service and the Army Corps of Engineers require surveys only in areas that will be affected by land-disturbing activities. *Id.* at 13.

²⁸ Moratto, *supra* note 3, at 20-21.

or even greater percentage of the archaeological sites in other states have been destroyed.²⁹ The principal activities threatening the remaining archaeological resources are: (1) construction, mining, and other land development activities;³⁰ (2) commercial looting or "pothunting";³¹ and (3) individual treasure hunting and vandalism.³²

Construction, mining, and other land development activities are rapidly diminishing the nation's archaeological resource base.³³ Federal law requires federal officials to survey and salvage, if necessary, "significant" archaeological resources discovered in the course of federally funded or licensed activities.³⁴ Developers, however, know that archaeological salvage work invariably causes delays and therefore sometimes fail to report archaeological discoveries.³⁵ Even if all developers coop-

29. One witness before the Senate Committee hearings on ARPA estimated that before the year 2000, 80 to 90% of the archaeological sites in the eastern half of Arkansas will be destroyed by land-leveling activities. *The Archaeological Resources Protection Act of 1979: Hearings on S. 490 Before the Subcomm. on Parks, Recreation, and Renewable Resources of the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 91 (1979) (statement of Charles R. McGimsey III) [hereinafter cited as *Senate Hearings*]. See also *supra* note 1.

30. See *infra* notes 33-38 and accompanying text.

31. See *infra* notes 39-42 and accompanying text.

32. See *infra* notes 43-49 and accompanying text.

33. See *supra* note 1. Particularly in the West, mineral resource development and the siting of missile systems threaten massive destruction of archaeological treasures. *It's a Banner Year for Archaeology*, U.S. NEWS & WORLD REP., May 19, 1980, at 72.

34. The Archaeological and Historical Preservation Act requires federal agencies to ensure the preservation of significant archaeological resources affected by any federal construction project or federally licensed or funded project, activity or program. 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979). Project funds may be used to finance the necessary survey and salvage activities. *Id.* § 469c.

The requirement of "archaeological significance" has generated a considerable amount of debate concerning the appropriate criterion for assessing the significance of archaeological resources. See, e.g., Raab & Klinger, *A Critical Appraisal of "Significance" in Contract Archaeology*, 42 AM. ANTIQUITY 629 (1977); Glassow, *Issues in Evaluating the Significance of Archaeological Resources*, 42 AM. ANTIQUITY 413 (1977); Sharrock & Grayson, "Significance" in *Contract Archaeology*, 44 AM. ANTIQUITY 327 (1979); Raab & Klinger, *A Reply to Sharrock and Grayson on Archaeological Significance*, 44 AM. ANTIQUITY 328 (1979); Barnes, Briggs & Nielsen, *A Response to Raab and Klinger on Archaeological Site Significance*, 45 AM. ANTIQUITY 551 (1980). Although it is beyond the scope of this article to enter the fray, a few points are relevant. Department of Interior regulations governing the determination of archaeological significance for purposes of National Register designation consider a site "significant" if it has "yielded or may be likely to yield, information important in prehistory or history." 36 C.F.R. § 1202.6 (1980). The requirement is necessarily broad enough to encompass a diversity of sites of interest today and in the future. But whatever the criterion for "significance," the requirement is clearly intended to exclude certain classes of archaeological resources, and therefore effectively diminishes the resource base. Its impact on future archaeological research is uncertain, in part because "significance" is a "dynamic concept varying through space, time, and even perhaps across investigators." Sharrock & Grayson, *supra*, at 327.

35. Hochfield, *supra* note 1, at 30, cites an example of a Los Angeles contractor who knew months in advance that his housing project would destroy important prehistoric village sites but waited until he built model homes to notify archaeologists. A few days

erated with government officials, however, archaeologists would be concerned that the needs of other development activities, rather than the needs of archaeology, were determining the course of archaeological research.³⁶ Resources destroyed now by salvage excavations will not be available for future archaeologists who will probably have the background, methodology, and technology to get more information out of the resources.³⁷ Thus, the increasing incidence of salvage archaeology may entail the loss of irretrievable information.³⁸

later, having capitalized on the publicity value of the archaeological investigations during the grand opening of his tract, he ejected the archaeologists and bulldozed the sites.

Because large numbers of archaeological sites are not mapped, developers may unwittingly submit out-of-date survey maps to authorities as proof that no sites will be affected by their proposed projects. They may also do it "knowingly and with intent to mislead." *Id.* at 32.

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

[M]uch of the spurt in archaeological projects stems from the availability of federal money for checking likely sites in areas where dams, highways, and government structures are planned. First authorized in 1974 as an effort to preserve historic evidence that was rapidly being destroyed by new construction, the program provides government funds amounting to more than 10 million dollars yearly. Widely known as contract archaeology, it is financing much of the boom this year in historic American digs.

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

37. See *supra* note 18 and accompanying text.

38. As one commentator recently noted:

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

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

G. MCHARGUE & M. ROBERTS, *A FIELD GUIDE TO CONSERVATION ARCHAEOLOGY IN NORTH AMERICA* 19 (1977) (emphasis in original).

The activities of pothunters, or commercial looters, are of particular concern to federal and state officials.³⁹ A large commercial looting industry has developed to satisfy the international art market's demand for artifacts. Especially in the American Southwest, ransacking and looting of archaeological sites for artifacts is common.⁴⁰ Gangs of commercial looters "strip-mine protected sites with bulldozers and power-shovels,"⁴¹ and sometimes "use helicopters and citizen band radios to spot approaching ranger patrols."⁴²

Treasure hunters⁴³ often take archaeological resources such as arrowheads, coins, bottles, bullets, or potsherds.⁴⁴ Treasure hunting on public lands has increased as the number of people exploring previously inaccessible areas in National Parks and National Forests has increased.⁴⁵

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

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

41. *Id.*

42. *Id.*

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

44. Davis, *supra* note 1, at 269, notes that digging by relic collectors has reached alarming proportions, in part because it is now more difficult to find "nice" pieces on the surface, and in part because more people have leisure time to dig.

45. See *Senate Hearings*, *supra* note 29, at 90 (statement of Charles R. McGimsey III); see also Hochfield, *supra* note 1, at 33; Davis, *supra* note 1, at 270.

Federal enforcement resources are dwarfed by the territories involved. The federal government and Indian tribes own about 65% of the land in the Southwest. Hochfield, *supra* note 1, at 31. In Arizona, the National Forest Service and the Bureau of Land Management each administer about 12 million acres, and the National Park Service, the Defense Department and the Bureau of Indian Affairs also are responsible for immense preserves. *Id.* But despite the vast size of the territory to be policed, enforcement personnel are few in number. A recent *New York Times* article reported a typical example of the magnitude of the problem:

Standing between the thieves and the artifacts, which by law belong to the Federal Government . . . desert rangers . . . of the Bureau of Land Management face a difficult challenge. . . . [Six rangers] patrol an area nearly twice as large as Delaware on foot and on horseback, with four-wheel-drive vehicles and [a] helicopter. In the wild 2.6 million-acre San Juan Canyon Resource Area, it is hard to find a herd of cattle, let alone a 'pot hunter' who does not want to . . .

Government Rangers Pursue Robbers of Ancient Indian Graves in Southwest, N.Y. Times, June 23, 1980, § 1, at 14, col. 4.

This increase in the recreational use of the public lands has also led to an increase in the incidence of vandalism.⁴⁶ Vandals are defacing rocks bearing petroglyphs and pictographs of considerable age and value⁴⁷ and desecrating ancient Indian burial grounds.⁴⁸ The harm done by treasure hunters and vandals cannot compare with the complete destruction accomplished by the commercial looter's bulldozer. Treasure hunters and vandals, however, do destroy contextual information, which is the basis of much archaeological inference.⁴⁹

Without estimates of the number and distribution of archaeological sites destroyed, it is difficult to depict the combined effect of these destructive activities. Some patterns, however, are evident. First, there is a general correlation between high rates of destruction and high population density because of the more intensive land use and greater numbers of collectors in populated areas.⁵⁰ Second, because there are few regulations of archaeological resources on private lands,⁵¹ many of the nation's remaining archaeological resources are located on undeveloped tracts of state and federal land, particularly the vast public lands in the western United States.⁵² As these lands become more accessible, the threat of destruction increases.

46. See *supra* note 45.

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

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

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

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

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

In general, state and local efforts to regulate archaeological resources on private lands have been hampered by fears of exceeding constitutional limits, by insufficient means of enforcement, and by an overall lack of public support. See C. R. MCGIMSEY III, *supra* at 46-49. As public awareness of and concern over the problem increase, additional attempts at regulation will probably be forthcoming. See generally *Vandalizing America's Heritage*, *supra* note 2, at 76 (recent attempt in New Mexico to enact law banning the use of mechanical equipment to excavate archaeological sites on private lands). Until such time there remains a large void through which many sites may vanish.

52. See Moratto, *supra* note 3, at 20-23.

C. Federal Laws Protecting Archaeological Resources on Public and Indian Lands

Before the enactment of ARPA in 1979, the Antiquities Act of 1906⁵³ provided the primary protection for archaeological resources on lands owned and controlled by the United States, including Indian lands.⁵⁴ Other federal laws, such as the Historic Sites Act of 1935,⁵⁵ the National Historic Preservation Act of 1966,⁵⁶ and the Reservoir Salvage Act of 1960 as amended by the Archaeological and Historical Preservation Act of 1974,⁵⁷ protect only resources of "archaeological significance,"⁵⁸ and thus exclude resources which, though they interest archaeologists, are not "significant." Tribal ordinances protecting archaeological resources on Indian lands are largely ineffective because of jurisdictional restrictions.⁵⁹ Thus, the only comprehensive protection for the nation's archaeological resources before 1979 was the Antiquities Act.

53. 16 U.S.C. §§ 431-433 (1976 & Supp. III 1979).

54. Regulations governing the preservation of antiquities on Indian lands were issued pursuant to section 432 of the Antiquities Act of 1906, 16 U.S.C. § 432 (1976), 25 C.F.R. pt. 132 (1981). These regulations apply to "Indian tribal lands or . . . individually owned trust or restricted Indian lands." *Id.* § 132.2.

55. 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979).

56. *Id.* §§ 470-470t.

57. *Id.* §§ 469-469c.

58. See *supra* note 34. The Historic Sites Act of 1935, 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979), preserves historic sites "of national significance for the inspiration and benefit of the people of the United States." *Id.* § 461. It authorizes the Secretary of Interior to survey, document, evaluate, acquire, and preserve archaeological and historical sites throughout the country. *Id.* § 462. The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), expands the scope of protection to sites of state, local, and regional significance.

Under these two acts, sites and objects "significant in American . . . archaeology" are eligible for inclusion in the National Register of Historic Places. *Id.* § 470a. Section 106 of the National Historic Preservation Act of 1966 requires federal agencies to "take into account" the effects of their projects on historical and archaeological resources included or eligible for inclusion in the National Register and to give the Advisory Council on Historic Preservation opportunity to comment on such effects. *Id.* § 470f. Regulations implementing the National Historic Preservation Act of 1966 direct federal agencies to determine and adopt if possible any feasible and prudent alternatives that will avoid or mitigate adverse effects on historic or archaeological sites. 36 C.F.R. § 800.6 (1980). If the decision is to proceed with a project entailing substantial alteration or demolition of the National Register property, the federal agency must "initiate measures to assure that . . . timely steps be taken to make or have made records, including measured drawings, photographs and maps, of the property . . ." Exec. Order No. 11,593, 3 C.F.R. § 154 (1971), reprinted in 16 U.S.C. § 470 app. at 429-30 (1976). In addition, the Reservoir Salvage Act of 1960 as amended by the Archaeological and Historical Preservation Act of 1974, 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979), requires survey and salvage excavation when appropriate.

59. Indian governments cannot exercise criminal jurisdiction over non-Indians on Indian land. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Indian government authority to impose criminal penalties on Indians for violation of tribal ordinances is limited by section 202(7) of the Indian Civil Rights Act, 25 U.S.C. § 1302(7) (1976), which places a ceiling on criminal penalties of a \$500 fine or 6 months imprisonment or both.

The Antiquities Act prohibits any person from "appropriat[ing], excavat[ing], injur[ing], or destroy[ing] any historic or prehistoric ruin or monument, or any object of antiquity" on federal lands without permission of the federal land manager.⁶⁰ Until ARPA was passed in 1979, the Antiquities Act contained the primary statutory penalties for damage or destruction of archaeological resources on public lands⁶¹ and the only penalties applicable to non-Indians who damaged archaeological resources on Indian lands.⁶² Violators of the Antiquities Act are subject to a fine of \$500, or 90 days in jail, or both.⁶³ These penalties are, however, totally ineffective deterrents to looting.⁶⁴ When prehistoric pots sell for \$10,000 or more, most pothunters treat a \$500 fine as a mere business expense.⁶⁵

The Antiquities Act, moreover, does not protect all archaeological resources on federal lands. Congress only attempted to preserve "objects of antiquity"⁶⁶ when it passed the Antiquities Act in 1906 because archaeologists at the turn of the century were primarily interested in artifact typologies.⁶⁷ Today archaeologists use a broad range of contextual information to explore man's prehistoric life and interaction with the environment.⁶⁸ The Antiquities Act does not protect many archaeological resources, such as the relation of artifacts in the site and environmental evidence, that are crucial to the modern archaeologist's work.

Congress' emphasis on "antiquity" has also made it difficult to enforce the Act. *United States v. Diaz*, a 1974 decision by the Ninth Circuit, held that the penalty provisions of the Antiquities Act were unconstitutionally vague.⁶⁹ The defendant in *Diaz* allegedly took sacred ceremonial face masks from a cave on the San Carlos Indian Reservation in Arizona. A medicine man had made the masks sometime in 1969 or 1970. At trial, a professor of anthropology testified that the term "object of antiquity" "could include something that was made just yesterday if related to religious or social traditions of long standing."⁷⁰ On appeal, the Ninth Circuit held that the Antiquities Act violated the fifth amendment's due process clause because it provided no notice "that the word 'antiquity' can have reference not only to the age of an object but also

60. 16 U.S.C. § 433 (1976 & Supp. III 1979).

61. Federal officials may also prosecute defendants under general theft and malicious mischief statutes, 18 U.S.C. §§ 641, 1361 (1976 & Supp. III 1979). See *infra* text accompanying notes 132-33.

62. See *supra* note 59.

63. 16 U.S.C. § 433 (1976 & Supp. III 1979).

64. *Senate Hearings, supra* note 29, at 60 (testimony of Robert B. Collins).

65. *Senate Hearings, supra* note 29, at 43 (testimony of Dr. Ernest Allen Connally).

66. 16 U.S.C. § 433 (1976).

67. See G. WILLEY & J. SABLUFF, A HISTORY OF AMERICAN ARCHAEOLOGY 42-64 (1974).

68. See F. HOLE & R. HEIZER, *supra* note 9, at 25-39.

69. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

70. *Id.* at 114.

to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge."⁷¹

The *Diaz* decision has severely hampered federal efforts to protect objects of antiquity in the Ninth Circuit and elsewhere. Even though some federal land managers have disregarded the broad language of *Diaz*⁷² and continued to use the Act to protect obvious antiquities⁷³ and the Tenth Circuit has upheld the Act against constitutional challenges,⁷⁴ prosecutors now face constitutional challenges in every enforcement proceeding.⁷⁵ Thus, for practical purposes, *Diaz* has significantly weakened the Act.

71. *Id.* at 115.

72. The Ninth Circuit should have limited its decision to the particular facts of the *Diaz* case and preserved the penalties for cases which fall squarely within the meaning of the Antiquities Act. In reviewing the constitutionality of congressional acts, courts have a duty to seek a limiting construction that might save a statute. *United States Civil Serv. Comm'n v. National Association of Letter Carriers*, 413 U.S. 548, 571 (1973). In assessing vagueness, courts must consider a statute in light of the defendant's alleged conduct. *See United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963); *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979) (upholding the Antiquities Act as applied to appropriation of 800 to 900 year old artifacts from prehistoric Indian burial grounds). Thus, although the Antiquities Act may not give a person of ordinary intelligence reasonable opportunity to know that collecting four or five year old artifacts is prohibited, *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971) (laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly), it does give sufficient notice regarding obvious antiquities, such as 800 to 900 year old Mimbres pots. *Smyer*, 596 F.2d at 941.

73. *See Grayson, The Antiquities Act in the Ninth Circuit Court: A Review of Recent Attempts to Prosecute Antiquities Act Violations in Oregon*, *TEBWA*, Fall 1976, at 59.

74. *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979).

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

In *United States v. Camazine*, No. 1416-M (D.N.M. filed Nov. 15, 1977), the defendant allegedly excavated a prehistoric ruin on the Zuni Indian Reservation in western New Mexico in violation of the Antiquities Act. The ruin was an Anasazi pueblo inhabited approximately from A.D. 1100 to A.D. 1200, and the ceramic sherds that the defendant collected were 700 to 800 years old. At trial, the magistrate granted the defendant's motion to dismiss the complaint, holding that the Antiquities Act was unconstitutionally vague on its face and fatally vague as applied to the facts of the case. The double jeopardy clause of the fifth amendment precluded the federal prosecutors from appealing the magistrate's decision. *See Collins & Green, supra*, at 1057; *Antiquities Act Ruled Illegal*, *AM. Soc'y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER*, Oct. 1977, at 3. Subsequently the Tenth Circuit upheld the Act in *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979).

Thus each case involving the Antiquities Act has been challenged on the basis of the *Diaz* decision. Both federal officials and U.S. attorneys are confused as to how or whether to proceed with a case involving violations of the Act. *Senate Hearings, supra* note 29, at 44 (statement of John R. McGuire).

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

The *Diaz* decision illustrates one of the problems which Congress and the federal agencies face in attempting adequately to protect the nation's archaeological resources. Because the range of archaeological resources is broad and constantly changing,⁷⁶ there is a conflict between the desire to provide comprehensive protection for archaeological resources and the need to provide sufficient notice to the public that a resource is protected.⁷⁷ The tension between comprehensive protection and adequate notice, however, is only one of the problems inherent in a comprehensive program of archaeological resource protection. It is difficult, for example, to provide sufficient penalties to deter pothunters, without imposing unreasonably burdensome penalties on weekend treasure hunters and the "innocent" public. Similarly, it is necessary to make trade-offs between archaeological resource protection and mineral resource development. Finally, conflicts will arise about whether archaeological resources should be developed at all. Archaeologists generally want to develop archaeological resources in order to increase their understanding of the past.⁷⁸ Native Americans, however, may oppose development because it entails the desecration or destruction of important religious and cultural sites.⁷⁹ Because archaeological resources are often Native American resources, there is often conflict about who will determine the course of their development.⁸⁰

In reconciling these competing interests, Congress was constrained by existing law. The Constitution protects the public from penalties imposed without sufficient notice.⁸¹ The first amendment and the American Indian Religious Freedom Act protect Native American religious interests.⁸² The mineral resource developer also has certain rights under existing federal law.⁸³ Congress enacted ARPA without altering this framework.

II. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

A. Overview of Major Provisions

Congress enacted ARPA to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands."⁸⁴ ARPA establishes

76. *See supra* notes 9-18 and accompanying text.

77. *See United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

78. *See supra* notes 17-23 and accompanying text.

79. *See supra* note 26.

80. *See infra* note 226.

81. *See supra* text accompanying notes 69-71.

82. *See infra* text accompanying notes 327-45.

83. *See infra* text accompanying notes 314-26.

84. 16 U.S.C. § 470aa(b) (Supp. III 1979).

a permitting procedure for excavation and removal of archaeological resources on public and Indian lands,⁸⁵ and prohibits excavation, removal, damage, alteration, or defacement of these resources without a permit issued under ARPA or the Antiquities Act.⁸⁶ ARPA also prohibits trafficking in artifacts obtained in violation of federal, state, or local law.⁸⁷

Violators of the Act face criminal penalties of up to \$100,000 or five years in prison for second convictions.⁸⁸ Federal land managers may impose civil penalties,⁸⁹ and rewards of up to \$500 may be paid for information leading to a criminal or civil penalty assessment.⁹⁰

ARPA seeks both to distribute and to prevent the distribution of information. ARPA exempts information about archaeological resources protected under the Act from the provisions of the Freedom of Information Act to prevent pothunters from using federal information to destroy archaeological resources.⁹¹ On the other hand, ARPA attempts, through its permitting procedures, to insure that excavated resources and related information will be preserved for the public.⁹² The Act also encourages the distribution of information from private archaeological collections that were obtained before the effective date of the Act.⁹³

The Secretaries of Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority, in consultation with other federal agencies, the states, and Indian tribes, will issue uniform regulations to implement ARPA.⁹⁴ In addition, the federal land managers may promulgate rules that are consistent with the uniform regulations and necessary to perform their duties under the Act.⁹⁵

B. Lands Affected: Public Lands and Indian Lands

ARPA protects archaeological resources on public lands and Indian lands.⁹⁶ Congress, however, rejected a proposal to include private and

85. *Id.* § 470cc.

86. *Id.* § 470ce(a).

87. *Id.* §§ 470ce(b)-(c).

88. *Id.* § 470ce(d).

89. *Id.* § 470ff.

90. *Id.* § 470gg(a).

91. *Id.* § 470hh.

92. *Id.* § 470cc(b)(3).

93. *Id.* § 470jj.

94. *Id.* § 470ii(a). This article will refer to those writing the uniform regulations as "the federal agencies."

95. *Id.* § 470ii(b). The federal land manager of public lands is "the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands." *Id.* § 470bb(2). The federal land manager of public lands or Indian lands "with respect to which no department, agency, or instrumentality has primary management authority, [is] the Secretary of the Interior." *Id.* With the Secretary of the Interior's consent, the Secretaries of other departments and the heads of other agencies or instrumentalities may delegate their responsibilities under the Act to the Secretary of the Interior. *Id.*

96. *Id.* § 470cc.

state lands within Indian reservation boundaries in the definition of "Indian lands."⁹⁷ As a result, federal jurisdiction over archaeological resources under ARPA is no greater than under the Antiquities Act.⁹⁸ ARPA's limited definition of Indian lands is inconsistent with other federal laws governing activities on Indian reservations; these laws extend federal jurisdiction to "Indian Country," which includes private and state lands within reservation boundaries as well as federally owned or controlled land.⁹⁹ Moreover, ARPA's limited definition of Indian lands creates serious enforcement problems. ARPA's definition gives the federal government "checkerboard jurisdiction"¹⁰⁰ over archaeological resources located within Indian reservations. It is difficult to determine the boundaries between private, state, and federal land within Indian reservations,¹⁰¹ and thus federal officials may have to "search tract books in order to determine whether . . . jurisdiction over each particular offense, even though committed within the reservation, is in the . . . Federal Government."¹⁰² Though the question is far from clear, it appears that Congress has authority under the Indian commerce clause¹⁰³ and the federal trust responsibility for Indian property to extend federal jurisdiction over archaeological resources to all lands within reservation boundaries.¹⁰⁴ Congress should therefore reconsider whether to extend

97. As originally drafted, section 3(3) included "all lands within the exterior boundaries of any Federal Indian reservation." HOUSE REPORT, *supra* note 7, at 17, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1720. The drafters amended this section so that it does not cover private and state lands within reservation boundaries. *Id.*

98. The Antiquities Act applied only to lands "owned or controlled by the United States." 16 U.S.C. § 432 (1976).

99. See, for example, 18 U.S.C. § 1151 (Supp. III 1979) which defines "Indian Country" for purposes of the Major Crimes Act of 1885, 18 U.S.C. § 1153 (1976), as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation."

100. *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962).

101. *Id.* Cf. HOUSE REPORT, *supra* note 7, at 8, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1711 (analogous problem regarding public lands).

102. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). The Supreme Court in *Seymour* upheld federal criminal jurisdiction over an Indian under the Major Crimes Act of 1885, 18 U.S.C. § 1153 (1976), for an offense committed on land held in fee-patent by a non-Indian. The Court did not consider whether Congress in fact had the authority to define "Indian Country" so broadly for purposes of federal jurisdiction and to supercede state jurisdiction within the defined area, but it noted that more limited definition would raise serious enforcement problems. 368 U.S. at 358.

103. U.S. CONST. art. I, § 8. See *United States v. Mazurie*, 419 U.S. 544, 554-56 (1975) (upholding federal regulation of the distribution by non-Indians of intoxicating beverages on land owned by non-Indians within the boundaries of an Indian reservation). "Today, under a more expansive view of the federal commerce power . . . virtually all federal Indian legislation is [authorized] by the power [to] regulate commerce . . . with the Indian tribes." Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 209 n.29 (1973).

104. See *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (upholding the Major Crimes Act of 1885 on the basis of the government's fiduciary relationship with the Indians). Congressional authority to extend federal jurisdiction seems even clearer when archaeo-

ARPA to all lands within reservation boundaries in order to simplify enforcement of the Act.

C. Scope of Protection: Archaeological Resources

ARPA defines "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act [and which are] at least 100 years of age."¹⁰⁵

Because ARPA protects "material remains" rather than "objects of antiquity," ARPA protects more than the Antiquities Act.¹⁰⁶ In addition to artifacts and other "objects," contextual data, such as the spatial relation of artifacts, fall squarely under ARPA's protection.¹⁰⁷

ARPA, however, requires that the remains be of "archaeological interest" and thus does not protect all the "objects of antiquity" protected by the Antiquities Act.¹⁰⁸ The "archaeological interest" requirement, however, should prove a minor limitation because increased knowledge and improved technology have expanded the list of remains of potential value to the archaeologist.¹⁰⁹ Nevertheless, the word "interest" must be carefully construed to avoid setting too high a threshold.¹¹⁰

The most obvious difference between ARPA and the Antiquities Act is ARPA's restriction to remains "at least 100 years of age." The 100

logical resources on Indian lands are recognized to be important cultural resources. The importance of this property to the Indians justifies expansive federal jurisdiction under the federal trust responsibility for Indian property.

Similar jurisdictional problems exist with regard to public lands. See HOUSE REPORT, *supra* note 7, at 8, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1711. Congress therefore encouraged federal land managers to carry out an active public information program and to publish appropriate prohibitions and warnings. *Id.* Given the current definition of "Indian lands," such measures should be taken on Indian reservations as well.

105. 16 U.S.C. § 470bb(1) (Supp. III 1979).

106. Compare *id.* with *id.* § 433 (1976 & Supp. III 1979).

107. Though not "objects," contextual data are nonetheless material remains that reflect man's presence and activities. See F. HOLE & R. HEIZER, *supra* note 9, at 308.

108. ARPA's definition of "archaeological resource" thus excludes certain resources important to Indian tribes. Inanimate objects that are of religious significance to Indian peoples, such as San Francisco Peaks in Arizona, see *A Fight for Rites*, NEWSWEEK, Apr. 9, 1979, at 98, are not necessarily of interest to archaeologists. See *Senate Hearings*, *supra* note 29, at 49 (testimony of John R. McGuire).

109. See *supra* notes 9-18 and accompanying text.

110. In drafting ARPA, Congress chose "archaeological interest" as opposed to "archaeological significance," apparently to give broader coverage than other federal laws provide. Material remains may be of "interest" to archaeologists but may not necessarily yield "important" information in prehistory or history. Cf. 36 C.F.R. § 1202.6 (1980) (archaeological resources are "significant" if they yield or are likely to yield information important in prehistory or history). This choice is consistent with the Act's purpose to conserve the nation's archaeological resource base. See *supra* text accompanying note 84. Resources of no particular significance now may become significant as technology improves and knowledge increases. See *supra* note 18 and accompanying text. Therefore, conservation requires preservation now of resources that will be significant only in the future.

year limit has no archaeological significance. Material remains that are fifty or seventy-five years old are no less archaeological resources than those one hundred years old or more.¹¹¹ The limit thus excludes many resources that are "material remains of archaeological interest," including many sites of religious or cultural significance to Native Americans.¹¹² The 100 year limit does, however, provide a convenient administrative cutoff and a way to avoid the vagueness problems raised in *United States v. Diaz*.¹¹³

ARPA's definition of archaeological resource is flexible; as archaeologists use new types of resources, these resources will become archaeological resources protected by ARPA. This flexibility, however, presents problems in light of the *Diaz* decision. A definition that is too broad and flexible creates vagueness and uncertainty which in turn creates enforcement problems.¹¹⁴ Congress therefore imposed some limits on the scope and flexibility of the definition of archaeological resource.

ARPA gives a partial list of material remains that qualify as archaeological resources under its definition.¹¹⁵ This approach reduces uncertainty, but it may also confuse citizens, who may think that they are not violating the Act when they only disturb resources not included in the list. In fact, this problem has already arisen in criminal actions under ARPA.¹¹⁶

111. See F. HOLE & R. HEIZER, *supra* note 9, at 6:

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

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

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

The original Senate bill contained a 50 year limit. S. REP. NO. 179, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as SENATE REPORT]. Because of concern over the *Diaz* decision, the final version which was enacted set a 100 year limit. See HOUSE REPORT, *supra* note 7, at 8, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1711.

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

115. Archaeological resources include: "[p]ottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items." 16 U.S.C. § 470bb(1) (Supp. III 1979).

116. One of the first criminal prosecutions under ARPA charged defendant Casey Shumway with illegally excavating and damaging Turkey Pen Ruin, a cliff site in San Juan County, Utah dating from 200-400 A.D. to 1250 A.D. Fike, *Antiquities Violations in Utah, Justice Does Prevail*, AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, Oct. 1980, at 32. The evidence established that Shumway did dig into a midden. ("Middens" are refuse heaps.) After nine hours of deliberation, the jury sent the judge a note asking if a "midden" is an archaeological resource. The judge responded that a midden is not an

In addition to listing examples of protected remains, ARPA expressly excludes certain items from its coverage. Collectors of arrowheads from the ground surface, for example, are exempt from criminal and civil penalties,¹¹⁷ even though such arrowheads are unquestionably archaeological resources under ARPA's definition.¹¹⁸ The Act also provides that neither its permitting procedure nor its prohibitions apply to the collection for private use of any rock, coin, bullet, or mineral that is not an "archaeological resource."¹¹⁹ The meaning of this provision is unclear: it could mean that resources which are not archaeological resources are not archaeological resources; it could mean that rocks, coins, and bullets are not archaeological resources. ARPA does not clarify when these items are archaeological resources, but the legislative history suggests that such items are not archaeological resources when they occur in isolation, even if they are more than 100 years old.¹²⁰ As a practical matter, federal land managers are unlikely to enforce the Act against the collector of an isolated rock, coin, bullet, or mineral given the Act's uncertain message in this regard.

ARPA thus is only moderately successful in providing comprehensive protection for archaeological resources on public lands and Indian lands. Although the Act defines "archaeological resource" to include a broad range of material remains, Congress' attempts to give adequate notice to the public have left significant gaps in the Act's coverage. Given the 100 year limit, the difficulty of dating isolated coins, bottles, rocks, or minerals may justify excluding them from the Act. The same cannot be said for arrowheads, however, especially considering the importance of surface arrowhead scatters in archaeological investigation.¹²¹ Congress exempted arrowheads because it did not want to subject Boy Scouts and other arrowhead collectors to criminal penalties.¹²² A better way to achieve this goal would be to leave prosecution of arrowhead

archaeological resource because it is not listed in section 3(1) of the Act. Green, *A Summary of the First Court Cases under ARPA*, AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, Oct. 1980, at 29. The jury found that the defendant had not violated ARPA. He was, however, convicted under Title 18, Depredation of Government Property, 18 U.S.C. § 1361 (1976), sentenced to a three year probated prison term, and fined \$750. Fike, *supra*, at 34.

117. 16 U.S.C. §§ 470ec(g), 470ff(a)(3) (Supp. III 1979).

118. *Id.* § 470bb(1). Technically speaking, because arrowheads are not expressly excluded from the definition of archaeological resource, collecting arrowheads from the ground surface may violate the Act even though the collector is not subject to penalty.

119. *Id.* § 470kk(b).

120. "Such items as coins, and bottles are clearly not intended to come under the purview of this Act unless found within an archaeological site." HOUSE REPORT, *supra* note 8, at 8, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1711.

121. "In the United States knowledge of the distribution of early big-game hunters is based largely on a plotting of isolated projectile points and other artifacts found by farmers while plowing in their fields or by persons who accidentally came upon them while walking." F. HOLE & R. HEIZER, *supra* note 9, at 118.

122. See, e.g., Senate Hearings, *supra* note 29, at 39 (testimony of Sen. Domenici).

collectors to the federal land manager's discretion. Indeed, ARPA's arrowhead exclusion fails to serve its purpose because arrowhead collectors are subject to prosecution under general federal theft and malicious mischief statutes, which authorize penalties as high as \$10,000 or ten years' imprisonment.¹²³ Congress should therefore amend ARPA to eliminate the exemptions granted arrowhead collectors from the Act's criminal and civil penalties. Congress should also amend the Act to clarify whether isolated rocks, coins, bullets, and minerals are excluded from its coverage.¹²⁴

Even if Congress resolved these statutory problems, however, gaps would remain in the protection afforded the nation's archaeological resources. ARPA signals broad coverage but leaves the precise scope of protection to be defined by the regulations.¹²⁵ This approach offers the flexibility needed to accommodate an expanding resource base, but also creates a number of difficult regulatory problems to be discussed in Section III.

D. Prohibited Activities: Section 6

Section 6 provides that no person may "excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands" unless such activity is authorized by a permit issued under the Act or under the Antiquities Act or is subject to an exemption.¹²⁶

Section 6(b) prohibits the sale, purchase, exchange, or transport of any archaeological resource excavated or removed from public lands or Indian lands in violation of section 6(a) or any other federal law.¹²⁷ This provision expands the enforcement authority of the federal land managers

123. 18 U.S.C. §§ 641, 1361 (1976 & Supp. III 1979).

124. Congress should also consider amending ARPA to protect selected "nonarchaeological resources." Paleontological resources such as petrified wood might be included. Vandals and treasure hunters pose a significant threat to such resources. See *Pound by Pound, Tourists Carry Off Petrified Forest*, AUDUBON, July 1973, at 110. Several states now cover paleontological resources under their archaeological protection statutes. E.g., CAL. PUB. RES. CODE §§ 5097-5097.6 (West 1972).

Protection of nonarchaeological resources of religious or cultural interest to Indian tribes, however, ought to be left to other federal laws. See, e.g., American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. III 1979). Notice clearly poses a problem with respect to such resources. To the uninitiated public, Indian resources such as San Francisco Peaks in Arizona, see *supra* note 108, hardly appear to have religious or cultural significance, and to the Native American, secrecy is often an important aspect of the resource's religious function. See generally Blair, *Indian Rights: Native Americans versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125 (1979); Winter, *supra* note 26.

125. 16 U.S.C. § 470bb(1) (Supp. III 1979).

126. *Id.* § 470ec(a). *Id.* § 470cc(g) exempts Indians desiring to excavate archaeological resources on Indian lands from ARPA's permit requirements. See *infra* text accompanying notes 211-15.

127. 16 U.S.C. § 470ec(b) (Supp. III 1979).

beyond their authority under the Antiquities Act; federal prosecutors can now pursue those who buy and sell artifacts which were obtained illegally and thus cut off the market that supports the commercial looting industry.¹²⁸ Museums, universities, and other institutions, which are subject to ARPA's prohibitions,¹²⁹ must now take care to determine the origin of their acquisitions. This provision may curtail dealing in antiquities because the origin of a particular piece is often difficult to ascertain.¹³⁰

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

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

128. See *supra* notes 39-42 and accompanying text.

129. See 16 U.S.C. § 470bb(6) (Supp. III 1979) (defining "person" to include "an . . . institution . . . or any other private entity").

130. A recent article, for example, quoted one dealer who said, "When it comes down to the nitty-gritty, one just doesn't know where a piece came from. . . . There's a fair chance that most of the pottery now on the market is of at least questionable legality." *Grave Robbers of the Southwest*, *supra* note 40.

131. 16 U.S.C. § 470ce(b) (Supp. III 1979). Section 6(f), *id.* § 470ef(f), provides that nothing in § 6(b)(1), *id.* § 470ee(b)(1), which relates to resources excavated or removed in violation of ARPA, shall apply to any person with respect to an archaeological resource that the person lawfully possessed prior to the effective date of the Act. This provision does not apply, however, to § 6(b)(2), *id.* § 470ee(b)(2), which relates to resources excavated or removed in violation of other federal law.

132. 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1985 (1979).

133. 18 U.S.C. §§ 641, 1361 (1976 & Supp. III 1979).

134. 16 U.S.C. § 470ee(c) (Supp. III 1979).

135. See *supra* note 3.

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

E. Enforcement

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

I. Criminal Penalties: Section 6(d)

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

136. See 16 U.S.C. § 470ee (Supp. III 1979).

137. Relic collectors and treasure hunters, unlike pothunters, are unlikely to sell or exchange illegally obtained archaeological resources.

138. See HOUSE REPORT, *supra* note 7, at 20, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1723.

139. 16 U.S.C. § 668(a) (1976 & Supp. III 1979).

140. *Id.* § 703 (1976).

141. *Andrus v. Allard*, 444 U.S. 55, 59-60 (1979). See also *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973) (duty of court to adopt construction that will save statute from constitutional infirmity).

142. See *Senate Hearings*, *supra* note 29, at 40 (testimony of Sen. Domenici).

143. 16 U.S.C. §§ 470ee(b)-(c) (Supp. III 1979) ("receiving" or "purchasing" illegally obtained artifacts prohibited). Even though possession of illegally obtained artifacts does not trigger ARPA's criminal and civil penalty provisions, such artifacts may be recovered under *id.* § 470gg(b). See *infra* text accompanying notes 187-92.

employs any other person to violate" the Act.¹⁴⁴ The federal government may thus impose criminal penalties on the employers of looters as well as looters themselves. Looters are often hired laborers whose employers pay their fines and defense costs as a cost of doing business.¹⁴⁵ By pursuing the employers, ARPA will probably diminish the illegal antiquities trade.

The crime defined in section 6(d) is a general intent crime; that is, it requires only an intent to perform the act in question, not intent to violate the law.¹⁴⁶ Thus, violators are exempt from ARPA's criminal penalty provisions only if the violation was an accident or otherwise unintentional. Congress probably adopted a general intent standard in ARPA because a specific intent standard would have unduly impaired enforcement efforts.¹⁴⁷ The general intent standard, however, itself raises some problems. There is no easy to define the difference between the pothunter's activities and the treasure hunter's, and therefore Congress subjected both to the same prohibitions. Under a general intent standard, however, this subjects treasure hunters who did not know of the law to criminal penalties. Congress attempted to deal with this problem in part by reducing the Act's scope of protection. Recall that the Act exempts collectors of arrowheads off the ground surface from its penalties¹⁴⁸ and exempts collectors of isolated bottles, coins, bullets, and minerals from its prohibitions.¹⁴⁹ Such limitations on scope may not be necessary however, in view of ARPA's variety of enforcement tools and the federal land manager's considerable enforcement discretion. Rather than diluting ARPA's protective provisions, Congress should have provided for public education and then relied on the federal land manager's discretion to protect unwitting treasure hunters.¹⁵⁰

144. *Id.* § 470ee(d).

145. *Senate Hearings*, *supra* note 29, at 62-63 (testimony of Robert Bruce Collins). See also *supra* text accompanying notes 63-65.

146. *HOUSE REPORT*, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714. To violate a statute with a general intent standard it is only necessary to have an intent to do the prohibited act. To violate a statute with a specific intent standard, however, it is necessary to have an intent to violate the law. See *Senate Hearings*, *supra* note 29, at 59 (statement of Michael D. Hawkins).

147. See *Senate Hearings*, *supra* note 29, at 59 (testimony of Michael D. Hawkins).

148. 16 U.S.C. § 470ee(g) (Supp. III 1979); see *supra* text accompanying notes 117-18.

149. 16 U.S.C. § 470kk(b) (Supp. III 1979); see *supra* text accompanying notes 119-20.

Notwithstanding ARPA's exemptions, removing such items from public lands violates other federal laws, such as federal theft and malicious mischief statutes, 18 U.S.C. §§ 641, 1361 (1976 & Supp. III 1979). Congress explicitly declined to restrict the applicability of more general federal laws to activities that violate ARPA. *HOUSE REPORT*, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714.

150. This approach has been adopted with respect to other resources under ARPA. Committee reports admonish federal officials not "to harass citizens in their normal use of the public lands or to impose heavy penalties on persons who inadvertently violate regulations in a minor way." *HOUSE REPORT*, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714. See also *SENATE REPORT*, *supra* note 113, at 9; *Senate Hearings*, *supra* note 29, at 39 (statement of Sen. Domenici).

For a first violation, ARPA authorizes misdemeanor penalties of up to a \$10,000 fine or one year imprisonment, or both, when the value of the archaeological resources damaged or destroyed is less than \$5000,¹⁵¹ and felony penalties of up to a \$20,000 fine or two years imprisonment, or both, when the value of the archaeological resources damaged or destroyed exceeds \$5000.¹⁵² For subsequent violations, the maximum penalty is a \$100,000 fine or five years imprisonment, or both.¹⁵³ These penalties should be sufficient to halt commercial looting; pothunters will no longer be able to treat such fines as "a cost of doing business."¹⁵⁴

ARPA bases penalties on the value of the affected resource.¹⁵⁵ Felony charges are reserved for violations involving resources worth more than \$5000.¹⁵⁶ It is not always easy, however, to place a value on archaeological resources. Section 6(d) provides three elements of value to consider in determining whether a violation reaches the \$5000 felony threshold: (1) commercial or archaeological value, (2) cost of restoration,¹⁵⁷ and (3) cost of repair.¹⁵⁸ "Commercial or archaeological value" is prob-

151. 16 U.S.C. § 470ee(d) (Supp. III 1979).

152. *Id.*

153. *Id.*

154. See *supra* text accompanying notes 65 & 145.

155. See 16 U.S.C. § 470ee(d) (Supp. III 1979); see also *SENATE REPORT*, *supra* note 113, at 9.

156. 16 U.S.C. § 470ee(d) (Supp. III 1979).

157. One author has defined "cost of restoration" as:

the cost of retrieval of scientific information from the disturbed or damaged portion of an archaeological site through archaeological excavation of the disturbed portions together with a sufficient portion of the adjacent nondisturbed site as a comparison base and includes the cost of the research design, fieldwork, laboratory analysis, and written report.

Green, *supra* note 116, at 30. Under this definition, restoration and repair are not synonymous. Restoration involves returning to the public whatever value can be salvaged from the resource; repair is limited to reconditioning and stabilizing the resource. *Id.*

Other authors take issue with this definition. See Donaldson, Goddard & McAllister, *Response to Green*, AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, Feb. 1981, at 28. They maintain that although ARPA distinguishes between restoration and repair, in fact the two terms are virtually synonymous. *Id.* at 29. They define "restoration" as "measures taken to bring back resources to their predisturbance state insofar as possible and feasible. Such measures might involve rebuilding damaged walls of structures or reconstructing broken pots." *Id.*

158. 16 U.S.C. § 470ee(d) (Supp. III 1979). Green, *supra* note 116, at 30, defines "cost of repair" as "the cost of the physical repair of archaeological resources which have been damaged or disturbed in order to return said resources to the condition existing prior to the damage or disturbance." This definition corresponds to the definition of "restoration" offered by Donaldson, Goddard & McAllister, *supra* note 157, at 30. *Cf. id.* (definition of "repair" as the "preventative measures taken to ensure that no further damages occur to disturbed resources").

Using the Green definitions of restoration and repair under ARPA will ensure that the full cost of restoring and repairing a disturbed resource will be recovered. Most restoration and repair efforts will require some salvage excavation, and the Green definitions are broad enough to cover such costs. Even though Green's definitions of "restoration" and "repair" differ somewhat from the usual meanings of the terms, see Donaldson, Goddard & McAllister, *supra* note 157, at 29, they comprise the normal range of operations undertaken to restore and repair a damaged archaeological resource.

ably the most difficult to estimate. The "commercial value" of artifacts that are commonly traded in the antiques market, such as pots, baskets, jewelry, or ceremonial objects, is easy to ascertain. A standard of "archaeological value" is necessary, however, for resources that have no readily ascertainable commercial value.¹⁵⁹

The standard of "archaeological value" must approximate the resource's value to the archaeologist and be easy to administer.¹⁶⁰ Although an archaeological resource may not have a commercial market, it nonetheless has a scientific market. The value of an archaeological resource in the scientific market is what an archaeologist would pay for the resource, that is, what an archaeologist would be willing to spend to research and develop the resource, including costs of planning, survey, excavation, laboratory analysis, and report preparation.¹⁶¹

This "informational value" standard appears both accurate and simple. It will not, however, always be easy to apply an informational value standard to specific violations. Informational value calculations are relatively straightforward when an entire site has been destroyed, but not when a site has been only partially destroyed. The language of section 6(d) suggests that only those archaeological resources actually "involved" in a violation, that is, only those resources damaged or destroyed, should be considered in the valuation.¹⁶² Thus the informational value of the whole site would not be an appropriate measure of lost value.¹⁶³ One approach to this problem would be to determine what proportion of the site has been damaged or destroyed and to divide the informational value of the site accordingly. This approach would be easy to administer, but would produce artificial values because material remains are never spread uniformly over an archaeological site. An alter-

159. Examples of such resources are human skeletal remains, paleontological remains, structural remains and distributional information.

160. Because the value of an archaeological resource will determine the criminal penalty imposed, see *supra* notes 155-59 and accompanying text, juries may often have to apply the standard in criminal prosecutions. See, e.g., Green, *supra* note 116, at 30. Federal land managers will also be using this standard frequently in assessing civil penalties. See, *infra* text accompanying note 168.

161. The proposed regulations adopt this approach. Section 1215.16 of the proposed regulations defines "archaeological value" as the "value of information associated with the archaeological resource" to be appraised "in terms of the costs of the retrieval of the scientific information contained in the archaeological resource which would have been obtainable if the archaeological resource were found in its undisturbed state." 46 Fed. Reg. 5566, 5574 (1981) (to be codified in 36 C.F.R. § 1215.16) (proposed Jan. 19, 1981). Among the factors to be considered in this determination are whatever costs of developing a research design, conducting fieldwork, performing laboratory analysis and preparing reports are necessary to realize the resource's information potential. *Id.* See also Green, *supra* note 116, at 30. Cf. Donaldson, Goddard & McAllister, *supra* note 157, at 29 (archaeological value should be defined in terms of the cost of scientific data recovery from those areas disturbed by the illegal activities).

162. 16 U.S.C. § 470ee(d) (Supp. III 1979). See also Donaldson, Goddard & McAllister, *supra* note 157, at 28-29.

163. Donaldson, Goddard & McAllister, *supra* note 157, at 28-29.

native approach would calculate the difference between the cost of retrieving information from the site as a whole and the cost of retrieving information from the part of the site that remains intact. Although somewhat complicated, this approach would estimate the diminution in value of the site as a whole and thus reflect the value of lost contextual data.¹⁶⁴

An informational value standard will not always produce an accurate valuation because what an archaeologist would pay to develop a resource may not equal the value of the resource to the archaeologist.¹⁶⁵ Alternative standards of "archaeological value," however, would rely on less objective criteria and thus make valuation even more difficult and less predictable.¹⁶⁶ "Archaeological value" should therefore be computed on the basis of the cost of researching and developing the resource. For partially damaged or destroyed archaeological sites, value should be computed on the basis of the difference between the cost of retrieving information from the whole site and the cost of retrieving information from the part of the site that remains intact.

2. Civil Penalties: Section 7

Section 7 authorizes federal land managers to impose civil penalties for any violation of the Act.¹⁶⁷ The federal land manager is to determine the amount of civil penalty in accordance with the uniform regulations, considering, among other factors, the "archaeological or commercial value" of the resource and the cost of restoration and repair.¹⁶⁸ The

164. Disruption of contextual data greatly reduces the costs of planning, excavation and analysis by closing various paths of investigation, such as analyses of the relationship of artifacts within a site and environmental analyses based on stratigraphic sequences. Because archaeological research entails certain "fixed costs," even this approach will not approximate the full value of the lost resource. See *infra* note 165 and accompanying text.

165. The cost of archaeological investigation often depends upon the location of the resource rather than its research value. Excavation of an archaeological site, for example, entails certain fixed costs such as equipment and labor, regardless of the value of the resources contained therein. On the other hand, archaeological resources of comparable value to a research design may entail different collection costs because they are not similarly situated, i.e., one may be in a surface scatter, the other in an archaeological site.

166. An approach that values archaeological resources in terms of "archaeological significance," for example, would be difficult to administer. "Archaeological significance" is not easily defined. See *supra* note 34. A resource may be significant because of its relative scarcity, because of its importance in a particular research design, or because of its other unique features. See *supra* note 34. Attaching a monetary value to "archaeological significance" poses an even greater problem.

Case-by-case determinations of archaeological value could be foregone in favor of a predetermined schedule of "values" based on the nature of the resource and its potential significance to archaeological investigation. The same pitfalls that are inherent in case-by-case determinations are inherent in devising such schedules, but schedules might facilitate criminal and civil penalty assessments. The approach is probably unworkable, however. Given the tremendous variation in archaeological resources, standardized valuation is virtually impossible and subject to challenge on the facts of each particular case.

167. 16 U.S.C. § 470ff(a)(1) (Supp. III 1979).

168. *Id.* § 470ff(a)(2). This provision leaves "archaeological or commercial value" to be defined by the regulations. *Id.* Neither the Act nor its legislative history clarifies

manager may mitigate or remit the penalties¹⁶⁹ or double the penalties for succeeding violations.¹⁷⁰ Section 7, unlike section 6, contains no intent standard.¹⁷¹

Section 7 provides for judicial review of penalty assessments in United States District Court either in the District of Columbia or in any district in which the aggrieved party resides.¹⁷² Should a violator fail to pay a penalty, the federal land manager may request that the Attorney General bring an action for enforcement and collection.¹⁷³

ARPA's civil penalties are discretionary;¹⁷⁴ they give the federal land manager the flexibility to impose penalties to educate, deter, or compensate.¹⁷⁵ Congress intended that the civil penalty provisions of ARPA would supplement the criminal penalty provisions and provide a means of deterring illegal activities without unduly burdening the "ignorant" citizen.¹⁷⁶

The federal land manager must remit penalties collected for violations on Indian lands to the Indian tribe concerned.¹⁷⁷ Because the civil penalties serve various noncompensatory functions, however, this money will not always fully compensate the Indian tribe for the damage to the archaeological resource.¹⁷⁸ Moreover, only the federal land managers can invoke the civil penalty provisions, and the Act makes no provision for enforcement at the Indian tribe's request.¹⁷⁹

what "other factors" may be considered in calculating a civil penalty. The legislative history suggests, however, that Congress intended to limit the amount of civil penalty by the archaeological or commercial value of the resource and the cost of restoration and repair. HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714. Thus, "other factors" may refer to mitigating factors.

169. 16 U.S.C. § 470ff(a)(1) (Supp. III 1979).

170. *Id.* § 470ff(a)(2).

171. *Id.* § 470ff(a)(1).

172. *Id.* § 470ff(b)(1).

173. *Id.* § 470ff(b)(2).

174. *Id.* § 470(a)(1).

175. 46 Fed. Reg. 5566, 5568 (1981).

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

The Committee adopted a civil penalties section based on existing procedures in the Endangered Species Act [16 U.S.C. §§ 1531-1543 (1976 & Supp. III 1979)]. . . . This section would give the Federal land manager "ticket writing" authority for minor offenses which do not involve a knowing violation of the prohibitions of the act. The Committee agreed that enforcement authority which did not involve the stigma of a criminal violation would be useful to the Federal land manager as a deterrent for illegal activities for users of the public lands who might unknowingly violate the act The Committee cautions that civil penalties should be sparingly used, and then only in situations which clearly warrant an enforcement action and not to harass citizens in normal use of public lands or who inadvertently infringe on regulations in minor ways.

SENATE REPORT, *supra* note 113, at 9.

177. 16 U.S.C. § 470gg(c) (Supp. III 1979).

178. This is especially true when the penalties assessed against an "unknowing" violator are mitigated. See *supra* text accompanying notes 169, 174-76.

179. 16 U.S.C. § 470ff(c) (Supp. III 1979). Indian tribes may sue, however, in tribal

Violations on public lands will also raise problems of compensation. ARPA's civil penalty provisions are the primary mechanism for recovery of compensatory damages for injury to archaeological resources on public lands.¹⁸⁰ Because they are calculated with reference to the archaeological or commercial value of the resource and the cost of restoration and repair,¹⁸¹ these penalties arguably compensate the public for any injury and thus render separate civil suits unnecessary.¹⁸² Realistically, however, civil penalties will seldom fully compensate the public because they must deter without being "unreasonably burdensome."¹⁸³

Ideally, compensation for lost resources would be the goal in each case. Congress could realize this goal by amending section 7 to make violators of the Act expressly liable for compensatory damages and to provide the federal land managers with authority to bring civil suits to recover such damages.¹⁸⁴ Congress could also amend the Act to allow concerned citizens, such as Indians or archaeologists, to sue to compel federal land managers to pursue the available remedies.¹⁸⁵ Such amendments, however, might put undue burdens on the unknowing violator. ARPA's legislative history suggests that when faced with a conflict between compensation and protection for unknowing violators, Congress will choose the latter.¹⁸⁶ The responsibility thus falls on the regulators

courts or state courts for damages for injury or destruction of archaeological resources on Indian lands. See Canby, *supra* note 103, at 737.

180. *Id.*

181. See *supra* text accompanying note 168.

182. ARPA is silent as to whether the authorized civil penalties alter or merely add to the remedies already available to the federal land managers under other federal laws. The Act's legislative history suggests, however, that Congress was aware that the federal land managers had authority to initiate civil actions to recover damages, and did not intend to restrict this or any other available remedy. See HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714; SENATE HEARINGS, *supra* note 29, at 61 (testimony of Michael D. Hawkins). When full compensation is the goal, such as when the violation is serious enough to warrant criminal prosecution as well as civil action, a civil suit may in fact be more efficient than an administrative procedure with judicial review. Given that the courts are determining archaeological value and cost of restoration and repair in criminal proceedings, see *supra* text accompanying notes 155-58, the courts' lack of the agencies' expertise should not present an obstacle to judicial determination of these sums in civil actions. As a practical matter, though, the availability of an administrative mechanism for assessing substantial civil penalties may limit such use of the courts.

183. HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714.

184. Such an amendment was in fact introduced in the Senate. The proposed amendment made violators of the Act liable to the United States for the archaeological value and the commercial value of the injured resource, and the cost of restoration and repair. SENATE REPORT, *supra* note 113, at 10. This amendment did not appear in the final version of the bill, perhaps due to a concern over subjecting unknowing citizens to burdensome penalties. See HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714.

185. The Endangered Species Act, for example, contains a similar provision. 16 U.S.C. § 1540(g) (1976 & Supp. III 1979).

186. See HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714.

and the federal land managers to assure adequate compensation in every case.

3. Forfeiture: Section 8(b)

Section 8(b) provides that a court may order the forfeiture to the United States of all archaeological resources, vehicles, and equipment that were involved in a violation of ARPA.¹⁸⁷ If the violation occurred on Indian land, the items are forfeited to the Indian or Indian tribe concerned.¹⁸⁸

Section 8(b) authorizes recovery of illegally obtained archaeological resources not only from persons who have violated ARPA but also from any person who has possession. Thus, even though possession alone will not trigger ARPA's civil or criminal penalty provisions, it may expose the possessor to a civil suit for recovery of the illegally obtained artifact.

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

To ensure that violators are not deprived of their property without "due process of law,"¹⁸⁹ ARPA clearly intends that some kind of hearing will precede forfeiture. Only a court or administrative law judge may order forfeiture.¹⁹⁰ The federal land manager must bring a civil suit if he wants to recover any resources, vehicles, or equipment involved in a violation when a civil penalty has been assessed without a formal hearing.

To avoid "unduly burdensome forfeitures of property belonging to persons who neither knew nor could have known of the illegal activities,"¹⁹¹ Congress left forfeiture to the discretion of the court or administrative law judge. Making forfeiture of illegally obtained archaeological resources discretionary, however, is inconsistent with the principle that archaeological resources on public lands are public resources that remain the property of the United States.¹⁹² In its zeal to protect unwitting violators from burdensome confiscation of vehicles and other property, Congress has needlessly diluted the protection for archaeological resources. Congress should amend section 8(b) to make forfeiture of illegally obtained archaeological resources mandatory: the recovery of public resources should not be left to a court or administrative law judge's discretion.

4. Rewards: Section 8(a)

Section 8(a) authorizes rewards for information leading to the assessment of a fine or penalty under the Act's civil or criminal penalty

187. 16 U.S.C. § 470gg(b) (Supp. III 1979).

188. *Id.* § 470gg(c).

189. U.S. CONST. amend. V.

190. 16 U.S.C. § 470gg(b) (Supp. III 1979).

191. HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714.

192. See 16 U.S.C. § 470cc(b)(3) (Supp. III 1979).

provisions.¹⁹³ Specifically, the Secretary of Treasury may pay from the collected fine or penalty a reward equal to one-half the fine or penalty but not exceeding \$500.¹⁹⁴ This provision increases the federal land manager's enforcement power by giving visitors to public lands an incentive to discover and report violations. Thus the federal land manager will not have to rely solely on a limited staff to police vast and often remote public lands.¹⁹⁵

F. Permitting: Section 4

Section 4 establishes a permitting procedure to govern the investigation and development of archaeological resources on public lands and Indian lands.¹⁹⁶ Section 4 distinguishes between "public lands" and "Indian lands."¹⁹⁷ To allow for effective management and conservation of archaeological resources on public lands, the Act leaves the permitting of archaeological investigation on public lands to the federal land manager's discretion.¹⁹⁸ To ensure adequate consideration of Indian religious, cultural, and sovereign interests, however, special provisions apply to permits for archaeological investigation on Indian lands.¹⁹⁹

1. When Is a Permit Required?

Section 4(a) requires any person to obtain a permit from the federal land manager for excavation, removal, and "associated activities" involving archaeological resources on public and Indian lands.²⁰⁰

ARPA does not require a permit for an archaeological survey alone.²⁰¹ Requiring a permit for surveys would prove impractical. With such a requirement, even the activities of hikers could trigger ARPA's penalty provisions; moreover, proving that an illegal survey had been conducted would be nearly impossible.²⁰² Under the existing provision, however, a survey conducted concurrently with excavation can be

193. *Id.* § 470gg(a).

194. *Id.*

195. See *supra* note 45.

196. 16 U.S.C. § 470cc (Supp. III 1979).

197. See *supra* text accompanying notes 96-104.

198. 16 U.S.C. § 470cc(b) (Supp. III 1979).

199. *Id.* § 470cc(g).

200. *Id.* § 470cc(a).

201. At its most rudimentary level, archaeological survey involves walking over areas of ground looking for evidence of archaeological sites, such as artifact scatters or changes in topography or vegetation. F. HOLE & R. HEIZER, *supra* note 9, at 166. More sophisticated survey is more systematic, often involving erection of a grid. *Id.*

Congress declined to adopt amendments proposed by the Department of Interior that would have added archaeological survey to ARPA's permit requirements. Compare 16 U.S.C. § 470cc(a) (Supp. III 1979) with HOUSE REPORT, *supra* note 7, at 18, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1720 (proposed revision requiring permits for archaeological survey); cf. Antiquities Act of 1906, 16 U.S.C. § 432 (1976) (requiring permits "for the examination of ruins").

202. See *supra* note 201.

treated as an "associated activity" subject to the terms and conditions of the excavator's permit. To clarify this situation, Congress should amend ARPA to exempt all surveys from its permit requirements.

Because ARPA defines "person" to include "any officer, employee, agent, department, or instrumentality of the United States,"²⁰³ the Act's permit requirements apply to the federal land manager's agents and employees. The extension of the permit requirements to government employees should be viewed as an attempt to ensure the rational development of archaeological resources rather than as a bureaucratic obstacle to effective management.²⁰⁴ To allow federal land managers to conduct emergency salvage work, the federal agencies could either establish an expedited permitting procedure or deem federal agents and employees conducting emergency salvage work to operate under a valid permit.²⁰⁵ In all other situations, the normal permitting procedure should not seriously hamper effective management.²⁰⁶

Section 12(a) exempts activities relating to mining, mineral leasing, and reclamation from ARPA's permit requirements.²⁰⁷ The Act's legislative history suggests two reasons for this exemption: (1) an unwillingness to burden these legitimate uses of public lands with additional permit requirements,²⁰⁸ and (2) a concern that in the course of these uses a person might unwittingly trigger the Act's penalty provisions.²⁰⁹ ARPA thus leaves the protection of archaeological resources from such activities to other federal laws.²¹⁰

203. 16 U.S.C. § 470bb(6) (Supp. III 1979).

204. Congress declined to adopt amendments suggested by the Department of the Interior that would have exempted officers, employees, agents, departments or instrumentalities of the United States from the permit requirement when they perform official land management duties. Compare *id.* § 470cc with HOUSE REPORT, *supra* note 7, at 19, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1722 (proposed exemption).

205. Congress was correct to reject this proposal because of the problems of Antiquities Act violations by federal employees. In April 1979, for example, two Wyoming Bureau of Land Management employees were convicted of violating the Antiquities Act by damaging several prehistoric rockshelters. Friedman, *Antiquities Violations by BLM Employees: Further Developments*, AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, Apr. 1980, at 35. The federal government had to appropriate \$25,000 to stabilize the damaged sites. *Id.*

206. Such regulations could be issued pursuant to Section 10, 16 U.S.C. § 470ii (Supp. III 1979).

207. Problems will inevitably arise in subjecting all federal agents or employees to ARPA's permit requirements. Accidental destruction of archaeological sites in the course of roadwork, for example, will subject a federal employee to stiff criminal penalties. Telephone interview with Charles M. McKinney, Department of the Interior (Oct. 26, 1981). In such cases the employee will have to rely on the federal land manager to use discretion to avoid an unduly harsh result.

208. 16 U.S.C. § 470kk(a) (Supp. III 1979).

209. See Senate Hearings, *supra* note 29, at 40 (statement of Sen. Domenici).

210. See HOUSE REPORT, *supra* note 7, at 23, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1726.

211. Section 12(a), 16 U.S.C. § 470kk(a) (Supp. III 1979), provides that "nothing in this chapter shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation and other multiple uses of public land" (emphasis added).

2. Indian Lands

Section 4(g) exempts Indian tribes desiring to excavate archaeological resources on their lands from the permit requirements of the Act if the tribes have laws regulating the excavation and removal of those resources.²¹¹ In the absence of such tribal law, ARPA's permit provisions apply.²¹² ARPA's permit provisions extend to all non-Indians desiring to excavate archaeological resources on Indian lands regardless of the existence of tribal law regulating those resources.²¹³ Both Indians and non-Indians desiring to investigate archaeological resources on Indian land must obtain the approval of the Indian tribe before a permit will issue under ARPA,²¹⁴ and any such permit must contain the terms and conditions requested by the Indian tribe.²¹⁵

ARPA thus leaves Indian tribes considerable authority over archaeological resources on Indian lands. Because the federal government regulates excavation by Indians on Indian lands only when Indian tribes decline to regulate them,²¹⁶ Indian tribes may displace federal control simply by enacting tribal ordinances governing archaeological resources on their lands. Indian tribes may also incorporate tribal law into the terms and conditions of permits issued to Indians and non-Indians under ARPA,²¹⁷ or may refuse to approve such permits.²¹⁸

Indian tribes may also continue to have concurrent jurisdiction over archaeological resources on their lands. Prehistoric and historic Indian sites likely fall under tribal sovereign authority.²¹⁹ A statute does not

211. *Id.* § 470cc(g). ARPA does not impose on the Indian tribes any standards for permit issuance to tribal members. Often, however, the Secretary of the Interior has approved, pursuant to the tribal constitution, the tribal ordinances regulating archaeological resources. See Canby, *supra* note 103, at 216.

212. 16 U.S.C. § 470cc(g)(1) (Supp. III 1979).

213. The section 4(g) exemption applies only to "any Indian tribe or member thereof." *Id.* ARPA's permit provisions also extend to Indians who are not members of the tribe having jurisdiction over the land containing the archaeological resource. *Id.*

214. *Id.* § 470cc(g)(2).

215. *Id.* Arguably there are limits as to the terms and conditions that the Indian tribe may impose. At the very least, such terms and conditions should be consistent with the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1976).

216. See *supra* text accompanying notes 211-12.

217. See 16 U.S.C. § 470cc(g)(2) (Supp. III 1979).

218. *Id.* Indian tribal authority over permitting therefore is limited only insofar as the tribe may desire to issue a permit to a non-member on terms less stringent than those that ARPA imposes. See *infra* text accompanying notes 211-28.

219.

[O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . ." United States v. Mazurie, 419 U.S. 544, 557 [1975] The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 323 (1978) (upholding application of the "dual sovereignty" doctrine to federal and tribal criminal jurisdiction over Indian offenders on Indian lands).

abrogate such authority absent a "clear showing" of congressional intent to abrogate.²²⁰ Nothing in ARPA suggests that Congress intended to abrogate Indian sovereign authority over archaeological resources on Indian lands. In particular, section 4(g) does not prohibit tribal regulation of archaeological resources on Indian lands.²²¹ Failure to comply with tribal ordinances, therefore, may subject Indians to tribal criminal and civil penalties²²² and non-Indians to civil penalties or expulsion from the

Courts often recognize the existence of Indian sovereign powers not explicitly stated in treaty. Judicial rules of construction require ambiguities to be resolved in the Indians' favor. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973), and treaties to be interpreted as the Indians themselves would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). In general, courts choose liberal construction in favor of the Indians. *Id.* See generally, *Wilkinson & Volkman: Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975).

For Indian tribes, prehistoric and historic Indian sites are often important religious and cultural resources. See *supra* note 26. The Indians and the federal government did not likely contemplate the relinquishment of Indian authority over such resources when the treaties were signed. *Cf. Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (holding that treaty language "to be held as Indian lands are held" included the right to fish and to hunt). Questions may arise, however, in the case of prehistoric sites situated on lands historically occupied by tribes unrelated to the sites' original inhabitants.

220. *United States v. White*, 508 F.2d 453 (8th Cir. 1974). See also *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (the purpose to abrogate treaty rights of Indians is not to be lightly imputed to Congress).

221. Section 4(g)(1), 16 U.S.C. § 470cc(g)(1) (Supp. III 1979), acknowledges the existence of tribal law regulating archaeological resources on Indian lands, but neither the Act nor its legislative history contain language indicating that the Act preempts such laws as they apply to Indians or non-Indians on Indian land. See *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) ("[w]e find it difficult to believe that Congress, without explicit statement, would [destroy] property rights conferred by treaty"). See also *United States v. White*, 508 F.2d 453, 457 (8th Cir. 1974) (express Congressional abrogation or modification required to affect Indian treaty rights to hunt on the reservation).

Concurrent federal and tribal jurisdiction has been upheld under other circumstances. See *United States v. Wheeler*, 435 U.S. 313 (1978) (upholding concurrent tribal and federal criminal jurisdiction over Indian offenders on Indian lands under the Major Crimes Act of 1885).

222. See *United States v. Wheeler*, 435 U.S. 313 (1978) (upholding tribal criminal jurisdiction over tribal members on Indian lands); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (civil regulatory authority over tribal members on the reservation remains vested in the tribe).

Section 202(7) of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(7) (1976), places a ceiling on tribal criminal penalties of \$500 or 6 months imprisonment or both. There seems to be no limit, however, on tribal civil penalties. The Supreme Court has noted that within reservations Indian tribes have plenary authority over members except as expressly limited by federal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). See generally *Collins, Implied Limitations on the Jurisdiction of Indian Tribes*, 54 W.A. L. REV. 479, 518 (1979). Such authority apparently includes the power to impose civil sanctions. "Many regulatory schemes, at all levels of government, exist without criminal sanctions for enforcement purposes. [The state] itself relies in part on civil sanctions in its [regulatory] enforcement scheme The Supreme Court has at no time denied the power of an Indian tribe to assert its civil powers." *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 735 (10th Cir. 1980) *vacated and remanded on other grounds*, 101 S. Ct. 1752 (1981). Absent express limits, tribal authority to impose civil sanctions on its members should be unrestricted. See *Santa Clara Pueblo*, 436 U.S. 49 (1978).

reservation.²²³ ARPA thus can be viewed as a supplement to tribal regulation of archaeological resources on Indian lands that authorizes criminal and civil penalties for unauthorized excavation, removal, or damage.

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

223. Tribal governments may not exercise criminal jurisdiction over non-members. *Oliphant v. Suquamish*, 435 U.S. 191 (1978). *Oliphant* did not divest Indian tribes, however, of all authority over non-members. See *Collins, supra* note 222, at 516-21. The Supreme Court recently upheld, for example, tribal regulation of hunting and fishing by non-members on land owned by the tribe or held in trust by the United States for the tribe. *Montana v. United States*, 101 S. Ct. 1245, 1254 (1981). As *Collins* observes:

Where non-Indians have entered into consensual relationships with Indians for the use of Indian land, the historical case for tribal civil jurisdiction and related tribal legislative authority is quite strong [T]he authority to tax, license, and regulate has been sustained in those situations. The same reasoning should apply to matters of domestic relations in instances of intermarriage, to contracts, leases, and agreements concerning the use of Indian land, and other interracial matters. Torts arising directly out of such relationships should be governed by the same principle.

Collins, supra note 222, at 515 (emphasis added). See also *Montana v. United States*, 101 S. Ct. at 1254.

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

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

224. Indian groups proposed amendments to ARPA granting Indian tribes a veto over the excavation of sites of religious or cultural significance to the tribes. Congress rejected these amendments as too broad. *Senate Hearings, supra* note 29, at 48-50.

225. 16 U.S.C. § 470cc(c) (Supp. III 1979).

226. Indians are becoming increasingly concerned over the removal of sacred objects from, and the desecration of, Indian religious sites. As a result, Indians are attempting with increasing frequency to regain control over objects and sites managed by archaeologists and non-Indians. See, e.g., *A Fight for Rites, supra* note 108. See generally, *Blair, supra*

establishment of religion.²²⁷ Thus if Indians want to affect or prevent the archaeological development of sites not on the reservation, they must establish overriding religious or cultural significance of the sites.²²⁸

3. Grounds for Issuing a Permit

The federal land manager may issue a permit for investigation of archaeological resources on public lands and, when appropriate, on Indian lands, if (1) the applicant is qualified to perform the activity, (2) the activity is undertaken to further archaeological knowledge in the public interest, (3) the resources excavated or removed from public lands will remain the property of the United States and will be preserved in a suitable institution, and (4) the activity is consistent with any management plan for the affected lands.²²⁹ For archaeological investigation on Indian land, tribal approval must also be obtained.²³⁰

ARPA's solution to the problem of applicant qualifications is better than that of the Antiquities Act. Under the Antiquities Act, federal land managers issue permits only to qualified institutions²³¹ such as museums and universities.²³² Under ARPA, however, federal land managers may issue permits to any "person"²³³ who meets qualifications to be defined by the uniform regulations.²³⁴ ARPA thus relies on the federal land man-

note 124; Winter, *supra* note 26; Corby, *The Far West, Native Americans and Archaeology*, AM. SOC'Y FOR CONSERVATION ARCHAEOLOGY NEWSLETTER, Dec. 1977, at 2.

227. See *infra* notes 336-42 and accompanying text.

228. As one author notes:

All Americans have a right to the knowledge represented in cultural resources unless a direct defensible claim to the resources can be specifically established by a group on traditional or religious grounds. At that point, the concerns of the group should be essential to the planning for any federal agency construction affecting the future of the resources. The agency is responsible for the final decision and it revolves around all laws applicable to the project undertaking. If a Native American group cannot substantiate its claim to cultural resources other than to say generally 'they're of religious significance to us,' a federal agency would have little justification for accommodating them. Many agency officials are accustomed to dealing in depth with a multitude of claims and probably could not recommend, for example, either stopping a construction project or abandoning legally authorized data recovery as an appropriate alternative to irrevocable adverse impact.

Most of us strongly support the retention of cultural traditions and would gladly step aside to avoid impacting their manifestations. As a matter of principle and in the interest of our dwindling cultural resources, we should guard against having archaeological investigation nullified because of insinuated 'traditions' of questionable origin.

Corby, *supra* note 226, at 7.

229. 16 U.S.C. § 470cc(b) (Supp. III 1979).

230. *Id.* § 470cc(g)(2).

231. *Id.* § 432 (1976).

232. Regulations under the Antiquities Act authorizes the federal land managers to issue permits to "reputable museums, universities, colleges, or other recognized scientific or educational institutions, or to their duly authorized agents." 43 C.F.R. § 3.3 (1980).

233. Section 3(6) defines "person" as "an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States or any Indian tribe, or of any state or political subdivision thereof." 16 U.S.C. § 470bb(6) (Supp. III 1979).

234. *Id.* § 470cc(h).

ager to make case-by-case assessments of applicant qualifications rather than resorting to shorthand categories. This not only ensures that institutions and individuals undertaking archaeological projects are in fact qualified, but allows qualified individuals who are not affiliated with a museum or educational institution²³⁵ to conduct their own research.

ARPA, unlike the Antiquities Act, requires that excavation be in the public interest. The Antiquities Act provides that land managers may issue permits for investigations undertaken "for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects."²³⁶ ARPA provides that land managers may only issue permits "to further archaeological knowledge in the public interest."²³⁷ ARPA thus recognizes that archaeological resources belong to the public and that the archaeologist's interest and the public interest do not always coincide.

A federal land manager cannot issue a permit under ARPA unless he or she is satisfied that the applicant has made adequate provision for the preservation of the archaeological resources.²³⁸ Before ARPA, excavators generally retained archaeological resources retrieved from public lands or Indian lands. This created two problems: the public did not have access to public resources, and Indians lost all control over resources retrieved from Indian lands.²³⁹ ARPA attempts to deal with these by: (1) declaring that archaeological resources retrieved from public lands "remain the property of the United States,"²⁴⁰ and (2) requiring the consent of the affected tribe to the exchange and ultimate disposition of archaeological resources recovered from Indian lands.²⁴¹ ARPA, however, also provides that resources recovered from *public lands*, regardless of their religious or cultural significance to Indian tribes, remain public resources.²⁴²

Congress inserted the requirement that the proposed excavation be consistent with any land management plan to allow for the conservation of archaeological resources.²⁴³ Conservation is sometimes preferable to

235.

[S]ources of funds for archaeological research, such as foundations and educational institutions, are feeling financial pressure from all angles, and the amount of money available from these sources for archaeology is not increasing in proportion to the amount of destruction. . . . Many professional archaeologists are turning for help to "amateur archaeologists"—those persons who study the past in their leisure time.

Davis, *supra* note 2, at 271.

236. 16 U.S.C. § 432 (1976 & Supp. III 1979).

237. *Id.* § 470cc(b)(2) (Supp. III 1979).

238. *Id.* § 470cc(b)(3).

239. See *supra* note 226.

240. 16 U.S.C. § 470cc(b)(3) (Supp. III 1979).

241. *Id.* § 470dd.

242. *Id.* § 470cc(b)(3).

243. See HOUSE REPORT, *supra* note 7, at 9, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1712.

development because archaeological resources are nonrenewable and because future archaeologists may have the knowledge, technology, and methodology to extract more information from the resources. The consistency requirements, however, may have other, unintended effects. For example, a proposed archaeological research project could conflict with a mining project called for by a land management plan. Because ARPA does not impose permit requirements on mining,²⁴⁴ the archaeological resource would be developed only to the extent that it is protected by other federal law, such as the Archaeological and Historical Preservation Act.²⁴⁵

ARPA generally leaves the decision whether to issue a permit for excavation on public lands to the discretion of the federal land manager.²⁴⁶ Thus, with one exception, applicants who meet ARPA's requirements have no right to a permit. At the request, however, of any state governor acting for the state or its educational institutions, a federal land manager must find that an applicant is qualified and that the proposed activity is in the public interest and must impose no additional terms and conditions on the permit other than those requested by the governor.²⁴⁷ ARPA's legislative history does not explain this provision. It appears, however, to be an attempt to give states greater control over their archaeological resources.

4. Procedural Aspects of Permits

Persons seeking a permit to develop archaeological resources on public lands, or on Indian lands if the persons are not exempted by section 4(g), must submit to the federal land manager an application describing the time, scope, location, and specific purpose of the proposed work.²⁴⁸ In the case of an application to excavate on Indian land, the federal land manager must seek the approval of the Indian or Indian tribal authority having control over the land.²⁴⁹ In the case of an appli-

244. 16 U.S.C. § 470kk(a) (Supp. III 1979). See *supra* notes 207-10 and accompanying text.

245. 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979). See *supra* note 34 and accompanying text.

246. See 16 U.S.C. § 470cc(b) (Supp. III 1979) (providing that a permit "may be issued").

247. *Id.* § 470cc(j).

The provisions of section 4(g), *id.* § 470cc(g), which require Indian approval and the imposition of such terms and conditions as the Indian tribe may request, still apply to works involving Indian lands. *Id.* § 470cc(j). The absence of standards for permit issuance in such cases may effectively reduce the protection afforded archaeological resources under the Act. As currently drafted, the provision does not restrict the purposes for which a state may request a permit. Even excavations associated with commercial development are covered. Congress should consider restricting permit issuance to situations in which the state is interested in learning more about local history and prehistory.

248. *Id.* § 470cc(a).

249. *Id.* § 470cc(g)(2).

cation to excavate on public land, the federal land manager must determine whether the proposed activity will harm or destroy a site of religious or cultural significance to an Indian or Indian tribe, and, if it will, notify the Indian or Indian tribe concerned.²⁵⁰

ARPA does not tell the federal land manager what to do after giving such notice. The first amendment may require that the Indian or Indian tribe whose religious interests are threatened have an opportunity for comment.²⁵¹ What weight to accord such comment is, however, an open question. ARPA does not require the federal land manager to deny an application because of unfavorable comments from concerned Indians. The American Indian Religious Freedom Act²⁵² and the federal trust responsibility for Indian property,²⁵³ however, require the federal land manager to consider the effect on Indian religious and cultural interests of any action on a permit application. ARPA thus leaves the resolution of conflicts over the development of archaeological resources on public lands to the regulations and other federal law.²⁵⁴

ARPA does not provide other interested parties notice or a chance to comment before permit issuance. In fact, section 4(i) of ARPA exempts ARPA permits from section 106 of the National Historic Preservation Act.²⁵⁵ That section requires that, before issuing any "license," a federal agency must: (1) "take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register," and (2) "shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."²⁵⁶ ARPA's legislative history suggests that Congress inserted section 4(i) to reduce the red tape involved in getting a permit and to eliminate apparent duplication of effort.²⁵⁷ In fact, however, this exclusion seems to shift responsibility for determining whether archaeological investigations will affect National Register properties, from the Advisory Council on Historic Preservation to the federal land managers.

A recent Ninth Circuit decision, *County of San Bernardino Museum v. Smithsonian Institution*,²⁵⁸ suggests that neither the Administrative Procedure Act²⁵⁹ nor the fifth amendment²⁶⁰ require that federal officials conduct a hearing before they issue an ARPA permit. The plaintiffs, the

250. *Id.* § 470cc(c).

251. See *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973) (church entitled to a court hearing before condemnation of church property).

252. 42 U.S.C. § 1996 (Supp. III 1979).

253. See *infra* note 344.

254. See *infra* notes 314-25 and accompanying text.

255. 16 U.S.C. § 470cc(i) (Supp. III 1979).

256. *Id.* § 470f (1976 & Supp. III 1979).

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

258. 618 F.2d 618 (9th Cir. 1980).

259. 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. III 1979).

260. U.S. CONST. amend. V.

State of California and the San Bernardino County Museum, sought to enjoin the Smithsonian Institution from removing a 6070 pound meteorite from federal land in southern California. The plaintiffs argued that the federal government had to hold a hearing before it could grant an Antiquities Act permit to the Smithsonian to remove the meteorite. The Ninth Circuit held that: (1) the permit process is not the type of "quasi-judicial" proceeding that requires a hearing under the Administrative Procedure Act, and (2) that the plaintiffs' interest in the meteorite was not sufficient to give them a constitutional right to a hearing.²⁶¹ The court's analysis appears to apply to ARPA as well as the Antiquities Act.

In general, ARPA leaves the imposition of terms and conditions on permits to the regulations and discretion of the federal land managers except for permits authorizing excavations on Indian lands.²⁶² This should give the federal land managers the flexibility to coordinate archaeological resource development with overall land management plans and to promote conservation of archaeological resources.

The federal land manager may *suspend* a permit if: (1) activities are conducted that are not authorized by the permit, (2) trafficking in archaeological resources is conducted in violation of the Act, or (3) any other violation of ARPA or the terms and conditions of the permit has occurred.²⁶³ The federal land manager may *revoke* a permit if the permittee has been convicted of a crime or assessed a civil penalty under the Act.²⁶⁴

Any of the grounds for permit suspension are grounds for the imposition of civil and criminal penalties.²⁶⁵ Archaeologists are concerned about the possibility of criminal penalties because violation of ARPA is a general intent crime²⁶⁶ and archaeologists are unlikely to commit accidental violations. It seems likely, however, that federal land managers will use permit suspension and other enforcement tools before using criminal penalties against archaeologists.

ARPA makes no provision for review of the federal land manager's decisions regarding permits. The considerable discretion vested in the federal land manager²⁶⁷ and the limited participation of interested persons in the decision process²⁶⁸ would probably make judicial review pointless. The ARPA regulations, however, could provide meaningful review by establishing an administrative appeal procedure.²⁶⁹

261. 618 F.2d at 621.

262. See 16 U.S.C. §§ 470cc(d), (g)(2) (Supp. III 1979).

263. *Id.* § 470cc(f).

264. *Id.*

265. See *id.* §§ 470ee, 470ff.

266. See *supra* note 146 and accompanying text.

267. See *supra* text accompanying notes 246.

268. See *supra* text accompanying notes 255-61.

269. Such regulations may be issued pursuant to the federal agencies' authority to promulgate regulations that are "appropriate to carry out [ARPA's] purposes." 16 U.S.C. § 470ii (Supp. III 1979).

G. Protection of Information From Disclosure Under the Freedom of Information Act: Section 9

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

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

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

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

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

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

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

272.

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

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

273. 16 U.S.C. § 470hh(b) (Supp. III 1979).

274. See Senate Hearings, *supra* note 29, at 89 (statement of Dr. Raymond R. Thompson).

vations.²⁷⁵ To deal with this problem, section 11 directs the Secretary of Interior to institute a program of information sharing between federal agencies and private individuals regarding the nation's archaeological resources.²⁷⁶ Moreover, section 5 authorizes the Secretary of Interior to promulgate regulations that will foster the exchange between institutions and museums of archaeological resources recovered from public lands.²⁷⁷ These provisions should expand the nation's archaeological resource base.

III. REGULATORY PROBLEMS

ARPA fails to resolve all of the problems raised by the Antiquities Act, and, in turn, raises some new problems. ARPA leaves for the regulations important questions concerning the scope of protection for archaeological resources,²⁷⁸ the assessment of penalties,²⁷⁹ and the direction of resource development when conflicts arise.²⁸⁰ In promulgating the regulations, however, federal agencies do not have unlimited discretion: ARPA, its legislative history, and other federal laws constrain their decisions.

This section discusses three areas in which regulatory problems arise: (1) the definition of "archaeological resource," (2) penalties, and (3) permitting. It explores approaches to regulation and suggests resolutions of the regulatory problems.

A. Definition of Archaeological Resource

As seen in Section I, the term "archaeological resource" may encompass a wide variety of things.²⁸¹ ARPA therefore seeks a flexible definition of "archaeological resource" that is also definite enough to avoid the vagueness problem of the Antiquities Act.²⁸² Section 3(1) gives a basic definition of "archaeological resource" as "material remains of past human life or activities which are of archaeological interest" and then directs the federal agencies to define in regulations the remains which fall within this definition.²⁸³

In writing a regulatory definition of "archaeological resource," the federal agencies must consider the interests of the groups that will be

275. See generally, Moratto, *supra* note 3, at 21, 23; G. MCHARGUE & M. ROBERTS, *supra* note 38, at 17-31.

276. 16 U.S.C. § 470jj (Supp. III 1979).

277. *Id.* § 470dd. This provision also serves to clarify Congress' intent that institutions may continue to exchange cultural resources for the scientific and educational benefit of the public, as they have in the past. SENATE REPORT, *supra* note 97, at 10.

278. See *supra* text accompanying note 125.

279. See *supra* text accompanying notes 167-86.

280. See *supra* text accompanying notes 243-45, 252-54.

281. See *supra* text accompanying notes 9-16.

282. See *supra* text accompanying notes 69-75.

283. 16 U.S.C. § 470bb(1) (Supp. III 1979).

affected by the definition. Archaeologists seek a definition of maximum scope and flexibility to ensure the preservation of archaeological resources for the future.²⁸⁴ Native Americans, like archaeologists, want broad protection, but may also want to protect sites of current religious and cultural significance that are not necessarily of archaeological significance.²⁸⁵ Recreational users of public lands worry about ARPA's criminal penalties and thus seek a narrow definition that states exactly what resources are protected.²⁸⁶ Developers of mineral resources favor a narrow definition to avoid expanding the protection that other federal laws afford archaeological resources.²⁸⁷ The federal agencies will also have to consider the notice requirements of the due process clause of the fifth amendment.²⁸⁸

There are several approaches which regulators could take toward the problem of defining "archaeological resources." The regulations could, for example, focus on the words "archaeological interest." A material remain is of archaeological interest if it can provide information about man's past life.²⁸⁹ Because virtually any material remain of past human life is of potential informational value to the archaeologist, a definition based on this broad conception of archaeological interest would provide broad coverage and the flexibility to accommodate future expansion of the archaeological resource base.

Such a definition, however, would presume some understanding of archaeology, and therefore would probably not possess the clarity and specificity necessary to satisfy the due process requirements of the fifth amendment. Diaz stated that a statute is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily differ as to its application" While archaeologists of "common intelligence" would understand the scope of "archaeological resource" under this definition, non-archae-

284. *Senate Hearings*, *supra* note 29, at 87 (testimony of Dr. Raymond H. Thompson).

285. *Id.* at 93 (testimony of Leroy Wilder).

286. See, e.g., 46 Fed. Reg. 5566, 5567 (1981). Early comments on the issuance of regulations under the Act suggested, for example, that a definition of "what is not an archaeological resource" be used for the benefit of collectors. *Id.*

287. See *Senate Hearings*, *supra* note 29, at 40 (testimony of Sen. Domenici). A broad definition of "archaeological resource" under ARPA may expand protection under other acts. The survey and salvage provisions of the Archaeological and Historical Preservation Act, 16 U.S.C. §§ 469-469c (1976 & Supp. III 1979), for example, are triggered when federally licensed or funded activities may cause "irreparable loss or destruction of significant . . . archaeological data." *Id.* §§ 469a-1, 469a-2 (emphasis added).

288. See *supra* note 114 and accompanying text.

289. The proposed regulations adopt this construction. Section 1215.3(a) provides in part: "An object, site, or other material remains is of archaeological interest if, through its scientific study and analysis, information or knowledge can be obtained concerning human life or activities." 46 Fed. Reg. 5566, 5570 (1981) (to be codified at 36 C.F.R. § 1215.3(a)) (proposed Jan. 19, 1981).

290. *United States v. Diaz*, 499 F.2d 113, 114 (1974) (quoting *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). See also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

ologists would probably differ as to what constitutes a "material remain of archaeological interest." Without more, then, this broad definition would probably fail to satisfy *Diaz*. The 100 year age limit²⁹¹ reduces the vagueness problem if it can be assumed that it is a matter of common understanding that "old things" are of interest to archaeologists.²⁹² The broad definition would still, however, include a variety of "remains," such as the distribution of artifacts within a site, that are less obviously of archaeological interest.²⁹³

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

Congress did not want ARPA to cover "virtually any object located on public lands"; it intended to protect only remains of "true archaeological interest."²⁹⁴ A narrow construction of "archaeological interest" would not, however, be the best way to limit the scope of the Act. If archaeological investigation were viewed as primarily involving artifact analysis, for example, much contextual and environmental information would be excluded from the definition of "archaeological resource," and the Act would not offer any greater protection than the Antiquities Act.²⁹⁵ If the regulations were to focus instead on the value of a material remain in a particular research design, the definition would begin to resemble a requirement of "archaeological significance."²⁹⁶

Section 3(1) suggests an alternative approach to the problem of defining "archaeological resource." Section 3(1) contains a list of material remains that are intended to fall within the definition of archaeological resource.²⁹⁷ Using this list as a guideline, the federal agencies would specify categories of material remains, such as artifacts, structural remains, and site sediments, which would generally be of archaeological interest. Remains in these categories would be deemed "archaeological resources" under the Act.²⁹⁸

291. 16 U.S.C. § 470bb(1) (Supp. III 1979).

292. When age might be difficult to ascertain as with isolated coins or bullets, ARPA's exemptions would apply. *Id.* § 470kk(b).

293. See *supra* text accompanying note 107.

294. HOUSE REPORT, *supra* note 7, at 8, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1711.

295. See *supra* text accompanying note 107.

296. See *supra* note 34. Another possibility would be to refine further the notion of "archaeological interest" by defining the nature of the investigation for which the material remains are of use. This would entail, however, a long and complicated discussion of archaeological methodology not suitable for purposes of the Act.

297. 16 U.S.C. § 470bb(1) (Supp. III 1979).

298. The proposed regulations seem to adopt this approach. Section 1215.3 sets forth several categories of "material remains of past human life or activities" including:

One disadvantage of this approach is that it would be difficult to decide on a list of categories. Archaeologists would want to include a broad range of artifactual, organic, contextual, and environmental data.²⁹⁹ Native Americans would seek to include "non-archaeological" sites of religious or cultural significance.³⁰⁰ Recreational users and developers would argue that Congress never intended to cover such a broad range of resources.³⁰¹ Thus, the debate over the scope of the Act's protection would shift from the functional definition to the list.

One advantage of this approach is that it would be easier to modify a list than a basic functional definition. In fact, it would probably be necessary to modify the list of categories frequently. However comprehensive the list, situations would arise in which an item deserving protection was not included,³⁰² and prosecution for damage to the "unlisted" resources would be difficult. In recent prosecution under ARPA in Utah the judge instructed the jury to consider only damage to remains listed in section 3(1).³⁰³ Although this case could be distinguished from future

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

46 Fed. Reg. 5566, 5570-71 (1981) (to be codified at 36 C.F.R. § 1215.3) (proposed Jan. 19, 1981). The proposed regulations apparently presume such remains to be of "archaeological interest" and to be protected under ARPA if more than 100 years old. *Id.* at 5567.

299. SENATE HEARINGS, *supra* note 29, at 87 (testimony of Dr. Raymond H. Thompson).

300. *Id.* at 93 (testimony of Leroy Wilder). These sites are arguably excluded, however, by the requirement that they be "material remains of past human life or activities" of "archaeological interest." 16 U.S.C. § 470bb(1) (Supp. III 1979).

301. In support of their argument these interest groups may point to the language of the Act. The list of "archaeological resources" in section 3(1), 16 U.S.C. § 470bb(1) (Supp. III 1979), does not include many categories of contextual and environmental data. The Act's legislative history suggests, however, that Congress was fully aware of the range of non-artifactual remains of potential use to the archaeologist, and did not intend the definition in section 3(1) to be so restricted. See SENATE REPORT, *supra* note 113, at 7.

302. Great care has been taken in the proposed regulations to list a wide range of resources covered under the Act. Even so, the list contains notable omissions. For example, it does not include inorganic remains in an archaeological setting that have not been modified by man. See § 1215.3(a), 46 Fed. Reg. 5566, 5570 (1981) (to be codified at 36 C.F.R. § 1215.3(a)) (proposed Jan. 19, 1981). Unworked shell, stone and other raw materials are not strictly speaking tools or byproducts and an argument can be made that they are not "archaeological resources" as defined by the regulations, yet they are material remains of past human activities that can yield a great deal of information to the archaeologist. See R. DUNNELL, *supra* note 10, at 119. Another example of an omitted resource is fossil footprints. See, e.g., N.Y. Times, Sept. 2, 1978, at 64 (microfiche of material sent over N.Y. Times News Service and Associated Press wires during the 1978 printers' strike).

303. See *supra* note 116.

cases because there are at present no regulations under ARPA, the same considerations of notice and fairness would often prevent successful prosecution under the regulations for damage to an "unlisted" resource. Thus, as these situations arose, the list would have to be modified.

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

B. Penalty Assessment

The federal agencies writing regulations to implement ARPA's civil penalty provisions³⁰⁴ must provide guidance to the federal land managers about: (1) when to assess civil penalties, (2) how to determine the amount of a civil penalty, and (3) when to mitigate a civil penalty.³⁰⁵ In writing these regulations the agencies face two related basic problems. First, the civil penalty provisions serve several purposes: they are to deter violations, to compensate the public and Indians for lost resources, and to educate the public.³⁰⁶ These purposes may conflict; a \$100 penalty may suffice to educate a treasure hunter but be utterly inadequate to compensate the public for the pot which the treasure hunter destroyed. Second, the groups affected by the civil penalties have conflicting interests. Archaeologists and recreational users fear that an unwitting violation of the Act or a permit may subject them to high civil penalties.

304. 16 U.S.C. § 470ff (Supp. III 1979).

305. In addition to these problems of when and how to assess penalties, the regulations will have to establish procedures for assessing civil penalties. Section 7 of ARPA, *id.*, requires only that the person charged be given notice and an opportunity to be heard before a civil penalty is assessed. To acquire the information needed to determine whether mitigation is appropriate, however, the federal land manager will have to conduct some kind of hearing, either on paper or before an administrative law judge. The alternative is either to harass average citizens by assessing the maximum penalties or to ignore the compensatory function of the civil penalty provision by assessing only nominal penalties in all cases.

The proposed regulations provide for several stages of "hearing" prior to penalty assessment in an effort to maximize the opportunity for settlement and compromise. 46 Fed. Reg. 5566, 5574-75 (1981) (to be codified at 36 C.F.R. § 1215.17) (proposed Jan. 19, 1981). During an initial "paper hearing" stage, the person charged is served with a "notice of assessment" which states the facts believed to show a violation, the provisions of the Act, regulations or permit that are alleged to have been violated, the amount of the penalty, and the right of the person charged to file a petition for relief. *Id.* It may also contain an offer of mitigation or compromise. *Id.* The person charged is then given the opportunity to have informal discussions with the federal land manager, and to petition for relief. *Id.* Failing resolution through the process of "paper hearing," the person charged is given the opportunity to request a formal adjudicatory hearing. *Id.* In the end, judicial review is available. *Id.*

306. See *supra* notes 174-76 and accompanying text.

The federal government and Native Americans, however, want adequate compensation for resources damaged or destroyed on public or Indian lands.

At least two approaches are possible to the problem of when to assess civil penalties. The regulations could require federal land managers to assess a civil penalty for each violation of the Act.³⁰⁷ This approach would serve an educational function, but it could unduly harass the public, contrary to congressional intent.³⁰⁸ Alternatively, the regulations could limit civil penalties to a few classes of serious cases, such as cases where concurrent criminal prosecutions are pending. This approach, however, would increase the overlap of the civil and criminal penalty provisions and thus reduce the value of civil penalties as an alternative deterrence mechanism.³⁰⁹ Indeed, it would be difficult to draft any prerequisites for penalty assessment that would not reduce the federal land manager's ability to deter violations of ARPA.

The regulations could avoid the problem of when to assess by strictly limiting the federal land manager's discretion in setting the amounts of civil penalties. Two approaches to the determination of penalty amounts are possible. The regulations could establish a fixed penalty schedule based on the nature of the offense, the approximate value of the resource, the intent of the violator, and other relevant factors.³¹⁰ The schedule,

307. Section 1215.17 of the proposed regulations, for example, requires the federal land manager to issue a "notice of violation" upon discovery of a violation of the Act or of the terms and conditions of a permit issued under the Act or the Antiquities Act. 46 Fed. Reg. 5566, 5574-75 (1981) (to be codified at 36 C.F.R. § 1215.17) (proposed Jan. 19, 1981). The notice of violation must state the facts believed to show a violation, the provisions of the Act, regulations or permit that are alleged to have been violated, and a statement that a civil penalty may be assessed or that no penalty will be assessed, as appropriate. *Id.* Section 1215.17 requires that a notice of violation be issued in every case whether or not concurrent criminal proceedings have been instituted and whether or not the federal land manager intends to assess a civil penalty. *Id.* Thus the function of the notice of violation appears to be largely educational in nature.

308. HOUSE REPORT, *supra* note 7, at 11, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1714.

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

310. Section 1215.18(a)(1)(i) of the proposed regulations allows the federal land manager to elect to assess a predetermined fixed amount. 46 Fed. Reg. 5566, 5575 (1981) (to be codified at 36 C.F.R. § 1215.18(a)(1)(i)) (proposed Jan. 19, 1981). This approach is recommended, however, only in situations where the person charged has not committed a previous violation, the damage is minimal, and all archaeological resources have been recovered. *Id.* Thus, if confronted with numerous minor violations involving minimal damage, the federal land manager may establish a fixed penalty schedule for administrative convenience so long as the penalties assessed do not exceed the ceiling imposed by the Act. *Id.*

for example, could specify that the penalty for an unintentional first violation that causes less than \$200 worth of damage would be \$20. A schedule would give users of public lands notice and would be easy to administer. A schedule would also, however, encourage litigation. ARPA places a ceiling on civil penalties equal to twice the sum of: (1) the archaeological or commercial value of the damaged resource, and (2) the cost of restoration and repair.³¹¹ Unless the penalties in the schedule were quite low, they would often approach or exceed this limit. Thus, civil penalties set by a schedule, particularly large penalties, would often be challenged.

Alternatively, the regulations could require the federal land manager to calculate the maximum penalty in each case and then decide whether to reduce the penalty based on specific criteria, such as the nature of the violation, the violator's intent, the violator's financial situation, or other relevant considerations.³¹² This approach would offer federal land managers greater flexibility to tailor the penalty to the facts of the particular case. It would, however, entail a greater administrative burden.

The uniform regulations could achieve a relatively satisfactory resolution of the competing concerns of those affected by civil penalties by making compensation the goal except where it would be unduly burdensome. The regulations should therefore direct the federal land manager to calculate the maximum penalty amount³¹³ and then to consider mitigating circumstances if appropriate. Mitigation would not, for example, be appropriate in cases where concurrent criminal actions are pending. Nor would mitigation be appropriate in cases of severe damage to archaeological resources unless the maximum penalty would cause extreme financial hardship. Substantial mitigation would, however, be appropriate if damage was minimal and modest penalties would adequately educate and deter.

311. 16 U.S.C. § 470ff(a)(2) (Supp. III 1979).

312. An example of this alternative procedure is set forth in section 1215.18(b) of the proposed regulations, 46 Fed. Reg. 5566, 5576 (1981) (to be codified at 36 C.F.R. § 1215.18(b)) (proposed Jan. 19, 1981). The federal land manager may reduce the penalty in mitigation or compromise if: (1) the person charged agrees to return the archaeological resources taken in violation of the Act; (2) the person charged agrees to assist the federal land manager in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands or Indian lands; (3) the person charged agrees to provide information that will assist in the detection, prevention, or prosecution of violations of the Act or regulations; (4) the person charged demonstrates hardship or inability to pay, but only if such person has not been previously found to have violated provisions of the Act or regulations; (5) the federal land manager determines that the person charged did not intentionally commit the violation; or (6) the federal land manager determines that other mitigating circumstances exist which are appropriate to consider in reaching a fair and expeditious settlement. *Id.*

313. The maximum penalty amount is equal to "double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources destroyed or not recovered." 16 U.S.C. § 470ff(a)(2) (Supp. III 1979).

C. Conflicts Between Archaeological and Other Interests

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

1. Conflicting Commercial and Archaeological Interests

Section 12(a) of ARPA exempts activities relating to mining, mineral leasing, and other multiple uses of public lands from ARPA's permit requirements.³¹⁴ ARPA thus leaves the regulation of these activities to other federal laws. This exemption significantly reduces the protection for archaeological resources on public lands.

The federal laws regulating mineral leasing,³¹⁵ mining,³¹⁶ reclamation,³¹⁷ and multiple uses³¹⁸ require federal land managers to consider the possible adverse effects of these activities on archaeological resources and to mitigate these effects whenever possible.³¹⁹ These laws, however, do not provide complete protection for archaeological resources. The

314. *Id.* § 470kk(a).

315. The Mineral Lands Leasing Act provides that before issuing any coal lease, the Secretary of the Interior shall consider the effects that mining of the proposed lease might have on an area, including effects on the environment. 30 U.S.C. § 201(a)(3)(C) (1976). The lease issued shall include such terms and conditions as the Secretary shall determine. *Id.* § 207(a), and prior to taking any action on a leasehold that might cause a significant disturbance of the environment, the lessee shall submit an operation and reclamation plan for the Secretary's approval. *Id.* § 207(c).

316. The Surface Mining Control and Reclamation Act of 1977 authorizes the Secretary of the Interior to designate an area unsuitable for surface coal mining operations if such operations will "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems." 30 U.S.C. § 1272(a)(3)(B) (Supp. III 1979).

It also prohibits surface coal mining operations that "will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site." *Id.* § 1272(e)(3).

317. 43 U.S.C. §§ 371-600e (1976 & Supp. III 1979).

318. Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 529 (1976); Federal Land Policy and Management Act, 43 U.S.C. § 1712 (1976).

319. The National Environmental Policy Act of 1969, mandates that when a federal agency proposes a major action significantly affecting the quality of the human environment, the agency must prepare an Environmental Impact Statement (EIS) which analyzes the environmental impact of the proposed action and alternatives to the action. 42 U.S.C. § 4332(2)(c) (1976). Even in the absence of a major federal action, federal agencies are required by the National Historic Preservation Act of 1966 to take into consideration the impact of proposed federal undertakings on archaeologically "significant" resources. 16 U.S.C. § 470f (1976).

Archaeological and Historical Preservation Act requires archaeological survey and salvage work only when commercial activities harm resources of "archaeological significance."³²⁰ Therefore, when a conflict arises between commercial interests and archaeological interests in "insignificant" resources, commercial interests prevail. At first glance, it appears sensible to favor tangible present economic interests over uncertain future archaeological interests. Archaeological resources, however, must be protected because they are vanishing rapidly and cannot be renewed.³²¹ Even archaeological resources that are presently "insignificant" may be made significant by advances in archaeological research techniques³²² and, therefore, deserve protection.

Section 12(a)'s exemption of commercial activities also means that the federal land managers cannot use ARPA to prevent or punish violations by commercial developers of the other federal laws and regulations protecting archaeological resources.³²³ This is a serious problem because commercial developers often conceal or destroy archaeological resources³²⁴ and the other federal laws do not contain penalties to prevent these practices.³²⁵ To stop these practices, Congress should amend ARPA to provide that mineral leasing, mining, reclamation or other multiple uses of public lands will be treated as complying with a constructive ARPA permit if they comply with other federal laws, regulations or permits. Violation of these laws would therefore constitute a violation of an ARPA permit and could be punished under ARPA.

ARPA does not discuss how to resolve conflicts between present excavations and planned mining projects. The federal agencies have the authority, however, to issue regulations for permit termination.³²⁶ The regulations could, therefore, require or allow federal land managers to terminate ARPA permits if amendments to the applicable land management plan brought the permitted archaeological activity into conflict with the proposed commercial activity. Such regulations, however, would be unfair to the archaeologists who, in reliance on the permit, have begun

320. See *supra* note 34.

321. See *supra* notes 1-2 and accompanying text.

322. See *supra* note 34.

323. Section 12(b) of ARPA, 16 U.S.C. § 470kk(b) (Supp. III 1979), declines to impose additional restrictions on those commercial activities permitted under other federal law. It should not be read to exempt commercial activities from the provisions of section 6(b), *id.* § 470ee(b), for excavation and removal of artifacts in violation of other federal laws, regulations or permits. Thus a private developer who sells or exchanges artifacts obtained in violation of other federal law may violate ARPA and face criminal and civil penalties.

324. See *supra* note 35 and accompanying text.

325. Neither the National Historic Preservation Act, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), nor the Archaeological and Historical Preservation Act, *id.* §§ 469-469c, impose penalties on private developers who interfere with the activities undertaken by the federal land managers in compliance with other acts.

326. This authority can be found in their broad authority to impose permit terms and conditions. 16 U.S.C. § 470ee (Supp. III 1979).

to develop the archaeological resources. The regulations, therefore, should limit permit termination to specific circumstances, such as where conservation is appropriate, or where the public interest in the proposed conflicting land use is significantly greater than the public interest in the present archaeological investigation. Such regulations would strike a fair balance between the development of natural and archaeological resources.

2. Indian Religious Interests in Archaeological Resources on Public Lands

To accommodate Indian religious, cultural, and sovereign interests, ARPA provides: (1) that federal land managers cannot issue ARPA permits to excavate on Indian lands without the approval of the Indian or Indian tribe that controls the land,³²⁷ and (2) that federal land managers must provide notice to Indians or Indian tribes whose religious or cultural interests are potentially affected³²⁸ by excavations on public lands. Section 10(a), however, directs the federal agencies to consider the American Indian Religious Freedom Act in writing regulations to implement ARPA.³²⁹ That Act states that it is the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."³³⁰ The regulations, therefore, must establish a permitting procedure for archaeological investigation on public lands that reconciles the development of the nation's archaeological resources with Indian religious interests. The difficulties of such reconciliation arise in all stages of the permitting process: notification of potentially affected Indians or Indian tribes, review of the permit application, and granting or denial of the permit.

Section 4(c) of ARPA requires the federal land manager to notify Indians or Indian tribes if an application to develop archaeological resources on public lands involves sites of potential religious or cultural significance to Indians.³³¹ This requirement creates two problems: (1) how to decide whether a site is of religious or cultural significance to an Indian tribe, and (2) how to locate the interested tribe in order to serve notice.

Neither ARPA nor the American Indian Religious Freedom Act sets forth objective criteria of religious or cultural significance. Indeed, it seems that "significance" necessarily depends on the subjective views of the concerned Indians. Section 4(c) does not require notice to Indians until the federal land manager decides that the activity may harm an

327. *Id.* § 470cc(g)(2).

328. *Id.* § 470cc(c).

329. *Id.* § 470ii(a).

330. 42 U.S.C. § 1996 (Supp. III 1979).

331. 16 U.S.C. § 470cc(c) (Supp. III 1979).

Indian religious or cultural site, but making this decision without Indian assistance may prove nearly impossible. Several responses to this problem are available. The regulations could, for example, provide that all historic and prehistoric Indian sites are of potential religious or cultural significance; this would trigger the notice requirement in almost every case. Alternatively, the regulations could solicit Indian assistance in identifying religious or cultural sites on public lands; this would simplify the subsequent permitting process.

After he or she decides that harm to Indian religious or cultural sites may occur, the federal land manager faces the problem of serving notice. Locating the concerned tribe is no easy task: the modern distribution of Indian tribes bears little relation to the prehistoric distribution.³³² This underscores the need to solicit Indian assistance in identifying religious and cultural sites. As noted above, the first amendment probably requires that the regulations give affected Indians a chance to comment on proposed ARPA permits that involve sites of religious or cultural significance to the Indians.³³³ Neither ARPA nor the first amendment, however, requires the federal land manager to accede to the desires of the affected Indians. Indeed, the first amendment probably *prohibits* regulations giving Indians a veto over archaeological development on non-Indian land.

During Senate Committee hearings on ARPA, American Indian groups sought veto power over all permit applications involving sites of religious or cultural significance to Indians, whether on Indian lands or public lands.³³⁴ Congress declined to adopt such a provision for public lands and left resolution of potential conflicts between Indians and archaeologists to the regulations and the federal land managers.³³⁵

The regulations probably cannot give concerned Indian tribes broad veto power over archaeological resource development on public lands without violating the establishment clause of the first amendment.³³⁶ A

332. See *Senate Hearings*, *supra* note 29, at 94 (testimony of Leroy Wilder). In response to this problem the proposed regulations establish a complex notification system that requires the federal land manager to (1) notify any known Indian tribe having a reservation within 200 miles of the area in which the permit applicant proposes to work; (2) notify any other Indian tribes known or believed by the federal land manager to have religious or cultural interest in the area of the proposed work; (3) notify any Indian group that has pending before the Secretary of the Interior a petition for acknowledgement; (4) notify in writing the Bureau of Indian Affairs area office and any additional Indian tribes that the area office may identify as having religious or cultural interest in the area of proposed work; and (5) consult for notification purposes any central listing of interested Indian, Alaska Native or Native Hawaiian groups that may be established within the Department of Interior pursuant to the Act, the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. III 1979), or other applicable authority. 46 Fed. Reg. 5566, 5572 (1981) (to be codified at 36 C.F.R. § 1215.6(a)) (proposed Jan. 19, 1981).

333. See *supra* note 251.

334. *Senate Hearings*, *supra* note 29, at 92 (testimony of Leroy Wilder).

335. See 16 U.S.C. § 470ii (Supp. III 1979) (directing the federal land managers to consider the mandates of the American Indian Religious Freedom Act in promulgating regulations implementing ARPA).

336. U.S. CONST. amend. I.

recent case, *Badoni v. Higginson*,³³⁷ dealt with a similar question, and concluded that the government could not issue regulations in aid of religious practice without violating the establishment clause. The plaintiffs in *Badoni* were Navajo Indians who sought an order requiring federal officials to issue regulations to prevent further desecration and destruction of the Rainbow Bridge area by tourists.³³⁸ The plaintiffs claimed that the government impeded the practice of their religion by allowing tourists to visit Rainbow Bridge because it permitted desecration of the site's sacred nature and denied them the right to conduct religious ceremonies there.³³⁹ The Tenth Circuit said that the affirmative government actions requested by the plaintiffs, such as regulations to exclude tourists from the Monument, would be clear violations of the establishment clause.³⁴⁰ The Court noted that the government had not prohibited plaintiff's religious activities in the area of Rainbow Bridge and that the plaintiffs could enter the monument on the same basis as others.³⁴¹

Regulations under ARPA which would give Indians a veto power over excavations on public lands would be virtually indistinguishable from those requested by the plaintiffs in *Badoni*. In some cases allowing excavation of archaeological resources may not interfere with Indians' free exercise of religion. Granting veto authority to Indian tribes over all permit applications involving sites of potential religious significance would appear to run afoul of the establishment clause.³⁴² Cases may arise, however, where archaeological investigation would restrict the exercise of Indian religion or even destroy an Indian religious site. In such cases, the free exercise clause may compel federal land managers to deny a permit or to impose terms and conditions on the permit to mitigate adverse effects.³⁴³ Because regulations granting veto authority

337. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3099 (1981).

338. *Id.*

339. *Id.*

340. *Id.* at 179.

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

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

341. *Id.* at 178.

342. See *supra* note 340.

343. See *Zorach v. Clauson*, 343 U.S. 306, 312-14 (1952) (upholding a school program of released-time for off-campus prayer and religious instruction).

Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may

to Indians would probably be an impermissible establishment of religion, reliance on the federal land manager's discretion may be the only way to reconcile the mandates of the free exercise clause and the establishment clause.

The regulations and the federal land managers must also consider the federal trust responsibility for Indian property.³⁴⁴ Often archaeological sites are important *cultural* as well as religious resources for Indians or Indian tribes. As such, they are subject to the fiduciary obligations imposed on federal officials in the management of Indian property.³⁴⁵

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

IV. CONCLUSION

ARPA offers greater protection for archaeological resources on public lands than did prior federal law. ARPA's definition of "archaeological resource" includes a wide range of artifactual, contextual, and environ-

not coerce anyone to attend church, to observe a religious holiday, or take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.

Id. at 314. See also *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of Seventh Day Adventist's unemployment compensation claim on the ground that she would not accept suitable work on Saturday abridged her right to free exercise of her religion).

344. The federal government occupies a fiduciary position with regard to Indian property. The United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). This trust responsibility has been held to apply to federal activities not directly involving the management of Indian trust property if such activities affect trust property. See, e.g., *Pitkin and Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) (enjoining certain diversions of water by a federal dam and reclamation project that reduced the level of Pyramid Lake on a downstream Indian reservation).

Indian religion and culture play an important role in tribal government and cultural autonomy. In enacting the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. III 1979), Congress found, for example, that "the religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems [and that] as an integral part of Indian life, are indispensable and irreplaceable." *Id.* Arguably the federal trust responsibility imposes a greater duty of care on federal officials with respect to Indian religious and cultural resources that play such an integral role in Indian life.

345. See *supra* note 344.

mental information and can expand as archaeologists begin to use new types of information. ARPA's enforcement provisions give federal land managers the tools necessary to curtail commercial looting of archaeological sites and trading in illegally obtained archaeological resources.

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

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

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

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

Congress' desire to protect treasure hunters and recreational users of public lands from unreasonable civil or criminal penalties has also resulted in several significant exceptions to ARPA. For example, the exemption provided to collectors of arrowheads found on the ground surface unduly restricts the Act's protection. There is no reason to give collectors of arrowheads greater protection than persons who destroy other resources, such as shell mounds, that are less clearly of archaeological interest. Congress should eliminate the exemption; it can rely on the federal land manager's discretion to protect innocent treasure hunters. Congress in fact already relies on this discretion to protect

innocent treasure hunters from severe penalties under the general government property statutes. Similarly, discretionary forfeiture need not include the public's archaeological resources. It hardly seems burdensome to require that violators of the Act return to the public archaeological resources that they have taken illegally. Congress should therefore amend the forfeiture provisions to provide mandatory return of archaeological resources involved in violations of the Act. Finally, Congress' concern over unreasonably burdensome penalties led it to undue reliance on the federal land manager's discretion to seek compensation for lost or damaged archaeological resources. Understandably, compensation cannot be required in all cases if the civil penalty provisions are to serve their multiple purposes. There is no reason, however, not to require compensation in cases where criminal convictions have been obtained. At the very least, therefore, Congress should amend ARPA to impose liability on convicted violators for the archaeological or commercial value of the damaged archaeological resources and the cost of restoration and repair.

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

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

Archaeological resources are valuable, vanishing, and nonrenewable. ARPA is a significant step toward halting unnecessary destruction of these resources and ensuring their rational development. The effort must not end here, however. Congress should amend the Act to eliminate unnecessary loopholes. The federal agencies should carefully draft regulations to provide the comprehensive protection for archaeological resources which Congress intended. The federal land managers should comply with the permit provisions of the Act and the regulations, give

adequate consideration in the permit process to the interests of Native Americans and other concerned parties, and require conservation where appropriate. Environmentalists and other citizens can, of course, contribute by reporting any illegal removal, damage, or destruction of archaeological resources on public lands and Indian lands. With such efforts, archaeological resources can be preserved for both the present and the future.

Arizona State Law Journal



SYMPOSIUM: THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT OF 1990 AND STATE REPATRIATION-RELATED LEGISLATION

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