

# Archeological Resources Protection Federal Prosecution Sourcebook

## SUPPLEMENT

June 2001

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- 1187 U.S. v. McClain, 593 F.2d 658 (5th Cir. 1979), cert. denied, 444 U.S. 918 (1979)(On appeal of conviction of having received, concealed, and/or sold pre-Columbian artifacts in interstate or foreign commerce and conspiracy to do the same in violation of the National Stolen Property Act, held: National Stolen Property Act applied to dealings in artifacts which were classified as stolen because Mexican government had enacted national ownership of its patrimony; and error in allowing jury to decide question of foreign law as to when Mexico declared ownership of all such artifacts required reversal of substantive count, but because of overwhelming evidence, did not require reversal of conspiracy count)
- 1200 Government of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd mem. sub nom. Government of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991)(In action by Government of Peru claiming it was owner of artifacts which had been seized by U.S. Customs Service from American citizen and seeking their return, held: Peru was not entitled to artifacts given uncertainty re. in what country artifacts were found, when they were found, whether they were in private possession in Peru more than one year after official registry book was opened, and extent of Peru's claim of ownership as part of its domestic law)
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- 1541 b. Government's response to defendant's motion to dismiss Count I on the ground that NAGPRA is unconstitutionally vague
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- 1623 f. Brief of amicus curiae Antique Tribal Art Dealers Association to the 10th Circuit in support of appellant Corrow
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THE SECRETARY OF THE INTERIOR  
WASHINGTON

## A National Strategy for Federal Archeology

Preservation and protection of America's archeological heritage is an important function of the Federal government. The Department of the Interior is the steward responsible for the greatest number of archeological sites on public lands throughout the nation. For this reason, Interior is charged with providing advice, technical information, and regulations for archeological programs conducted by Federal and other public agencies throughout the country. Leadership and coordination in this area is fundamental to our larger stewardship responsibilities.

America's archeological heritage, the sites from her historical and prehistoric past, needs protection. The number of archeological sites from bygone times never increases; it is only reduced, by modern development, by looting, and even by the very best of archeological research. It is important that we make the most of the sites that we have left, using wisely those that must be destroyed or damaged and preserving as many as possible so that future generations of Americans also will have access to the unique heritage information that they contain. These materials are a record of changing environments over the millennia and of the human community's adaptations to those changes.

Equally important is care for the collections and records of past and present archeological field investigations. Over the past six decades, the Federal government has invested substantial sums in the recovery of archeological data. Stewardship of these collections and records is therefore an important duty.

In 1990, the Department of the Interior submitted to Congress a report on Federal archeological activities, *Federal Archeology: The Current Program*. In this report, we identified topics for special emphasis by Federal agencies with archeological programs. These are topics that require greater attention for effective stewardship of America's archeological heritage. Focusing greater attention upon them will provide a more consistent strategy for Federal and other public archeological activities. The areas for special emphasis, and brief discussions of some activities that might be undertaken, are listed below:

**Public Education and Participation** We need more and better public education and opportunities for the public to participate legitimately in archeological projects. The increasing popularity of State Archeology Week celebrations, archeological open houses and tours, available archeological volunteer programs, even the Indiana Jones films, all demonstrate that archeology is a topic of interest to millions of Americans. Federal and other public agencies that conduct archeological investigations or manage archeological sites should increase the interpretation of these investigation results and sites for the public. Opportunities for public participation in Federal archeological projects should be included in the project design. We can expect to benefit from such opportunities in three ways. First, they provide a constructive outlet for persons with a strong interest in archeology who might otherwise engage in archeological looting. Second, there is no better way for people to appreciate the careful recording and detailed attention necessary in scientific archeological field and laboratory work than to have them excavate at a site or clean, sort, and catalog finds from an excavation. Finally, when properly supervised, public participation in archeological investigations provides large amounts of volunteer labor that can further the interpretive or management needs of public archeological preservation and protection.

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**Public Use of the Archeological Paleoenvironmental Record** Archeological sites include a record of thousands of years of human adaptation to changing American environments. The ancient plant and animal remains in them identify the conditions in which people have lived and the changes made in society, diet, and technology in response to changing climate and natural resources. This record is a public trust to be understood and evaluated to help shape our present responses to changing environments.

**Efforts to Fight Looting and Preserve the Archeological Record in Place** We have had recent successes in this area; several Federal bureaus have focused new attention on archeological site protection. In the fall of 1988, President Ronald Reagan signed into law amendments to the Archaeological Resources Protection Act that have strengthened its use as a tool for prosecuting looters. Many Interior bureaus and other Federal agencies joined in the national effort led by the Society for American Archaeology to protect archeological sites. The Society developed an action plan to carry on this effort, and Federal agencies are implementing many of the actions in the plan. In recent years the Administration and Congress have included additional funding to fight archeological looting and preserve sites in other ways.

**Interagency Cooperation in Information Exchange** Federal and other public agencies conduct tens of thousands of archeological investigations yearly. These studies result in information about the presence or absence of sites, the significance of sites that are found, and interpretations of history and prehistory. Such information is of interest to more than the agency that conducts the study, but exchange of information often is hampered by bureaucratic constraints. Public agencies must work to improve archeological information exchange at the national, State or regional, and local levels. One specific means of improving this exchange is the participation of public agencies in the National Archeological Database network being established through the National Park Service. Additional means will be interagency meetings to discuss common archeological challenges and opportunities, such as the Bureau of Land Management, National Park Service, Forest Service, and Natural Resources Conservation Service sponsorship of the 1990 Four Corners Governors Conference.

**Site Inventories** On average, Federal agencies that manage land have conducted investigations to inventory the archeological sites on less than 10 percent of this public land. The lack of information about where archeological sites are located has been identified by many as one of the problems confronting agencies in the preservation of sites. We need to find the means to undertake these inventory investigations.

**Curation of Collections and Records** Federal agencies also are responsible for protecting the government's interest in the vast numbers of artifacts and other remains excavated from sites on the lands they manage or from sites that their activities have disturbed. These remains must be curated properly. For sites that have been destroyed, these remains and records are the only heritage left to future generations from which they can learn about the archeological record. These remains and records must be cared for to ensure their preservation for future use. We must begin more systematic programs to meet this preservation challenge.

Our strategy of identifying these archeological topics to be emphasized will improve the preservation of America's archeological heritage when public agencies adopt and implement appropriate activities. The loss of any of this heritage diminishes all of us and future generations. There is no quick fix to our challenges. Public agencies must provide for archeological preservation as an important part of their ongoing programs.

*"A National Strategy for Federal Archeology" was signed by Secretary of the Interior Manuel Lujan, Jr., on October 24, 1991. Copies of the strategy are available from the National Park Service, Archeology and Ethnography Program, P.O. Box 37127, Washington, D.C. 20013-7127.*

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THE SECRETARY OF THE INTERIOR  
WASHINGTON

## **A National Strategy for Federal Archeology**

The stewardship of America's archeological heritage is a well-established policy and function of the federal government. Interagency cooperation and partnerships are fundamental to this mission. Archeological resources – sites, collections, and records – are unique and fragile. They must be used wisely and protected for future generations.

In 1991 the Secretary of the Interior identified areas of special emphasis for federal agencies with archeological programs. This update of the National Strategy renews our effort to pursue these actions.

### **Preserve and Protect Archeological Sites in Place**

- Identify, evaluate, and document sites
- Increase our understanding of the past and improve preservation through well-designed research
- Assess and document threats to sites and monitor their condition
- Prevent or slow deterioration of sites by stabilization and other means
- Fight looting with public awareness programs and effective legal strategies among archeologists, law enforcement officers, and public prosecutors

### **Conserve Archeological Collections and Records**

- Locate collections and records, assess their condition, and conserve appropriately
- Identify actions needed to ensure long-term care of and access to collections and records
- Undertake, facilitate, and promote research using collections and records to better understand the past

### **Utilize and Share Archeological Research Results**

- Synthesize research results, particularly grey literature, to advance scientific knowledge, further preservation, and better inform the public
- Facilitate use of archeological databases by managers and researchers
- Develop data standards to better share research results

### **Increase Public Education and Participation in Archeology**

- Establish education programs as a regular agency function
- Interpret archeological research for the public in a way that is accurate and understandable
- Consider the views of diverse cultural groups when interpreting the past
- Engage the public in archeology through professionally directed volunteer programs

MAR 4 1999

Date

Bruce Babbitt

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# Federal Register

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## Part V

### Department of the Interior

Office of the Secretary

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### Department of Agriculture

Office of the Secretary

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### Tennessee Valley Authority

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### Department of Defense

Office of the Secretary

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43 CFR Part 7

36 CFR Part 296

18 CFR Part 1312

32 CFR Part 229

Archaeological Resources Protection Act of 1979; Final Uniform Regulations

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(6) Any patents, licenses, or other patent rights which he may have in the field of the desired license; and

(7) The benefits, if any, which the applicant expects the public to derive from his proposed use of the invention

(b) It shall be the duty of the Solicitor, after consultation with the bureau most directly interested in the patent or invention involved in an application for a license, and with the Evaluation Committee if royalties are to be charged, to determine whether the license shall be granted. If he determines that a license is to be granted, he shall execute on behalf of the Secretary, an appropriate license.

#### § 6.57 Evaluation Committee.

At the request of the Solicitor, an Evaluation Committee will be appointed by the Secretary to recommend royalty rates with respect to any patents or inventions for which royalties may be charged.

## PART 7—PROTECTION OF ARCHAEOLOGICAL RESOURCES

### Subpart A—Uniform Regulations

#### Sec.

- 7.1 Purpose.
- 7.2 Authority.
- 7.3 Definitions.
- 7.4 Prohibited acts and criminal penalties.
- 7.5 Permit requirements and exceptions.
- 7.6 Application for permits and information collection.
- 7.7 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.
- 7.8 Issuance of permits.
- 7.9 Terms and conditions of permits.
- 7.10 Suspension and revocation of permits.
- 7.11 Appeals relating to permits.
- 7.12 Relationship to section 106 of the National Historic Preservation Act.
- 7.13 Custody of archaeological resources.
- 7.14 Determination of archaeological or commercial value and cost of restoration and repair.
- 7.15 Assessment of civil penalties.
- 7.16 Civil penalty amounts.
- 7.17 Other penalties and rewards.
- 7.18 Confidentiality of archaeological resource information.
- 7.19 Report.
- 7.20 Public awareness programs.
- 7.21 Surveys and schedules.

### Subpart B—Department of the Interior Supplemental Regulations

- 7.31 Scope and authority.
- 7.32 Supplemental definitions.
- 7.33 Determination of loss or absence of archaeological interest.
- 7.34 Procedural information for securing permits.
- 7.35 Permitting procedures for Indian lands.
- 7.36 Permit reviews and disputes.
- 7.37 Civil penalty hearings procedures.

**AUTHORITY:** Pub. L. 96-85, 93 Stat. 721, as amended; 102 Stat. 2983 (16 U.S.C. 470aa-mm) (Sec. 10(a)). Related authority: Pub. L. 89-209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 89-523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended; 88 Stat. 174 (1974); Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470a-t), as amended, 84 Stat. 304 (1970), 87 Stat. 139 (1973), 90 Stat. 1820 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95-341, 92 Stat. 469 (12 U.S.C. 1996).

### Subpart A—Uniform Regulations

**SOURCE:** 49 FR 1027, Jan. 6, 1984, unless otherwise noted.

#### § 7.1 Purpose.

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

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

and other multiple uses of the public lands.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, Jan. 26, 1995]

#### § 7.2 Authority.

(a) The regulations in this part are promulgated pursuant to section 10(a) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 47011), which requires that the Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority jointly develop uniform rules and regulations for carrying out the purposes of the Act.

(b) In addition to the regulations in this part, section 10(b) of the Act (16 U.S.C. 47011) provides that each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations in this part, as may be necessary for carrying out the purposes of the Act.

#### § 7.3 Definitions.

As used for purposes of this part:

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

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

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

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

(i) Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking

structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces; rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall-trenches, middens;

(ii) Surface or subsurface artifact concentrations or scatters;

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

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

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

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

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

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

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

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

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

(i) Paleontological remains;

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

(5) The Federal land manager may determine that certain material remains, in specified areas under the Federal land manager's jurisdiction, and under specified circumstances, are not or are no longer of archaeological interest and are not to be considered

archaeological resources under this part. Any determination made pursuant to this subparagraph shall be documented. Such determination shall in no way affect the Federal land manager's obligations under other applicable laws or regulations.

(6) For the disposition following lawful removal or excavations of Native American human remains and "cultural items", as defined by the Native American Graves Protection and Repatriation Act (NAGPRA; Pub. L. 101-601; 104 Stat. 3050; 25 U.S.C. 3001-13), the Federal land manager is referred to NAGPRA and its implementing regulations.

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

(c) *Federal land manager* means:

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

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

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

(d) *Public lands* means:

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

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

(e) *Indian lands* means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction

against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian tribe or Indian individual.

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

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

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

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

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

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

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

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 14, 1984, as amended at 60 FR 5260, Jan. 26, 1995]

#### § 7.4 Prohibited acts and criminal penalties.

(a) Under section 6(a) of the Act, no person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pur-

suant to a permit issued under § 7.8 or exempted by § 7.5(b) of this part.

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

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

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

(c) Under section (d) of the Act, any person who knowingly violates or counsels, procures, solicits, or employs any other person to violate any prohibition contained in section 6 (a), (b), or (c) of the Act will, upon conviction, be fined not more than \$10,000.00 or imprisoned not more than one year, or both; provided, however, that if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of \$500.00, such person will be fined not more than \$20,000.00 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person will be fined not more than \$100,000.00, or imprisoned not more than five years, or both.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, Jan. 26, 1995]

#### § 7.5 Permit requirements and exceptions.

(a) Any person proposing to excavate and/or remove archaeological resources from public lands or Indian lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Federal land manager for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Federal land manager may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in § 7.8(a) of this part.

(b) Exceptions:

(1) No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than

the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Federal land manager's responsibility to comply with other authorities which protect archaeological resources prior to approving permits, leases, licenses, or entitlements for use; any excavation and/or removal of archaeological resources required for compliance with those authorities shall be conducted in accordance with the permit requirements of this part.

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

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

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

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

(c) Persons carrying out official agency duties under the Federal land manager's direction, associated with

the management of archaeological resources, need not follow the permit application procedures of § 7.6. However, the Federal land manager shall insure that provisions of §§ 7.8 and 7.9 have been met by other documented means, and that any official duties which might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Federal land manager, have been the subject of consideration under § 7.7.

(d) Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Federal land manager shall issue a permit, subject to the provisions of §§ 7.5(b)(5), 7.7, 7.8(a) (3), (4), (5), (6), and (7), 7.9, 7.10, 7.12, and 7.13(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Federal land manager.

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

#### § 7.6 Application for permits and information collection.

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

(b) Each application for a permit shall include:

(1) The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed

time of performance, locational maps, and proposed outlet for public written dissemination of the results.

(2) The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in § 7.8(a).

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

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

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

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

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

(d) *Paperwork Reduction Act.* The information collection requirement contained in § 7.6 of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1024-0037. The purpose of the information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist Federal land managers in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

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

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

(1) Notice by the Federal land manager to any Indian tribe shall be sent to the chief executive officer or other designated official of the tribe. Indian tribes are encouraged to designate a tribal official to be the focal point for any notification and discussion between the tribe and the Federal land manager.

(2) The Federal land manager may provide notice to any other Native American group that is known by the Federal land manager to consider sites

potentially affected as being of religious or cultural importance.

(3) Upon request during the 30-day period, the Federal land manager may meet with official representatives of any Indian tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under § 7.9.

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

(b)(1) In order to identify sites of religious or cultural importance, the Federal land manager shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Federal land manager's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on sites eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w-3).

(2) If the Federal land manager becomes aware of a Native American group that is not an Indian tribe as defined in this part but has aboriginal or historic ties to public lands under the Federal land manager's jurisdiction, the Federal land manager may seek to communicate with official representatives of that group to obtain information on sites they may consider to be of religious or cultural importance.

(3) The Federal land manager may enter into agreement with any Indian tribe or other Native American group for determining locations for which such tribe or group wishes to receive notice under this section.

(4) The Federal land manager should also seek to determine, in consultation with official representatives of Indian

tribes or other Native American groups, what circumstances should be the subject of special notification to the tribe or group after a permit has been issued. Circumstances calling for notification might include the discovery of human remains. When circumstances for special notification have been determined by the Federal land manager, the Federal land manager will include a requirement in the terms and conditions of permits, under §7.9(c), for permittees to notify the Federal land manager immediately upon the occurrence of such circumstances. Following the permittee's notification, the Federal land manager will notify and consult with the tribe or group as appropriate. In cases involving Native American human remains and other "cultural items", as defined by NAGPRA, the Federal land manager is referred to NAGPRA and its implementing regulations.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 5260, 5261, Jan. 26, 1995]

#### § 7.8 Issuance of permits.

(a) The Federal land manager may issue a permit, for a specified period of time appropriate to the work to be conducted, upon determining that:

(1) The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

(i) A graduate degree in anthropology or archaeology, or equivalent training and experience;

(ii) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

(iii) The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;

(iv) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind

of activity the individual proposes to conduct under authority of a permit; and

(v) Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the historic period. Applicants proposing to engage in prehistoric archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data;

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

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

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

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

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

institution, which shall be named in the permit:

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

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

(b) When the area of the proposed work would cross jurisdictional boundaries, so that permit applications must be submitted to more than one Federal land manager, the Federal land managers shall coordinate the review and evaluation of applications and the issuance of permits.

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984]

#### §7.9 Terms and conditions of permits.

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

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

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

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

(4) Reporting requirements.

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

(c) The Federal land manager shall include in permits issued for archaeological work on Indian lands such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands, and for archaeological work on public lands shall include such terms and conditions as may have been developed pursuant to §7.7.

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

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

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

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

#### §7.10 Suspension and revocation of permits.

(a) *Suspension or revocation for cause.*

(1) The Federal land manager may suspend a permit issued pursuant to this part upon determining that the permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or §7.4. The Federal land manager shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

(2) The Federal land manager may revoke a permit upon assessment of a civil penalty under §7.15 upon the permittee's conviction under section 6 of the Act, or upon determining that the permittee has failed after notice under this section to correct the situation which led to suspension of the permit.

(b) *Suspension or revocation for management purposes.* The Federal land manager may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit would be in conflict with management requirements not in effect when the permit was issued. The Federal land

manager shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984]

#### § 7.11 Appeals relating to permits.

Any affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit through existing administrative appeal procedures, or through procedures which may be established by the Federal land manager pursuant to section 10(b) of the Act and this part.

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

Issuance of a permit in accordance with the Act and this part does not constitute an undertaking requiring compliance with section 106 of the Act of October 15, 1966 (16 U.S.C. 470f). However, the mere issuance of such a permit does not excuse the Federal land manager from compliance with section 106 where otherwise required.

#### § 7.13 Custody of archaeological resources.

(a) Archaeological resources excavated or removed from the public lands remain the property of the United States.

(b) Archaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources.

(c) The Secretary of the Interior may promulgate regulations providing for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, for the ultimate disposition of archaeological resources, and for standards by which archaeological resources shall be preserved and maintained, when such resources have been excavated or removed from public lands and Indian lands.

(d) In the absence of regulations referenced in paragraph (c) of this section, the Federal land manager may provide for the exchange of archaeological resources among suitable universities,

museums, or other scientific or educational institutions, when such resources have been excavated or removed from public lands under the authority of a permit issued by the Federal land manager.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, the Federal land manager will follow the procedures required by NAGPRA and its implementing regulations for determining the disposition of Native American human remains and other "cultural items", as defined by NAGPRA, that have been excavated, removed, or discovered on public lands.

[49 FR 1027, Jan. 6, 1984, as amended at 60 FR 6260, 6261, Jan. 26, 1995]

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

(a) *Archaeological value.* For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in § 7.4 of this part or conditions of a permit issued pursuant to this part shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) *Commercial value.* For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in § 7.4 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) *Cost of restoration and repair.* For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a vio-

lation of prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

(1) Reconstruction of the archaeological resource;

(2) Stabilization of the archaeological resource;

(3) Ground contour reconstruction and surface stabilization;

(4) Research necessary to carry out reconstruction or stabilization;

(5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;

(6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

(7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager.

(8) Preparation of reports relating to any of the above activities.

#### § 7.15 Assessment of civil penalties.

(a) The Federal land manager may assess a civil penalty against any person who has violated any prohibition contained in § 7.4 or who has violated any term or condition included in a permit issued in accordance with the Act and this part.

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

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;

(3) The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;

(4) Notification of the right to file a petition for relief pursuant to paragraph (d) of this section, or to await the Federal land manager's notice of assessment, and to request a hearing in accordance with paragraph (g) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(c) The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:

(1) Seek informal discussions with the Federal land manager;

(2) File a petition for relief in accordance with paragraph (d) of this section;

(3) Take no action and await the Federal land manager's notice of assessment;

(4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.

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

(e) *Assessment of penalty.* (1) The Federal land manager shall assess a civil penalty upon expiration of the period

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for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

(2) The Federal land manager shall take into consideration all available information, including information provided pursuant to paragraphs (c) and (d) of this section or furnished upon further request by the Federal land manager.

(3) If the facts warrant a conclusion that no violation has occurred, the Federal land manager shall so notify the person served with a notice of violation, and no penalty shall be assessed.

(4) Where the facts warrant a conclusion that a violation has occurred, the Federal land manager shall determine a penalty amount in accordance with § 7.16.

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

(1) The facts and conclusions from which it was determined that a violation did occur;

(2) The basis in § 7.16 for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(g) *Hearings.* (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing a copy of the notice of assessment, and shall deliver the request as specified in the notice of assessment, personally or by registered or certified mail (return receipt requested).

(2) Failure to deliver a written request for a hearing within 45 days of

the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.

(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal land manager under paragraph (f) of this section or any offer of mitigation or remission made by the Federal land manager.

(h) *Final administrative decision.* (1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;

(2) Where the person served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision;

(3) Where the person served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(i) *Payment of penalty.* (1) The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a U.S. District Court as provided in section 7(b)(1) of the Act.

(2) Upon failure to pay the penalty, the Federal land manager may request the Attorney General to institute a civil action to collect the penalty in a U.S. District Court for any district in which the person assessed a civil penalty is found, resides, or transacts business. Where the Federal land manager is not represented by the Attorney General, a civil action may be initiated directly by the Federal land manager.

(j) *Other remedies not waived.* Assessment of a penalty under this section shall not be deemed a waiver of the

right to pursue other available legal or administrative remedies.

#### § 7.16 Civil penalty amounts.

(a) *Maximum amount of penalty.* (1) Where the person being assessed a civil penalty has not committed any previous violation of any prohibition in § 7.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

(2) Where the person being assessed a civil penalty has committed any previous violation of any prohibition in § 7.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus double the archaeological or commercial value of archaeological resources destroyed or not recovered.

(3) Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this section.

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

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

(i) Agreement by the person being assessed a civil penalty to return to the Federal land manager archaeological resources removed from public lands or Indian lands;

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

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

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

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

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

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

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

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

[49 FR 1027, Jan. 6, 1984, as amended at 52 FR 47721, Dec. 16, 1987]

#### § 7.17 Other penalties and rewards.

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

(b) Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Federal land manager may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State, or local government who furnish information or render service in the performance of their official duties, and persons who have provided information under § 7.16(b)(1)(iii) shall not be certified eligible to receive payment of rewards.

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

#### § 7.18 Confidentiality of archaeological resource information.

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

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

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

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

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

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

[49 FR 1027, Jan. 6, 1984; 49 FR 5923, Feb. 16, 1984]

#### § 7.19 Report.

(a) Each Federal land manager, when requested by the Secretary of the Interior, will submit such information as is necessary to enable the Secretary to comply with section 13 of the Act and comprehensively report on activities carried out under provisions of the Act.

(b) The Secretary of the Interior will include in the annual comprehensive report, submitted to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States

Senate under section 13 of the Act, information on public awareness programs submitted by each Federal land manager under § 7.20(b). Such submittal will fulfill the Federal land manager's responsibility under section 10(c) of the Act to report on public awareness programs.

(c) The comprehensive report by the Secretary of the Interior also will include information on the activities carried out under section 14 of the Act. Each Federal land manager, when requested by the Secretary, will submit any available information on surveys and schedules and suspected violations in order to enable the Secretary to summarize in the comprehensive report actions taken pursuant to section 14 of the Act.

[60 FR 5260, 5261, Jan. 26, 1995]

#### § 7.20 Public awareness programs.

(a) Each Federal land manager will establish a program to increase public awareness of the need to protect important archaeological resources located on public and Indian lands. Educational activities required by section 10(c) of the Act should be incorporated into other current agency public education and interpretation programs where appropriate.

(b) Each Federal land manager annually will submit to the Secretary of the Interior the relevant information on public awareness activities required by section 10(c) of the Act for inclusion in the comprehensive report on activities required by section 13 of the Act.

[60 FR 5260, 5261, Jan. 26, 1995]

#### § 7.21 Surveys and schedules.

(a) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority will develop plans for surveying lands under each agency's control to determine the nature and extent of archaeological resources pursuant to section 14(a) of the Act. Such activities should be consistent with Federal agency planning policies and other historic preservation program responsibilities required by 16 U.S.C. 470 *et seq.* Survey plans prepared under this section will be designed to comply with the purpose of the Act re-

garding the protection of archaeological resources.

(b) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will prepare schedules for surveying lands under each agency's control that are likely to contain the most scientifically valuable archaeological resources pursuant to section 14(b) of the Act. Such schedules will be developed based on objectives and information identified in survey plans described in paragraph (a) of this section and implemented systematically to cover areas where the most scientifically valuable archaeological resources are likely to exist.

(c) Guidance for the activities undertaken as part of paragraphs (a) through (b) of this section is provided by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

(d) Other Federal land managing agencies are encouraged to develop plans for surveying lands under their jurisdictions and prepare schedules for surveying to improve protection and management of archaeological resources.

(e) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will develop a system for documenting and reporting suspected violations of the various provisions of the Act. This system will reference a set of procedures for use by officers, employees, or agents of Federal agencies to assist them in recognizing violations, documenting relevant evidence, and reporting assembled information to the appropriate authorities. Methods employed to document and report such violations should be compatible with existing agency reporting systems for documenting violations of other appropriate Federal statutes and regulations. Summary information to be included in the Secretary's comprehensive report will be based upon the system developed by each Federal land manager for documenting suspected violations.

[60 FR 5260, 5261, Jan. 26, 1995]

#### Subpart B—Department of the Interior Supplemental Regulations.

SOURCE: 52 FR 9168, Mar. 23, 1987, unless otherwise noted.

#### § 7.31 Scope and authority.

The regulations in this subpart are promulgated pursuant to section 10(b) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 47011), which requires agencies to develop rules and regulations for carrying out the purposes of the Act, consistent with the uniform regulations issued pursuant to section 10(a) of the Act (subpart A of this part).

#### § 7.32 Supplemental definitions.

For purposes of this subpart, the following definitions will be used:

(a) *Site of religious or cultural importance* means, for purposes of § 7.7 of this part, a location which has traditionally been considered important by an Indian tribe because of a religious event which happened there; because it contains specific natural products which are of religious or cultural importance; because it is believed to be the dwelling place of, the embodiment of, or a place conducive to communication with spiritual beings; because it contains elements of life-cycle rituals, such as burials and associated materials; or because it has other specific and continuing significance in Indian religion or culture.

(b) *Allotted lands* means lands granted to Indian individuals by the United States and held in trust for those individuals by the United States.

#### § 7.33 Determination of loss or absence of archaeological interest.

(a) Under certain circumstances, a Federal land manager may determine, pursuant to § 7.3(a)(5) of this part, that certain material remains are not or are no longer of archaeological interest, and therefore are not to be considered archaeological resources under this part.

(b) The Federal land manager may make such a determination if he/she finds that the material remains are not capable of providing scientific or humanistic understandings of past human

behavior, cultural adaptation, and related topics.

(c) Prior to making a determination that material remains are not or are no longer archaeological resources, the Federal land manager shall ensure that the following procedures are completed:

(1) A professional archaeological evaluation of material remains and similar materials within the area under consideration shall be completed, consistent with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716, Sept. 29, 1983) and with 36 CFR parts 60, 63, and 65.

(2) The principal bureau archaeologist or, in the absence of a principal bureau archaeologist, the Department Consulting Archeologist, shall establish whether the material remains under consideration contribute to scientific or humanistic understandings of past human behavior, cultural adaptation and related topics. The principal bureau archaeologist or the Department Consulting Archeologist, as appropriate, shall make a recommendation to the Federal land manager concerning these material remains.

(d) The Federal land manager shall make the determination based upon the facts established by and the recommendation of the principal bureau archaeologist or the Departmental Consulting Archeologist, as appropriate, and shall fully document the basis therefor, including consultation with Indian tribes for determinations regarding sites of religious or cultural importance.

(e) The Federal land manager shall make public notice of the determination and its limitations, including any permitting requirements for activities associated with the materials determined not to be archaeological resources for purposes of this part.

(f) Any interested individual may request in writing that the Departmental Consulting Archeologist review any final determination by the Federal land manager that certain remains, are not, or are no longer, archaeological resources. Two (2) copies of the request should be sent to the Departmental Consulting Archeologist, National Park Service, P.O. Box 37127, Washing-

ton, DC 20013-7127, and should document why the requestor disagrees with the determination of the Federal land manager. The Departmental Consulting Archeologist shall review the request, and, if appropriate, shall review the Federal land manager's determination and its supporting documentation. Based on this review, the Departmental Consulting Archeologist shall prepare a final professional recommendation, and shall transmit the recommendation and the basis therefor to the head of the bureau for further consideration within 60 days of the receipt of the request.

(g) Any determination made pursuant to this section shall in no way affect the Federal land manager's obligations under other applicable laws or regulations.

#### §7.34 Procedural information for securing permits.

Information about procedures to secure a permit to excavate or remove archaeological resources from public lands or Indian lands can be obtained from the appropriate Indian tribal authorities, the Federal land manager of the bureau that administers the specific area of the public lands or Indian lands for which a permit is desired, or from the state, regional, or national office of that bureau.

#### §7.35 Permitting procedures for Indian lands.

(a) If the lands involved in a permit application are Indian lands, the consent of the appropriate Indian tribal authority or individual Indian landowner is required by the Act and these regulations.

(b) When Indian tribal lands are involved in an application for a permit or a request for extension or modification of a permit, the consent of the Indian tribal government must be obtained. For Indian allotted lands outside reservation boundaries, consent from only the individual landowner is needed. When multiple-owner allotted lands are involved, consent by more than 50 percent of the ownership interest is sufficient. For Indian allotted lands within reservation boundaries, consent must be obtained from the Indian trib-

al government and the individual landowner(s).

(c) The applicant should consult with the Bureau of Indian Affairs concerning procedures for obtaining consent from the appropriate Indian tribal authorities and submit the permit application to the area office of the Bureau of Indian Affairs that is responsible for the administration of the lands in question. The Bureau of Indian Affairs shall insure that consultation with the appropriate Indian tribal authority or individual Indian landowner regarding terms and conditions of the permit occurs prior to detailed evaluation of the application. Permits shall include terms and conditions requested by the Indian tribe or Indian landowner pursuant to §7.9 of this part.

(d) The issuance of a permit under this part does not remove the requirement for any other permit required by Indian tribal law.

#### §7.36 Permit reviews and disputes.

(a) Any affected person disputing the decision of a Federal land manager with respect to the issuance or denial of a permit, the inclusion of specific terms and conditions in a permit, or the modification, suspension, or revocation of a permit may request the Federal land manager to review the disputed decision and may request a conference to discuss the decision and its basis.

(b) The disputant, if unsatisfied with the outcome of the review or conference, may request that the decision be reviewed by the head of the bureau involved.

(c) Any disputant unsatisfied with the higher level review, and desiring to appeal the decision, pursuant to §7.11 of this part, should consult with the appropriate Federal land manager regarding the existence of published bureau appeal procedures. In the absence of published bureau appeal procedures, the review by the head of the bureau involved will constitute the final decision.

(d) Any affected person may request a review by the Departmental Consulting Archeologist of any professional issues involved in a bureau permitting decision, such as professional qualifications, research design, or other profes-

sional archaeological matters. The Departmental Consulting Archeologist shall make a final professional recommendation to the head of the bureau involved. The head of the bureau involved will consider the recommendation, but may reject it, in whole or in part, for good cause. This request should be in writing, and should state the reasons for the request. See §7.33(f) for the address of the Departmental Consulting Archeologist.

#### §7.37 Civil penalty hearings procedures.

(a) *Requests for hearings.* Any person wishing to request a hearing on a notice of assessment of civil penalty, pursuant to §7.15(g) of this part, may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. The respondent shall enclose a copy of the notice of violation and the notice of assessment. The request shall state the relief sought, the basis for challenging the facts used as the basis for charging the violation and fixing the assessment, and respondent's preference as to the place and date for a hearing. A copy of the request shall be served upon the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested), at the address specified in the notice of assessment. Hearings shall be conducted in accordance with 43 CFR part 4, subparts A and B.

(b) *Waiver of right to a hearing.* Failure to file a written request for a hearing within 45 days of the date of service of a notice of assessment shall be deemed a waiver of the right to a hearing.

(c) *Commencement of hearing procedures.* Upon receipt of a request for a hearing, the Hearing Division shall assign an administrative law judge to the case. Notice of assignment shall be given promptly to the parties, and thereafter, all pleadings, papers, and other documents in the proceeding shall be filed directly with the administrative law judge, with copies served on the opposing party.

(d) *Appearance and practice.* (1) Subject to the provisions of 43 CFR 1.3, the

respondent may appear in person, by representative, or by counsel, and may participate fully in those proceedings. If respondent fails to appear and the administrative law judge determines such failure is without good cause, the administrative law judge may, in his/her discretion, determine that such failure shall constitute a waiver of the right to a hearing and consent to the making of a decision on the record made at the hearing.

(2) Departmental counsel, designated by the Solicitor of the Department, shall represent the Federal land manager in the proceedings. Upon notice to the Federal land manager of the assignment of an administrative law judge to the case, said counsel shall enter his/her appearance on behalf of the Federal land manager and shall file all petitions and correspondence exchanges by the Federal land manager and the respondent pursuant to §7.15 of this part which shall become part of the hearing record. Thereafter, service upon the Federal land manager shall be made to his/her counsel.

(e) *Hearing administration.* (1) The administrative law judge shall have all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions in accordance with 5 U.S.C. 554-567.

(2) The transcript of testimony, the exhibits, and all papers, documents and requests filed in the proceedings, shall constitute the record for decision. The administrative law judge shall render a written decision upon the record, which shall set forth his/her findings of fact and conclusions of law, and the reasons and basis therefor, and an assessment of a penalty, if any.

(3) Unless a notice of appeal is filed in accordance with paragraph (f) of this section, the administrative law judge's decision shall constitute the final administrative determination of the Secretary in the matter and shall become effective 30 calendar days from the date of this decision.

(4) In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal land manager under §7.15 of this part or any offer of

mitigation or remission made by the Federal land manager.

(f) *Appeal.* (1) Either the respondent or the Federal land manager may appeal the decision of an administrative law judge by the filing of a "Notice of Appeal" with the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923, within 30 calendar days of the date of the administrative law judge's decision. Such notice shall be accompanied by proof of service on the administrative law judge and the opposing party.

(2) Upon receipt of such a notice, the Director, Office of Hearings and Appeals, shall appoint an *ad hoc* appeals board to hear and decide an appeal. To the extent they are not inconsistent herewith, the provision of the Department of Hearings and Appeals Procedures in 43 CFR part 4, subparts A, B, and G shall apply to appeal proceedings under this subpart. The decision of the board on the appeal shall be in writing and shall become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered, unless otherwise specified therein.

(g) *Report service.* Copies of decisions in civil penalty proceedings instituted under the Act may be obtained by letter of request addressed to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. Fees for this service shall be as established by the Director of that Office.

undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

(51 FR 4577, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986)

#### § 1103.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

#### §§ 1103.152—1103.159 [Reserved]

#### § 1103.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal

opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(1) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(1) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1103.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action

that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

#### §§ 1103.161—1103.169 [Reserved]

#### § 1103.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Director, Equal Employment Opportunity shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Equal Employment Opportunity, International Boundary and Water Commission, United States and Mexico, United States Section, The Commons, Building C, Suite 310, 4171 North Mesa, El Paso, Texas 79902.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has ju-

isdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 1103.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

(51 FR 4577, Feb. 5, 1986, as amended at 51 FR 4577, Feb. 5, 1986)

#### §§ 1103.171—1103.999 [Reserved]

### PART 1104—PROTECTION OF ARCHAEOLOGICAL RESOURCES

- Sec.
- 1104.1 Purpose.
  - 1104.2 Definitions.
  - 1104.3 Prohibited acts.
  - 1104.4 Permit requirements and exceptions.
  - 1104.5 Application for permits and information collection.
  - 1104.6 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.
  - 1104.7 Issuance of permits.
  - 1104.8 Terms and conditions of permits.
  - 1104.9 Suspension and revocation of permits.
  - 1104.10 Appeals relating to permits.

- 1104.11 Relationship to section 106 of the National Historic Preservation Act.  
 1104.12 Custody of archaeological resources.  
 1104.13 Determination of archaeological or commercial value and cost of restoration and repair.  
 1104.14 Assessment of civil penalties.  
 1104.15 Civil penalty amounts.  
 1104.16 Other penalties and rewards.  
 1104.17 Confidentiality of archaeological resource information.  
 1104.18 Report to the Secretary of the Interior.

AUTHORITY: Pub. L. 96-95, 93 Stat. 721 (16 U.S.C. 470aa-11) (Sec. 10(a).) Related Authority: Pub. L. 59-209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86-523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470a-t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95-341, 92 Stat. 469 (42 U.S.C. 1996).

SOURCE: 56 FR 21590, May 10, 1991, unless otherwise noted.

#### § 1104.1 Purpose.

(a) The regulations in this part implement provisions of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-11) by establishing the definitions, standards, and procedures to be followed by the Commissioner in providing protection for archaeological resources, located on public lands through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and data, and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the archaeological resources.

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

#### § 1104.2 Definitions.

As used for purposes of this part:

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

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

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

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

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

(ii) Surface or subsurface artifact concentrations or scatters;

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

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

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

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

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

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

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

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

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

(i) Paleontological remains;

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

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

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

(c) *Commissioner* means the head of the United States Section, International Boundary and Water Commission, United States and Mexico, and his delegate.

(d) *Public lands* means lands to which the United States of America holds fee title, and which are under the control of the U.S. Section, International Boundary and Water Commission, United States and Mexico.

(e) *Indian tribe* as defined in the Act means any Indian tribe, band, nation, or other organized group or community. In order to clarify this statutory definition for purposes of this part, *Indian tribe* means:

(1) Any tribal entity which is included in the annual list of recognized tribes published in the FEDERAL REG-

ISTER by the Secretary of the Interior pursuant to 25 CFR part 54;

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

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

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

(h) *Act* means the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-11.), as amended.

#### § 1104.3 Prohibited acts.

(a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands unless such activity is pursuant to a permit issued under § 1104.7 or exempted by § 1104.4(b) of this part.

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

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

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

#### § 1104.4 Permit requirements and exceptions.

(a) Any person proposing to excavate and/or remove archaeological resources from public lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Commissioner for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Commissioner may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in § 1104.7(a) of this part.

(b) Exceptions:

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

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

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

(c) Persons carrying out official agency duties under the Commissioner's direction, associated with the management of archaeological resources, need not follow the permit application procedures of § 1104.5. However, the Commissioner shall insure that provisions of §§ 1104.7 and 1104.8 have been met by other documented means, and that any official duties which might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Commissioner, have been the subject of consideration under § 1104.6.

(d) Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Commissioner shall issue a permit, subject to the provisions of

§§ 1104.4(b)(5), 1104.6, 1104.7(a) (3), (4), (5), (6), and (7), 1104.8, 1104.9, 1104.11, and 1104.12(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Commissioner.

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

#### § 1104.5 Application for permits and information collection.

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

(b) Each application for a permit shall include:

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

(2) The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in § 1104.7(a).

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

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

logistical support and laboratory facilities.

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

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

(d) Paperwork Reduction Act. The information collection requirement contained in § 1104.5 of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024-0037. The purpose of the information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist the Commissioner in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

#### § 1104.6 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.

(a) If the issuance of a permit under this part may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands, as determined by the Commissioner, at least 30 days before issuing such a permit the Commissioner shall notify any In-

dian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 of the Act.

(1) Notice by the Commissioner to any Indian tribe shall be sent to the chief executive officer or other designated official of the tribe. Indian tribes are encouraged to designate a tribal official to be the focal point for any notification and discussion between the tribe and the Commissioner.

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

(3) Upon request during the 30-day period, the Commissioner may meet with official representatives of any Indian tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under § 1104.8.

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

(b)(1) In order to identify sites of religious or cultural importance, the Commissioner shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Commissioner's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on site eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w-3).

(2) If the Commissioner becomes aware of a Native American group that is not an Indian tribe as defined in this part but has aboriginal or historic ties

to public lands under the Commissioner's jurisdiction, the Commissioner may seek to communicate with official representatives of that group to obtain information on sites they may consider to be of religious or cultural importance.

(3) The Commissioner may enter into agreement with any Indian tribe or other Native American group for determining locations for which such tribe or group wishes to receive notice under this section.

#### § 1104.7 Issuance of permits.

(a) The Commissioner may issue a permit, for a specified period of time appropriate to the work to be conducted, upon determining that:

(1) The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

(i) A graduate degree in anthropology or archaeology, or equivalent training and experience;

(ii) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

(iii) The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;

(iv) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and

(v) Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or schol-

arly research, and preservation of archaeological data;

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

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

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

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

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

(b) When the area of the proposed work would cross jurisdictional boundaries, so that permit applications must be submitted to more than one Federal agency, the Commissioner shall coordinate the review and evaluation of applications and the issuance of permits.

#### § 1104.8 Terms and conditions of permits.

(a) In all permits issued, the Commissioner shall specify:

(1) The nature and extent of work allowed and required under the permit,

including the time, duration, scope, location, and purpose of the work;

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

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

(4) Reporting requirements.

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

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

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

(e) The permittee may request that the Commissioner extend or modify a permit.

(f) The permittee's performance under any permit issued for a period greater than 1 year shall be subject to review by the Commissioner, at least annually.

#### § 1104.9 Suspension and revocation of permits.

(a) *Suspension or revocation for cause.*

(1) The Commissioner may suspend a permit issued pursuant to this part upon determining that the permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or § 1104.3. The Commissioner shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

(2) The Commissioner may revoke a permit upon assessment of a civil penalty under § 1104.14 upon the permittee's conviction under section 6 of the Act, or upon determining that the permittee has failed after notice under

this section to correct the situation which led to suspension of the permit.

(b) *Suspension or revocation for management purposes.* The Commissioner may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit would be in conflict with management requirements not in effect when the permit was issued. The Commissioner shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

#### § 1104.10 Appeals relating to permits.

Any affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit.

#### § 1104.11 Relationship to section 106 of the National Historic Preservation Act.

Issuance of a permit in accordance with the Act and this part does not constitute an undertaking requiring compliance with section 106 of the Act of October 15, 1966 (16 U.S.C. 470f). However, the mere issuance of such a permit does not excuse the Commissioner from compliance with section 106 where otherwise required.

#### § 1104.12 Custody of archaeological resources.

(a) Archaeological resources excavated or removed from the public lands remain the property of the United States.

(b) The Commissioner may provide for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, when such resources have been excavated or removed from public lands under the authority of a permit issued by the Commissioner.

#### § 1104.13 Determination of archaeological or commercial value and cost of restoration and repair.

(a) *Archaeological value.* For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in § 1104.3 of this part or conditions of a permit issued pursuant to this part

shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) *Commercial value.* For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in § 1104.3 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

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

- (1) Reconstruction of the archaeological resource;
- (2) Stabilization of the archaeological resource;
- (3) Ground contour reconstruction and surface stabilization;
- (4) Research necessary to carry out reconstruction or stabilization;
- (5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;
- (6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

(7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Commissioner;

(8) Preparation of reports relating to any of the above activities.

#### § 1104.14 Assessment of civil penalties.

(a) The Commissioner may assess a civil penalty against any person who has violated any prohibition contained in § 1104.3 or who has violated any term or condition included in a permit issued in accordance with the Act and this part.

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

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;

(3) The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;

(4) Notification of the right to file a petition for relief pursuant to paragraph (d) of this section, or to await the Commissioner's notice of assessment, and to request a hearing in accordance with paragraph (g) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(c) The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:

(1) Seek informal discussions with the Commissioner;

(2) File a petition for relief in accordance with paragraph (d) of this section;

(3) Take no action and await the Commissioner's notice of assessment;

(4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.

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

(e) *Assessment of penalty.* (1) The Commissioner shall assess a civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

(2) The Commissioner shall take into consideration all available information, including information provided pursuant to paragraphs (c) and (d) of this section or furnished upon further request by the Commissioner.

(3) If the facts warrant a conclusion that no violation has occurred, the Commissioner shall so notify the person served with a notice of violation, and no penalty shall be assessed.

(4) Where the facts warrant a conclusion that a violation has occurred, the Commissioner shall determine a penalty amount in accordance with § 1104.15.

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

(1) The facts and conclusions from which it was determined that a violation did occur;

(2) The basis in § 1104.15 for determining the penalty amount, assessed and/or any offer to mitigate or remit the penalty; and

(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(g) *Hearings.* (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing a copy of the notice of assessment, and shall deliver the request as specified in the notice of assessment, personally or by registered or certified mail (return receipt requested).

(2) Failure to deliver a written request for a hearing within 45 days of the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.

(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Commissioner under paragraph (f) of this section or any offer of mitigation or remission made by the Commissioner.

(h) *Final administrative decision.* (1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;

(2) Where the person served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision;

(3) Where the person served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision

resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(1) *Payment of penalty.* (1) The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a United States District Court as provided in section 7(b)(1) of the Act.

(2) Upon failure to pay the penalty, the Commissioner may request the Attorney General to institute a civil action to collect the penalty in a United States District Court for any district in which the person assessed a civil penalty is found, resides, or transacts business. Where the Commissioner is not represented by the Attorney General, a civil action may be initiated directly by the Commissioner.

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

#### § 1104.15 Civil penalty amounts.

(a) *Maximum amount of penalty.* (1) Where the person being assessed a civil penalty has not committed any previous violation of any prohibition in § 1104.3 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

(2) Where the person being assessed a civil penalty has committed any previous violation of any prohibition in § 1104.3 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus double the archaeological or commercial value of archaeological resources destroyed or not recovered.

(3) Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this section.

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

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

(i) Agreement by the person being assessed a civil penalty to return to the Commissioner archaeological resources removed from public lands;

(ii) Agreement by the person being assessed a civil penalty to assist the Commissioner in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands;

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

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

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

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

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

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

#### § 1104.16 Other penalties and rewards.

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

(b) Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Commissioner may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State, or local government who furnish information or render service in the performance of their official duties, and persons who have provided information under § 1104.15(b)(1)(iii) shall not be certified eligible to receive payment of rewards.

#### § 1104.17 Confidentiality of archaeological resource information.

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

(1) The Commissioner may make information available, provided that the disclosure will further the purposes of

the Act and this part, or the Act of June 27, 1960, as amended (16 U.S.C. 469-469c), without risking harm to the archaeological resource or to the site in which it is located.

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

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

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

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

#### § 1104.18 Report to the Secretary of the Interior.

The Commissioner, when requested by the Secretary of the Interior, shall submit such information as is necessary to enable the Secretary to comply with section 13 of the Act.

Tennessee  
Valley  
Authority

**Public Safety Service**

**Archaeological  
Resource  
Protection Plan**

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TENNESSEE VALLEY AUTHORITY (TVA) PUBLIC SAFETY SERVICE (PSS)

ARCHEOLOGICAL RESOURCES PROTECTION PLAN

SEPTEMBER 1993

It is the policy of the TVA PSS to protect the archeological resources located on TVA lands. TVA PSS will cooperate with all internal TVA organizations including the General Counsel Office (OGC), the Office of the Inspector General (OIG), TVA Cultural Resources, and all law enforcement agencies external to TVA. PSS will pursue criminal and civil action against all violators of archeological sites on TVA-owned or controlled properties and will provide assistance to other TVA organizations and to law enforcement agencies external to TVA in investigations of archeological resource violations off TVA property.

1.0 SCOPE

A. Civil Action

Section 7 of the Archeological Resources Protection Act (ARPA) provides that any person who violates any prohibition contained in an applicable regulation or permit issued under ARPA may be assessed a civil penalty by the federal land managers concerned. The TVA, along with the Departments of the Interior,

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Agriculture, and Defense, has issued uniform regulations under ARPA. The Board has delegated to the President, Resource Group, the authority to issue notices of violation and assess civil penalties for the violation of any prohibition contained in TVA's ARPA regulations or permits issued by TVA under ARPA.

B. Criminal Action

Section 6 of the ARPA provides that any person who knowingly violates or counsels, procures, solicits, or employs any other person to violate any prohibition contained in the Act may be subject to criminal action. The pursuit of criminal action shall be determined by TVA's President, Resource Group, or his designee. This determination will be made upon consultation with Cultural Resources, the OIG, the OGC, and the PSS, as circumstances require, and with the United States Attorney's office in the appropriate federal district. In cases initiated or investigated by TVA's OIG, TVA's Inspector General will determine when criminal action is pursued subject to consultation with the Land Manager and/or other TVA organizations as appropriate.

The determination regarding criminal action will be guided by criteria set forth by each U.S. Attorney's office in the districts containing TVA's archeological sites.\*

\*See attachments for criteria for criminal action as set forth by the U.S. Attorney's for federal districts in the Tennessee Valley area.

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If, after reviewing these criteria the President, Resource Group, or his designee determines that criminal action should be pursued, he shall arrange consultation with the United States Attorney's office of the appropriate district.

In cases initiated and/or investigated by the OIG, TVA's Inspector General may arrange consultation with the U.S. Attorney's office independent of other TVA organizations when appropriate.

## 2.0 REPORTING OF VIOLATIONS

### A. Receiving the Report

Persons who wish to communicate suspected violations of ARPA regulations on TVA property may do so by contacting PSS, Cultural Resources, or the OIG. The following information should be obtained: description of the violation, the date and location of the violation, the identity of the violator, if known, and the name and address of the person making the report.

### B. Initial Inspection

1. If the OIG receives the initial report, the information received will be forwarded to the PSS for preliminary inspection. Cultural Resources should also be informed of

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the report. Depending on the location of the alleged violation and the availability of ARPA trained personnel, an ARPA trained archeologist, Public Safety Officer (PSO), or OIG agent should be dispatched to inspect the location stipulated in the report to determine if an ARPA violation is apparent.

If the preliminary site inspection indicates that a violation has occurred, an investigation will be initiated, the site secured, and archeologist requested.

2. If the PSS receives the initial report of violation, Cultural Resources should be notified and a preliminary investigation should be conducted as outlined in 2.0.B.1 above.
3. If Cultural Resources receives the initial complaint, the preliminary investigation should be conducted as indicated in 2.0.B.1 above.
4. When the initial report is received by either the PSS or Cultural Resources, the OIG will be advised.

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### 3.0 NOTICE OF CIVIL VIOLATION BY TVA PSOs

#### A. Issuing Civil Citations

TVA PSOs who observe a person in the act of violating TVA's ARPA regulations or permits or who observe a person on TVA-controlled land in unauthorized possession of archeological resources may immediately issue a notice of violation to such person. The officer should also seize any archeological resources in the person's possession believed to have been obtained in violation of TVA's ARPA regulations. The notice of violation contains the information required to be included by section 1312.15(b) of TVA's ARPA regulations. The notice of violation does not contain the amount of penalty proposed to be assessed, but instead contains a statement that notice of a proposed penalty amount will be served after the damages associated with the violation have been ascertained. A copy of the notice of violation, along with all other information about the violation, is sent to Cultural Resources and a copy of the PSS Uniform Incident Report is sent directly to both the OGC and the OIG immediately upon preparation through the chain of command.

The PSS officer shall consult his supervisor regarding questions concerning arrests, the issuance of civil citations or other matters relating to ARPA enforcement. The district manager shall develop an understanding with the appropriate U.S. Attorney's office or offices regarding the internal policy of the U.S. Attorney or attorneys as they relate to ARPA cases.

If the individual has no contract/permit to dig in or otherwise affect a TVA archeological sight, the officer may issue the individual a TVA Notice of Violation of ARPA (TVA form 30534). The original shall be given to the violator, copy two shall be maintained by the issuing officer, copy three shall be sent to the PSS Corporate Office, the fourth to Cultural Resources. A Uniform Incident Report shall be completed by the officer and forwarded through the District Manager to PSS Corporate headquarters, the OIG, and the OGC.

If the PSO recognizes what he/she believes to be archeological resources and artifacts in the possession of the violator, the officer may confiscate those items. Also, the officer may confiscate any tools and equipment he/she reasonably believes to have been used in the violation. An inventory of all seized items should be completed by the PSO. The inventory shall be signed and dated by the investigating PSS officer and shall serve as a receipt with a copy being given to the individual from whom items have been confiscated. Chain of custody of all evidence (including seized items) shall be maintained by the PSO and subsequent persons having contact with such evidence.

B. Not Issuing Civil Citation

In certain cases a PSO may not issue a civil citation in order to further investigate the facts and make a decision as to criminal prosecution or civil action. For example, the PSO may

know that the individual involved is already the subject of an active investigation regarding ARPA violations. In such cases the officer should confiscate what he reasonably believes to be artifacts. The officer may also confiscate tools that appear to have been used at the scene. Identification of the violator should be obtained if possible.

#### 4.0 CRIMINAL INVESTIGATION PROCEDURE

##### A. Criminal vs. Civil

All ARPA violations shall be treated initially as a criminal violation by PSS investigating personnel regarding preservation of the crime scene, the collection of evidence, the assessment of site damage, and the identification of witnesses and suspects. Data collected in the initial PSS investigation/assessment will be reviewed with the Land Manager utilizing the criteria set forth in 1.0.B above in conjunction with Sections 6 and 7 of ARPA to determine whether the case should be pursued further and if pursued whether such pursuit should be civil or criminal.

##### B. Site Investigation

1. If the PSO conducting the preliminary inspection of the site determines that a site investigation/assessment is required, the investigator will contact Cultural Resources to

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recommend such action be pursued. If a delay in initiating the investigation is anticipated, the PSS is responsible for securing the archeological site. The PSS is responsible for ensuring that any individuals so assigned are aware of the scene's outer perimeter in order to avoid inadvertent interference with crime scene processing.

2. Investigative Responsibilities at the Site

a. The ARPA investigator (either PSS, OIG, or outside law enforcement agent) is responsible for investigating possible criminal activity to include establishing federal ownership of the property, securing and examining the immediate scene of the violation, searching the general area of the violation for criminal evidence, ensuring the chain of custody for any criminal evidence discovered, interviewing witnesses and potential suspects, sketching and photographing the crime scene, and utilizing whatever other criminal investigatory methods may be appropriate under the circumstances. The investigator's objectives are to:

- (1) establish federal ownership of the property
- (2) establish that a crime has been committed
- (3) identify the criminal
- (4) establish venue (geographical jurisdiction)
- (5) locate the criminal
- (6) establish guilt

- b. Cultural Resources is responsible for providing an ARPA trained archeologist to assess the archeological damage at the violated site. The archeologist assigned to assess sight damage normally should not begin the assessment until the PSS has conducted a preliminary investigation of the site. This practice will help ensure that no evidence is disturbed. By the same token, the PSS investigators should be extremely cautious about any of their own activity that may alter or disturb the archeological site damage to be assessed.
- c. The PSS investigator has primary responsibility for management of the crime scene investigation; however, the investigator and archeologist shall assist each other as necessary in accomplishing the site investigation/assessment.
- d. The archeologist's statement to include damage assessment will accompany the investigator's report which will function as the primary report. The report will be reviewed by the district manager and thereafter distributed as appropriate.

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e. The PSS investigator is responsible for preparing the investigative report to include the archeologist's site damage assessment, evidence and photography logs, pertinent maps, drawings and crime scene sketches, witness statements, and other evidentiary items the investigator deems necessary. This report will be submitted to the district manager who shall thereafter distribute the report as appropriate. Cultural Resources shall maintain a copy of the archeological damage assessment. Any physical evidence collected shall be secured by the investigator and chain of custody maintained to ensure the integrity of the evidence.

3. Site Surveillance

If the PSO assigned to investigate an ARPA violation has reason to believe that a violation is of an ongoing nature, he/she may recommend site surveillance either as an alternative to or in addition to immediate site investigation/damage assessment. The PSO is responsible for obtaining approval of such surveillance from the appropriate District Manager, PSS, and the Vice-President, PSS or his designee. The PSS may notify Cultural Resources when appropriate prior to implementing such surveillance in order to prevent any inadvertent disruption of the surveillance by Cultural Resources personnel. Dissemination of information regarding any surveillance shall be handled discreetly on a "need-to-know" basis by all parties concerned.

4. Criminal Action

If after reviewing the submitted PSS investigative report all concerned parties determine that criminal action is required, the PSS and/or the OIG may pursue further criminal investigation if needed in accordance with the appropriate U.S. Attorney's office and coordinate the criminal prosecution with the Assistant U.S. Attorney assigned to the case.

5.0 PRELIMINARY RESPONSIBILITIES

A. Cultural Resources

1. It is the responsibility of Cultural Resources to provide the PSS a Site Vulnerability Assessment (SVA) for the purpose of prioritizing archeological site patrol requirements.
  
2. It is the responsibility of Cultural Resources to inform the PSS of any excavation or other activity that may be planned by either TVA Cultural Resources or by outside organizations through contract or permit to include the parameters of such excavation or activity.

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B. Public Safety Service

1. It is the responsibility of the unit supervisor to establish patrols of the most significant and vulnerable sites as indicated by the S.V.A. in a manner that maximizes manpower.
2. All PSOs in affected units shall be familiarized with the location, appearance and significance of each site in order to better detect fresh activity.
3. It is the responsibility of the Public Safety Service to establish any required surveillance of suspected activity involving ARPA violations to include establishing electronic monitoring devices if appropriate.

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ATTACHMENT 1  
CRITERIA FOR CRIMINAL ACTION  
U.S. ATTORNEY'S OFFICE FOR THE  
NORTHER DISTRICT OF ALABAMA

The decision to pursue criminal action normally shall be based on the existence of one or more of the following factors:

1. When there is evidence that the digging for artifacts was for profit, i.e., that the items found were to be sold.
2. Where the subject has a prior conviction for the same activity.
3. Where the dig was substantial, that is, there is evidence of multiple holes or large holes or trenches.
4. When the dig was an excavation of a grave site.

Where a subject is caught in the act of digging, law enforcement personnel should use care with respect to detaining such persons for any purpose other than recovering artifacts. Should the agent or public safety officer determine that an arrest is warranted, the duty Assistant United States Attorney (AUSA) should be immediately contacted and advised of the situation.

If time permits, we request that the duty AUSA be contacted prior to an arrest being made.

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PUBLIC SAFETY SERVICE

ARCHEOLOGICAL RESOURCE PROTECTION

PATROL AND RESPONSE PROCEDURES

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I. REPORT OF AN ARPA VIOLATION

A. Sources of Report

Report of an ARPA violation may come from the following sources:

1. General public
2. TVA employees
3. Cultural Resources
4. OIG
5. Other agencies

B. Information to be Obtained by PSO

If a PSO receives a report of an ARPA violation, the following information should be obtained:

1. Description of violation
2. The date and location of violation
3. Identity/description of violator if possible
4. Description of vehicle used if available
5. Name and address of person making report

C. Inspecting the Site

Upon receipt of a report of an ARPA violation, a PSO will be dispatched to the site to inspect it for activity of violation.

The inspection procedure is as follows:

1. Arrive safely
2. Inspection is a brief viewing of the site for as long as it takes to determine if a violation has occurred

3. Treat as potential crime scene and create as little disturbance as possible while in vehicle or on foot
4. Look for signs of fresh disturbances
5. Get names and addresses of witnesses and what they witnessed
6. If there is an immediate need to collect evidence, ensure that it is properly documented and secured
7. After inspection is completed, contact dispatch with report
8. If violation is apparent, secure crime scene and initiate investigation
9. Notify unit supervisor of violation and request assistance if needed

## II. PATROL TECHNIQUES FOR ARCHEOLOGICAL SITES

### A. Prioritizing Patrol Activities

The ARPA sites to be patrolled are determined by the Site Vulnerability Assessment (SVA) as determined and developed by Cultural Resources

### B. Patrolling Techniques

1. PSOs patrolling archeological sites shall know the location, appearance, and significance of sites to be patrolled in order to detect fresh activity
2. Utilize an irregular patrol schedule to avoid predictability

### C. Signs of Activity

1. On vehicle patrol, look for indications of fresh site entry to include tire marks, new trails, and broken foliage

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2. On boat patrol, look for signs of boat docking and footprints on bank
3. Look for freshly dug holes and logs and rocks that have been moved

D. Remote Sensing Devices

Remote sensing devices may be used to monitor important remote sites that cannot be patrolled as frequently as necessary. These devices are linked to the Central Alarm Station (CAS) where their activation will be signaled. The decision to utilize these devices will be determined by PSS management in consultation with Cultural Resources.

III. PSO DUTIES: ACTIVITY ONSITE - VIOLATOR NOT PRESENT

A. Report Investigation

If you see indications of violation, report this to your supervisor and recommend investigation be commenced. If you are uncertain if there has been a violation, request appropriate assistance through the unit supervisor.

B. Secure the Crime Scene

If there is a delay in response from PSS management, ensure that the crime scene is protected. The crime scene at an ARPA site should be looked upon as much larger than merely the specific disturbances that have been observed. It includes potential routes

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of entry and exit, nearby places where tools and artifacts could be hidden by a violator, or where the violator may have taken a break or thrown trash and refuse. The initial investigator may require that several separate areas be treated as individual crime scenes as described above.

C. Interview Witnesses

As soon as you have determined that an ARPA violation may have occurred, look for the presence of individuals in the immediate area who may have seen the activity. Obtain their names and addresses, a brief description of who and what they saw, and any other information you feel is relevant to the investigation. Remember that someone who appears to be a witness may in fact be a perpetrator.

D. Collect Evidence

If circumstances (i.e., weather conditions) dictate that evidence should be collected immediately, the inspecting officer should do so. Ensure any evidence you collect at the scene is properly secured and documented to preserve the chain of custody.

E. Take Field Notes

If awaiting arrival of investigator, take detailed field notes of what you witness from the time of your arrival until the arrival of the investigator or until you are relieved. Be prepared to write a report based on these notes and to turn this report as well as the notes over to the PSS investigator.

Caution: Do not assume that any other investigator will see the same things you see or hear the same thing (from witnesses for example) that you have heard.

IV. PSO DUTIES: DISCOVERY OF ACTIVITY - VIOLATOR PRESENT

A. Observe Activities

1. If you come upon individuals who appear to be violating a TVA archeological site, you may wish to observe them, if possible, prior to subject contact. Such observation allows you the following advantages:
  - (a) Time to better discern the purpose and level of their activity
  - (b) Time to record more descriptive details of the activity, persons, equipment, and vehicles involved
  - (c) The opportunity to take photographs if you have a camera available
  - (d) Time to determine if the subjects pose a threat to your safety
  - (e) The opportunity to call for backup
2. Prior to initiating contact, radio your dispatch with the following:
  - (a) Your location
  - (b) The number of subjects involved
  - (c) Their activity
  - (d) A brief description of the subjects
  - (e) A description of their equipment
  - (f) A description of their vehicles

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3. Do not approach multiple violators if you have a reasonable fear for your safety. ARPA violators who are in the artifact business for personal gain may be armed and dangerous.

B. Avoiding Contact

In some circumstances, it may be advisable to avoid any contact with a violator. For example, if you discover a violator at the site where ongoing activity has occurred, a determination may be made to allow the suspect to leave the site undetected in order to discover other conspirators, evidence, etc. This determination should be made after consultation with PSS management, if possible.

V. INITIAL CONTACT WITH SUSPECT

A. Inform Suspect of TVA Restriction

If you discover someone engaging in violation of an archeological site, you should explain that:

1. The activity they are pursuing is prohibited on this site because it is protected as an archeological resource
2. Any such activity is only allowed by permit

B. Identify Suspects and Perform NCIC Check

VI. ELEMENTS OF ARPA VIOLATION

A. Criminal Offense

Every criminal statute contains elements of the offense all of which must be proven beyond a reasonable doubt in order for a criminal conviction to be obtained. The elements of a criminal ARPA violation are:

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1. The crime must have occurred on federal or Indian lands
2. The site or artifacts in question must be identified as archeological resources
3. The activity must have been conducted without a permit
4. The activity must be designated as a prohibited activity under ARPA
5. There must be a damage assessment indicating whether the damage was above or below \$500 to designate whether the offense is a misdemeanor or felony

B. Civil Violation

The elements necessary to prove a civil violation of ARPA are the same as the first four elements required for a criminal conviction. The fifth element is not essential because there is no distinction between a misdemeanor and felony in a civil action. The civil proceeding also allows for a lower standard regarding burden of proof, that being a preponderance of the evidence (a slight tipping of the scales) versus the criminal standard of proof beyond a reasonable doubt.

VII. PSO OPTIONS UPON CONTACT WITH SUBJECT

A. ID and Release

1. If you encounter individuals who in your judgment are not in violation to an extent that requires a formal action of citation or arrest, you may choose to only issue a verbal warning regarding their activity. Such individuals likely may

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be random or surface collectors. Random collectors are nonsystematic, random collectors who do not plan their activity but rather see and take. Surface collectors are people who are not diggers but restrict their activities to surface collecting for recreation. The verbal warning should include:

- (a) Obtaining a positive identification of the individuals if possible (minors may have no such identification)
- (b) Explaining what an ARPA violation is and its consequences for them
- (c) Confiscating any artifacts in their possession
- (d) Documentating and securing the items seized in the event a question concerning your actions arise subsequent to your encounter
- (e) Providing the individuals with a receipt for items seized
- (f) Reporting the incident in writing

## 2. Officer Uncertainty

If you are uncertain whether the situation you have encountered requires a citation or an arrest, you should identify the subject (if possible) and briefly detain while you contact your supervisor for direction. In such instances you should also:

- (a) Explain what an ARPA violation is and what its consequences may be
- (b) Confiscate any artifacts in the subject's possession, give receipt for items seized, and ensure the chain of custody for items seized as evidence.

(c) Explain that civil or criminal charges may be considered by  
TVA

(d) Report the incident in writing

B. Detain and Contact Supervisor, Assistant United States Attorney  
(AUSA)

If you believe you have probable cause to arrest the violator for an ARPA violation, you should detain the violator and contact your supervisor for direction. The supervisor may contact the AUSA for direction if appropriate. The AUSA may advise to arrest, release, or issue a civil citation based on the facts presented. You should be familiar with both the communication process and criteria for an arrest relative to ARPA as required by the appropriate U.S. Attorney in the event the U.S. Attorney's office cannot be contacted or in the event you might have to contact that office directly.

C. Collection of Evidence from Subject

There may be occasions when evidence needs to be seized from the suspect's person when no arrest is effected (such as soil samples from clothing or shoes to match with footprints). Such seizures must be based on either the signed consent of the subject or a search warrant. A receipt for items seized shall be given to the subject, and the items seized shall be properly secured and documented to preserve the chain of custody.

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D. Arrest on State Charges

In some instances, you may cite or arrest the subject on state charges (i.e., vandalism, assault, criminal trespassing).

Following your action, PSS can still contact your AUSA or the TVA Land Manager as appropriate regarding civil or criminal ARPA charges. Be sure to inform the AUSA that subject has been arrested and charged with a state crime relative to this violation.

E. Issue Civil Citation

If you determine, based on facts at hand, that a civil citation for an ARPA offense should be issued, take the following actions:

1. Inform the subject of the specifics of the violation
2. Fill out completely the Notice of Violation (TVA 30534)
3. Ensure the facts indicating a violation are clearly stated
4. Explain the significance of the citation, the site damage assessment, and the administrative review procedure to the recipient. Explain that criminal prosecution may also result.
5. Sign the citation and request the subject sign it. If subject refuses to sign, simply write "Subject Refuses to Sign" in signature block.
6. Distribute the copies as indicated on the citation
7. Submit a written report to you supervisor

F. Property Seizure

1. Archeological items

(a) All the options stated above allow for the confiscation of what you reasonably believe to be archeological resources and artifacts.

(b) If items are seized, you should issue a receipt to the individual from whom the items have been seized.

2. Excavating tools

(a) Tools and equipment may be seized from violators pending civil or criminal action.

(b) A receipt for seized tools and equipment should be provided to the individual from whom they are seized.

3. Vehicles

(a) In cases where on-the-scene arrest is effected, vehicles involved may be impounded:

(1) If they are involved in the ARPA violation.

(2) If they pose a hazard or traffic obstruction if left where they are.

(b) Vehicles found at the scene of a violation may be examined in accordance with the following guidelines:

(1) Search incident to arrest - The interior of the passenger compartment that can be reached without exiting the vehicle may be searched for weapons and destructible evidence.

(2) Probable cause - A reasonable belief based on the facts at hand that evidence relating to the violation will be found in or about the vehicle. All parts of the vehicle that could conceal evidence relative to the crime at hand may be searched.

(3) Inventory - When a vehicle is impounded, the contents must be inventoried. All portions of the vehicle where people could reasonably be expected to keep valuables may be inspected.

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(c) A copy of the inventory should be provided to the vehicle's operator/owner. The original should be maintained by the investigating office and made a part of the case report. Such inventory is documentary evidence.

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MEMORANDUM OF AGREEMENT  
BETWEEN  
TENNESSEE VALLEY AUTHORITY  
AND  
UNITED STATES DEPARTMENT OF THE INTERIOR  
FOR IMPLEMENTING ADMINISTRATIVE HEARING PROCEDURES UNDER  
ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979, AS AMENDED

THIS MEMORANDUM OF AGREEMENT (MOA), made and entered into  
this 3rd day of May, 1990, by and between the TENNESSEE VALLEY  
AUTHORITY (TVA) and the UNITED STATES DEPARTMENT OF THE INTERIOR (DOI);

W I T N E S S E T H:

WHEREAS under Section 7 of the Archaeological Resources  
Protection Act of 1979 (ARPA), 16 U.S.C. § 470ff, any person assessed a  
civil penalty for violation of any prohibition contained in an applicable  
regulation or permit issued under ARPA must be given notice and oppor-  
tunity for a hearing with respect to such violation; and

WHEREAS under the regulations of the respective parties to this  
MOA (43 C.F.R. § 7.37 for DOI and 18 C.F.R. § 1312.15(g) for TVA), any  
person served with a notice of civil penalty assessment may file a  
written request for a hearing with the adjudicatory body specified in the  
notice, which hearings are to be held in accordance with the requirements  
of 5 U.S.C. § 554; and

WHEREAS Section 3(2) of ARPA, 16 U.S.C. § 470bb(2), authorizes the head of any agency to delegate to the Secretary of the Interior such agency head's responsibilities, in whole or in part, under ARPA; and

WHEREAS by this MOA, TVA desires to delegate to DOI the responsibility of providing a hearing for eligible persons requesting one under 18 C.F.R. § 1312.15(g); and

WHEREAS DOI possesses sufficient administrative law judges to preside at such hearings on behalf of TVA and is willing to consent to the proposed delegation; and

WHEREAS the parties desire to enter into this MOA solely for the purpose of providing for the use by TVA of DOI's administrative law judges in the event that a person served by TVA with a notice of civil penalty assessment files a written request for a hearing; and

WHEREAS by this MOA, the parties desire to define their respective responsibilities in making the delegation and conducting the hearings;

NOW, THEREFORE, in consideration of the foregoing premises and of the mutual covenants hereinafter contained, the parties hereto agree as follows:

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1. TVA hereby delegates to the Secretary of the Interior, subject to the terms and conditions contained herein, the authority to conduct administrative hearings, whenever requested by persons who have been assessed a civil penalty by TVA and who are eligible to request such a hearing, and to issue decisions in such hearings, as provided for in 18 C.F.R. § 1312.15(g) and 43 C.F.R. § 7.15(g).

2. The administrative hearings shall be conducted in accordance with DOI's regulations at 43 C.F.R. § 7.37, with DOI's administrative law judges presiding.

3. DOI shall notify TVA in writing when a request for an administrative hearing of a TVA notice of assessment has been made within ten (10) days after receipt of such request.

4. Notwithstanding the provisions of 43 C.F.R. § 7.37(d)(2), TVA's Office of the General Counsel shall represent TVA in all administrative hearing proceedings, and service upon TVA shall be made to the General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1499.

5. TVA shall reimburse the Office of Hearings and Appeals in DOI for the total cost of each hearing conducted for TVA hereunder. The terms for such reimbursement shall be established by means of a reimbursable support agreement between TVA and DOI in accordance with 31 U.S.C. § 1535.

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6. All civil penalties assessed by TVA shall be paid only to TVA and used by TVA in accordance with Section 26 of the Tennessee Valley Authority Act of 1933, as amended, 16 U.S.C. § 831y.

7. Nothing contained herein shall affect the authority of TVA to, in its sole discretion, remit or mitigate civil penalties or otherwise resolve or settle appeals prior to the final decision of the administrative law judge. All decisions of the administrative law judge issued in hearings held hereunder shall be considered the decision of TVA.

8. In all matters related to the administration of this MOA, the Vice President, River Basin Operations, 601 West Summit Hill Drive, OCH 1E 61E-K, Knoxville, Tennessee 37902, shall act for TVA and the Chief Administrative Law Judge, United States Department of the Interior, Office of Hearings and Appeals, Hearings Division, 4015 Wilson Boulevard, Arlington, Virginia 22203, shall act for DOI. All written notices required to be sent hereunder shall be sent to the representatives of the parties at the addresses listed in this section.

9. This MOA shall remain in effect until terminated by either party upon thirty (30) days' written notice to the other.

10. Notwithstanding the termination of this MOA as provided in section 9 herein, DOI shall continue to provide for administrative hearings in all cases where a request for hearing was made prior to the termination date, unless otherwise agreed by the parties.

11. Nothing contained herein is a waiver by TVA of any defenses that it may have with respect to any claim or in any proceeding arising out of or in any way connected with any decision issued by any administrative law judge on behalf of TVA pursuant to this MOA. Without limitation by reason of specification, nothing contained herein is, or shall be presumed or construed to be, a submission by TVA or by the United States to subject matter or personal jurisdiction with respect to any proceeding under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, brought against TVA or the United States on account of any claim arising from the activities of TVA. 28 U.S.C. § 2680(1).

IN WITNESS WHEREOF, the parties hereto have caused this MOA to be executed by their duly authorized representatives as of the day and year first written above.

UNITED STATES DEPARTMENT OF THE INTERIOR

By *[Signature]*  
 Secretary

TENNESSEE VALLEY AUTHORITY

By *[Signature]*  
 Executive Vice President and Chief Operating Officer

*[Handwritten]*  
 OGC

Approved by TVA Board of Directors  FEB 22 1990 <i>SWK</i> ASSISTANT SECRETARY
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**NOTICE OF VIOLATION  
ARCHAEOLOGICAL RESOURCES PROTECTION ACT (ARPA)  
TENNESSEE VALLEY AUTHORITY**

NOV No. \_\_\_\_\_

NAME		ID #	BOAT OR VEHICLE ID #		DATE
HOME ADDRESS			CITY	STATE / ZIP	
BUSINESS ADDRESS			CITY	STATE / ZIP	
HOME PHONE (Include Area Code)	BUSINESS PHONE (Include Area Code)	D.O.B.	AGE	SEX	RACE
The following facts are believed to show that you have committed a violation of TVA's regulations implementing ARPA, 18 C.F.R. part 1312:					
_____					
_____					
_____					
This conduct constitutes a violation of 18 C.F.R. § 1312.4, which prohibits excavating, removing, damaging, or otherwise altering or defacing any archaeological resource located on public lands without a permit or selling, purchasing, exchanging, transporting, or receiving any archaeological resource that has been excavated or removed from public lands without a permit. Notice of a proposed civil penalty amount will be served by TVA after the damages associated with the alleged violation have been ascertained. You have the right to file a petition for relief pursuant to 18 C.F.R. § 1312.15(d), or to await TVA's notice of assessment, and to request a hearing in accordance with 18 C.F.R. § 1312.15(g). You also have the right to seek judicial review of any final administrative decision assessing a civil penalty. In addition to civil penalties, you may be subject to criminal prosecution.					
_____			_____		
Name			Title		
I hereby sign this notice with the understanding that my signature is not an admission of guilt or liability, but only to certify that I received a copy of this notice.					
Signed _____		Date _____			
Recipient					
Inquires regarding this notice of violation may be addressed to Tennessee Valley Authority by calling toll free 1-800-824-3661. See reverse side of this form for additional information.					
Distribution of copies: 1. Recipient 2. Issuing Officer 3. PSS Supervisor/Case File 4. Cultural Resources					

TVA 30534 (RD-RBO 3-83)

TOTAL P.03

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## NOTICE OF VIOLATION

### 18 C.F.R. § 1312 - PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

#### § 1312.4 Prohibited acts

- (a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under § 1312.8 or exempted by § 1312.5 (b) of this part.
- (b) No person may sell, purchase, exchange, transport, or receive any archaeological resource, if such resource was excavated or removed in violation of:
  - (1) The prohibitions contained in paragraph (a) of this section; or
  - (2) Any provision, rule, regulation, ordinance, or permit in effect under any other provision of federal law.

#### § 1312.15 Assessment of Civil Penalties

- (c) The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:
  - (1) Seek informal discussions with the federal land manager;
  - (2) File a petition for relief in accordance with paragraph (d) of this section;
  - (3) Take no action and await the federal land manager's notice of assessment;
  - (4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.
- (d) Petition for Relief:

The person served with a notice of violation may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the federal land manager within 45 days of the date of service of the notice of violation (or of a proposed penalty amount, if later). The petition shall be in writing and signed by the person served with the notice of violation. If the person is a corporation, the petition must be signed by an officer authorized to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.
- (g) Hearings:
  - (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c) (4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing, a copy of the notice of assessment, personally or by registered or certified mail (return receipt requested).
  - (2) Failure to deliver a written request for a hearing within 45 calendar days of the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.
  - (3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. § 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the federal land manager under paragraph (f) of this section or any offer of mitigation or remission made by the federal land manager.

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# ARCHEOLOGY

## definition

The SCIENTIFIC RECONSTRUCTION of PAST HUMAN BEHAVIOR from MATERIAL REMAINS and their CONTEXT.

## key terms

1. RECONSTRUCTION - "study"

2. PAST -

Two periods of study -

prehistoric: 40,000/20,000 B.C. - 1500 A.D.

historic: 1500 A.D. - 1890/1940 A.D.

3. HUMAN BEHAVIOR -

Shared group behavior necessary for the survival of humans in their environment (CULTURE).

4. MATERIAL REMAINS -

**Site:** A place which has physical evidence of shared group behavior; purposeful behavior rather than accidental.

**Artifact:** Any material object made or altered by humans.

**Feature:** A non-portable artifact.

**Specimen:** A non-artifactual, material object which provides evidence relevant to the study of past human behavior.

# ARCHEOLOGY

definition cont.

## 5. CONTEXT -

The spatial arrangement, either horizontally or vertically, of sites, artifacts, features, and specimens.

Context is extremely important because most past human behavior is reflected not by material objects themselves, but by how they are situated in relation to one another.

**Horizontal Context:** The arrangement of objects on one surface or plane.

**Vertical Context:** The arrangement of objects in buried surfaces superimposed in layers one over another (stratigraphy).

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**ARCHAEOLOGICAL RESOURCES  
AS LISTED IN THE UNIFORM RULES AND REGULATIONS FOR THE  
ARCHAEOLOGICAL RESOURCES PROTECTION ACT  
(must be more than 100 year old)**

1. Surface or subsurface structures, shelter, facilities, or features, including but not limited to:

domestic structures	storage structures	cooking structures
ceremonial structures	artificial mounds	earthworks
fortifications	canals	reservoirs
gardens or fields	bedrock mortars	grinding surfaces
rock alignments	cairns	trails
borrow pits	cooking pits	refuse pits
burial pits/graves	hearths	kilns
post molds	trenches	middens

2. Surface or subsurface artifact concentrations or scatters.

3. Whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments, including but not limited to:

pottery	other ceramics	cordage
basketry	other weaving	bottles
other glassware	bone	ivory
shell	metal	wood
hide	feathers	pigments
flaked stone	ground stone	pecked stone

4. By-products, waste products, or debris resulting from manufacture or use of human-made or natural materials

5. Organic waste, including but not limited to:

vegetal remains	animal remains	coprolites
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6. Human remains, including, but not limited to:

bone  
burials

teeth  
cremations

mummified flesh

7. Rock carvings rock paintings, intaglios and other work of artistic or symbolic representation.

8. Rockshelters and caves or portions thereof containing any of the above material remains.

9. All portions of shipwrecks including but not limited to:

armaments  
cargo

apparel

tackle

10. Any portion or piece of any of the foregoing.

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**FOR OFFICIAL USE ONLY**

Date Received: \_\_\_\_\_  
Sent for Review: \_\_\_\_\_  
Control No.: \_\_\_\_\_

DI Form 1926 (June 1988)  
OMB No. 1024-0037  
Approved through 10/31/01

**UNITED STATES DEPARTMENT OF THE INTERIOR**

**APPLICATION for a FEDERAL PERMIT under  
THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT**

approved October 31, 1979

(P.L. 96-95; 93 Stat. 721; 16 U.S.C. 470aa-mm; 43 CFR 7)

or

**THE ANTIQUITIES ACT**

approved June 8, 1906

(P.L. 59-209; 34 Stat. 225; 16 U.S.C. 431-433; 43 CFR 3)

**Instructions: Complete and return two copies of this application form and attachments to each state or regional office of the land managing agencies involved. All information requested must be completed before the application will be considered. Use separate sheets of paper if more space is needed to complete a section.**

1. Name of Institution:

2. Address: (include zip code, phone number, email)

3. Type of permit requested: (check appropriate box)

a. Surveys, limited testing and/or limited collections on lands identified in No. 4.

b. Excavation, collection and intensive study of specific sites described below in No. 4.

4. Lands of the United States for which a permit is requested:

a. Description: Specify State and land managing agency(ies) including regions or districts. If on surveyed lands, descriptions must be by subdivisions of the Public Land Surveys. If on unsurveyed lands, description must be by metes and bounds with ties to some topographic feature.

b. Attach a readable copy of a map or plan showing specific sites or areas for which permit is desired.

5. Nature and extent of the work proposed, including how and why it is proposed to be conducted: (include research design, methods, curation)

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6. Name, address and institutional affiliation, if any, of persons in "a" and "b" below:

- a. Individual(s) proposed to be responsible for conducting the work (i.e., in direct charge of field work): Include evidence of qualifications (vitae) in accordance with Section 7.8 of the Final Uniform Regulation (43 CFR 7).
  
- b. Individual(s) proposed to be responsible for carrying out the terms and conditions of the permit (i.e., in general charge):

---

7. Proposed date project will begin:

8. Proposed date project will be completed:

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9. University, museum or other scientific or educational institution in which the applicant proposes to store all collections and copies of records, data, photographs and other documents derived from the proposed work: (The application must include a written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility, and to safeguard and preserve these materials as property of the United States or, in the case of an application on Indian lands, in the event the Indian owners do not wish to take custody.)

---

10. Proposed outlet for public written dissemination of the results:

---

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

---

12. Signature of individual in general charge:

13. Date of application:

---

**Paperwork Reduction Act Statement**

This information is being collected to conduct archeological studies on lands under the jurisdiction of the Department of the Interior. This information will be used to ensure that the proposed studies meet statutory and regulatory requirements. Response to this request is

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required to obtain a benefit. The public reporting burden for this form is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data, and completing and reviewing the form. Direct comments regarding the burden estimate or any other aspect of this form to the Information Collection Clearance Officer, National Park Service, 1849 C Street N.W., Room 3317, Washington, D.C. 20240 and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

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Please use this number  
when referring to this permit  
No.: \_\_\_\_\_

DI Form 1991 (Sept. 1992)  
OMB No. 1024-0037  
Approved through 10/31/2001

## UNITED STATES DEPARTMENT OF THE INTERIOR

### FEDERAL ARCHEOLOGICAL PERMIT

To conduct work upon public and Indian lands owned, controlled or held in trust by the Department of the Interior under:

- The Archaeological Resources Protection Act of 1979 (P.L. 96-95; 93 Stat. 721, 16 U.S.C. 470aa-mm) and its regulations (43 CFR 7).  
 The Antiquities Act of 1906 (P.L. 59-209; 34 Stat. 225, 16 U.S.C. 431-433) and its regulations (43 CFR 3).

1. Permit issued to:

2. Under application dated:

3. Name, address and official status of person:

a. In general charge:

b. In direct charge:

4. Activity authorized:

5. On lands described as follows:

Control No.

6. For period:

to

7. University, museum or other scientific or educational institution in which the materials collected under this permit will be deposited for permanent preservation: (A copy of a current, valid curation agreement must be kept on file with the land managing agency (es)).

8. Special conditions: This permit, as checked above, is subject to the provisions of the Archaeological Resources Protection Act of 1979, and its regulations (43 CFR 7), or the Antiquities Act of 1906, its regulations (43 CFR 3), and interdepartmental regulations (25 CFR 261) as to Indian lands. All permits are subject to the provisions of the Native American Graves Protection and Repatriation Act of 1990, the regulations for the curation of Federally-owned and administered archeological collections (36 CFR 79), and the special conditions as listed on the reverse side.

9. Preliminary report: Within approximately 6 weeks of the conclusion of field work, a preliminary report of work performed under this permit, illustrated with representative photographs and listing new and significant collected materials, should be furnished to:

10. Signature and title of approving official:

11. Date

#### Paperwork: Reduction Act Statement

This information is being collected to report on the results of archeological studies conducted on lands under the jurisdiction of the Department of the Interior. This information will be used to ensure that the work was conducted in accordance with statutory and regulatory requirements and any terms and conditions stipulated in the permit. Response to this request is required to obtain a benefit. The public reporting burden for the preliminary and final reports is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data, and completing and reviewing the reports. Direct comments regarding the burden estimate or any other aspect of this form to the Information Collection Clearance Officer, National Park Service, 1849 C Street N.W., Room 3317, Washington, D.C. 20240 and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

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8. (CONTINUED) Special conditions are checked (X) as appropriate to this permit:

- a.  This permit shall **not** be exclusive in character, and there is hereby reserved unto the landowners the right to use, lease or permit the use of said land or any part thereof for any purpose.
- b.  Other institutions **may** be engaged in archeological research in the general area covered by this permit. In case there should be conflict with respect to a site not specifically designated in a permit, the parties concerned shall reach agreement between themselves as to **which** shall work the site.
- c.  The Department of the Interior, including its bureaus and employees and the landowners and their grantees, shall be held blameless for any and all events, deeds or mishaps, regardless of whether or not they arise from operations under this permit.
- d.  Such guidance and protection as is consistent with duties of the Department of the Interior official in charge of the area will be afforded the permit holder and his party.
- e.  Transportation in Department of the Interior vehicles cannot be furnished, except in cases where no extra expense to the Department is involved.
- f.  All costs shall be borne by the permittee.
- g.  Excavation or removal of any Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony must be preceded by consultation with or, in the case of tribal lands, consent of the appropriate Indian tribe or Native Hawaiian organization. Consultation should be conducted with the lineal descendants, tribal land owners, Native American representatives, and traditional religious leaders of all Indian tribes and Native Hawaiian organizations that can reasonably be assumed to be culturally associated with the cultural items or, if the cultural affiliation of the objects cannot be reasonably ascertained, from whose judicially established aboriginal lands the cultural items originated.
- h.  All excavated areas shall be restored by filling in the excavations and otherwise leaving the area in as near to original condition as is practicable.
- i.  The permittee shall conduct all operations in such a manner as to prevent the erosion of the land, pollution of the water resources, and damage to the watershed, and to do all things necessary to prevent or reduce to the fullest extent the scarring of the lands.
- j.  Any findings of mined or processed metals or other treasure or treasure trove in the area covered by this permit are the exclusive property of the landowners, and shall not be disturbed or removed from the site without specific written permission from the Department of the Interior.
- k.  Two copies of the final report, a completed NTIS report documentation form (optional form 272), and required information for listing in the National Archeological Database (NADB-Reports) administered by the National Park Service will be submitted to the office issuing the permit:  
Procedures for submitting the required information for NADB listing are available from the issuing office.
- l.  Before undertaking any work on lands administered by the Bureau of Reclamation, clearance should be obtained from the official in charge of the area.
- m.  Before undertaking any work on lands administered by the National Park Service, clearance should be obtained from the superintendent in charge of the area.
- n.  Before undertaking any work on lands administered by the Bureau of Land Management, clearance should be obtained from the Office of the State Director and from the BLM District Officer in direct charge of the area concerned.
- o.  Before undertaking any work on lands administered by the Fish and Wildlife Service, clearance should be obtained from the Office of the Regional Director and from the Refuge Manager in charge at the appropriate Fish and Wildlife Refuge. Possession or use of firearms in such areas is prohibited.
- p.  Before undertaking any work on Indian tribal lands or on individually owned trust or restricted Indian lands, clearance should be obtained from the Bureau of Indian Affairs official having immediate jurisdiction over the property.
- q.  Other special conditions continued on attached sheet(s).

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A3821(2275)

**FEB 22 1999**

Steven P. Quarles  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2595

Dear Mr. Quarles:

Your permit appeal document, "Statement of Reasons in Support of the Application of Professors James E. Starrs and William M. Bass III," has been reviewed for its adequacy pursuant to Section 4 (b)(1)-(4) of the Archaeological Resources Protection Act of 1979 as amended (ARPA) and its implementing regulations 43 CFR part 7, *Protection of Archaeological Resources*. The document contained sufficient information about the proposed project for a careful and thorough review. Based on this review I have decided to support the decision of the Regional Director, Southeast Region to deny the permit application.

There are four grounds for this decision: (1) review of the application found that the applicants lack the qualifications to carry out the proposed work; (2) the proposed work does not address a research question sufficiently important to merit the disturbance of Lewis' grave and monument; (3) the application does not adequately provide for the methodological and technical approach that would be necessary to further archeological knowledge and to care for artifacts and other remains that may be encountered; and (4) the application is counter to the National Park Service (NPS) management plan for the park and overall NPS management policy. The sections that follow describe these deficiencies in detail. These sections are organized according to the requirements of ARPA Section 4 (b)(1)-(4) and its implementing regulations 43 CFR part 7.8.

**1. "The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets...minimum qualifications" (43 CFR part 7.8 (a)(1)).**

Professor Starrs is the primary applicant for the permit and is in general charge of the proposed project. As such, he is responsible for carrying out the terms and conditions of the permit. One of the conditions of the permit is that the applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competency in archeology.

Based on Professor Starrs' vita, his experience in conducting this type of work does not demonstrate the ability to carry research to completion, as evidenced by his failure to complete final reports describing his past projects' methods, techniques, results, and interpretations in a timely manner. Professor Starrs was project director on four previous investigations of the gravesites of Alfred Packer, Carl Weiss, Frank Olson, and Jesse James, but apparently final reports for these projects were never completed. Final reports for these projects are not listed in any of the documents supplied for this appeal. Although these projects have been discussed by Professor Starrs in lectures and written about in articles, these outlets for disseminating information do not substitute for the detailed description, analysis, and interpretation of results contained in a typical final report. A final report is required under ARPA's implementing regulations 43 CFR part 7.8 (a)(7). A final report is standard practice for archeological research, as described in Director's Order No. 28, NPS Cultural Resource Management Guideline (Release No. 5, 1997) and in The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (1983).

Additionally, Professor Starrs has no education, training or experience in archeology to carry out other phases of the proposed project not involving fieldwork. Although Dr. Bass is listed as the qualified archeologist in direct charge of fieldwork, his role in other phases of the proposed project that require education, training and experience in archeology is not defined in the application. For these reasons, Professor Starrs does not meet the minimum qualifications to carry out the proposed activity.

**2. "The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest..." (43 CFR part 7.8 (a)(2)).**

The stated primary purpose of the proposed project is "to conduct scientific analyses to determine, if possible, whether Governor Lewis' death in 1809 was a murder or suicide..." (p. 1). The archeological study of the Meriwether Lewis grave is not justified by the research significance of the murder or suicide debate. The manner of Lewis' death is not disputed by leading Lewis and Clark scholars. A forensic determination of the manner of Lewis' death, if achievable, would not affect his place in American history or bear in any other significant way on current historical scholarship. Five leading Lewis and Clark scholars, Mr. Stephen E. Ambrose, Professor John Logan Allen, Professor James P. Ronda, Professor Gary Moulton, and Mr. Dayton Duncan, were asked about these matters. They responded unanimously that there is no disagreement among leading Lewis and Clark scholars that Lewis committed suicide. They further commented that a forensic determination of the cause of Lewis' death would have no effect on his standing in American history or on the history of western exploration, whatever its outcome. Copies of the letters from these scholars are attached.

NPS policy and guidelines provide for archeological research to support planning for and management of park cultural resources (NPS Cultural Resource Management Guideline, Release No. 5, 1997; The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation 1983). "Archeological research in the parks is done to support management, protection, understanding, and interpretation of archeological resources.

Archeological research typically involves defining theoretical orientation and methodological approaches, identifying and evaluating resources, describing field work, analyzing and synthesizing data recovered, professionally reporting and interpreting results, and conserving data, associated records, and materials..." (NPS Cultural Resource Management Guideline, Release No. 5, 1997:71). The proposed work does not use adequate methods and techniques to successfully conduct the research.

Our review of the proposed field methodology and techniques indicates that archeological data will not be adequately recovered or preserved by the proposed research. The application asserts that "in the course of the excavation all artifacts, coffin container and human remains will be individually catalogued and noted as to their in situ location according to the pre-established grid" (Exhibit A, p. 5). Yet, there is no description of how this individual recording will be done or how the grid system will be taken into account during the investigation.

The application calls for a backhoe trench to be dug on one side of the monument. The trench is to be dug mechanically, without any stratigraphic controls. This risks the destruction of any archeological deposits or remains in that area. Also, the trench may exceed six feet in depth without any provisions to stabilize the walls from collapse. This careless approach jeopardizes worker safety and will damage the in situ condition of any possible archeological resources.

From this trench, it is proposed that a tunnel will be dug under the monument to recover the remains. Tunneling under the monument seeking the casket and remains of Lewis is an inappropriate method and technique that is likely to destroy archeological evidence without adequate recovery and recording of remains. It is not recognized as an archeological practice. Typically archeological excavations are conducted horizontally with careful removal of soil and archeological deposits and meticulous recording. Although it is possible to conduct archeological excavation along a vertical face, extra care must be taken in the recording of stratigraphic relationships and the recording method must be adjusted so that horizontal locational information also is accurately recorded. This proposal contains no description of the field methods and techniques to be used beyond the reference to tunneling. I find, therefore, that the archeological methods of examination, removal, and recording proposed for this investigation are inappropriate.

Finally, the short-term care of fragile materials that are likely to be recovered from the grave-- such as wood, coffin hardware, and clothing-- is not described. The application states that "standard procedures in an archeological excavation for documenting and handling found items will be strictly adhered to" (Exhibit A, p. 6). No reference or source is provided that describes these procedures. There is no reference to special field conservation that would be needed if organic material, such as wood and cloth, were encountered in the excavation. Such remains require immediate conservation attention by expert conservators when removed from archeological context in order to ensure minimal deterioration. Organic remains can be expected if the coffin in which Lewis was re-interred following the nineteenth century exhumation of his remains was wooden. Likewise, there is no description of special treatment that would be necessary if metal artifacts, such as coffin hardware, were encountered. There is no indication that Professor Starrs' team includes an expert in field conservation or any conservator at all. The

general statement in the proposal that the archeological resources will be properly treated and cared for is not, considered against the paucity of detail in the remainder of the application, sufficiently credible to ensure that this will be so.

Another purpose of the proposed project, as stated in the appeal, is to confirm “whether, in fact, the remains of Governor Meriwether Lewis are located under the monument” (p. 2). NPS is unaware of a factual dispute regarding the identity of the remains or their location. In fact, the application states, “All our historical and on-site investigations strongly suggest that the remains of Meriwether Lewis, *lying under the monument* [emphasis added], will be adequate for our diverse scientific analysis” (Exhibit A, p. 3). Thus, an archeological study is not needed to confirm the identity and location of the remains.

The support from living relatives of Meriwether Lewis, letters from historical societies, the unanimous coroner’s verdict, and the support by three governors demonstrate some public interest in this proposal. However, considering all the above stated factors, we have concluded that the proposed project will not further archeological knowledge in the public interest.

**3. “The archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution” (ARPA Section 4(b)3; 43 CFR 7.8 (a)(6)–(7)).**

The application contains a letter from George Washington University certifying its willingness “to assume curatorial responsibility for all collections and copies of records, data, photographs and other documents derived from the proposed work and to safeguard and preserve these [materials] as property of the United States...” (Exhibit A, Paragraph 5 – N). The application further states that all artifacts will be returned to a custodian designated by NPS, and the human remains will be reburied.

The application does not describe the expertise or funding for conservation actions that would be needed to ensure the long term stability of organic artifacts or other remains recovered during the excavation prior to returning them to NPS. Further, the application does not certify that the above collections, remains, and records will be delivered to NPS not later than 90 days after the date the final report is submitted to NPS as required in 43 CFR 7.8 (a)(7). The artifacts and human remains, if excavated, would be the responsibility of NPS and would have to be returned to NPS. For these reasons the application fails to satisfy this requirement.

**4. “The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned” (43 CFR part 7.8 (a)(3)).**

The application asserts that the proposed project is not inconsistent with NPS Management Policies (1988), the Natchez Trace Management Plan (1987) (herein called the Plan), the reasons the Park was created, and that the approval of the application would not create a harmful

precedent.

NPS Management Policies (1988) provides overall guidance in the stewardship and treatment of cultural resources in park units. Park planning is required to establish the strategies for achieving cultural resource management objectives. The Plan is the document that provides for the realization of the park's purpose in consonance with applicable legislation, management policies, and management objectives.

NPS management policy for burial sites and cemeteries is that "historic and prehistoric burial areas, whether or not formally plotted and enclosed as cemeteries, will be identified and protected. They will not be disturbed or archeologically investigated unless threatened with destruction by park development, operational activities, or natural forces" NPS Management Policies (1988: Chapter 5:13). This policy applies to the burial area of the Meriwether Lewis grave. The burial area is not being threatened by park development, operational activities, or natural forces. There is no reason to disturb or investigate the burial area.

The application states that natural forces are threatening the grave and remains, and that this justifies the work they propose. This argument misinterprets NPS policy. Once artifacts, remains, and other materials enter the archeological record, they are subject to degradation caused by natural processes. This degradation varies in severity depending on local environmental conditions involving chemical, physical, and biological processes. NPS Management Policies (1988) does not intend to suggest that all archeological resources be investigated because natural processes threaten them over the long term. Rather, the term "natural forces", read in context, refers to catastrophic natural events, such as erosion, flood, and fire, that immediately threaten the destruction of in situ archeological resources. Since the grave is not threatened with destruction by catastrophic natural forces, no studies or activities were identified in the Plan to investigate it and NPS Management Policies (1988) do not require its excavation.

The application asserts that the proposed project is not inconsistent with the Plan, particularly the cultural resource management goals and the interpretive theme for the Meriwether Lewis site. The Plan identifies the following studies and activities needed to protect and preserve archeological resources: (1) archeological investigations to determine the presence or absence of subsurface remains; (2) repair of the monument; and (3) location and identification of gravesites to rehabilitate the pioneer cemetery. The Meriwether Lewis grave is already identified, so the subsurface remains referred to here are those that might be present in unsurveyed areas within the monument boundaries. The Plan also does not identify the archeological excavation of the Meriwether Lewis grave as a study or activity because to do so would be contrary to NPS Management Policies (1988).

The application notes that the proposed project provides an opportunity to inspect the monument's condition and to locate the burials in the pioneer cemetery. However, NPS conducted both activities in 1998 (the report on which is currently in preparation); thus, it would not provide these additional benefits.

The interpretive theme identified in the Plan is to provide an overview of the Lewis story in context of the Natchez Trace as a transportation corridor, where travel was primitive and sometimes dangerous. The death of Meriwether Lewis is part of his story, but the need “to resolve the mysterious death of Captain Lewis in 1809” (p. 23) is not an interpretive objective for the site. As stated earlier, his suicide is not disputed among leading Lewis and Clark scholars, and the question has no effect on his standing in American history.

The application asserts that the proposed research is not inconsistent with the purpose for which the park was created. The establishment proclamation for the Meriwether Lewis National Monument [43 Stat. 1986 (February 6, 1925)] states that the grave is of transcendent importance to the Nation because of the “faithful and effective services of Captain Meriwether Lewis as an officer of the United States Army; as the leader of the Lewis and Clark Expedition; and as Governor of the Louisiana Territory...” The proclamation emphasizes a much broader purpose focused on Lewis’ service to the Nation and not his death. The 1961 legislative mandate, incorporating the Meriwether Lewis National Monument into the Natchez Trace Parkway, directs the Secretary of the Interior to “provide appropriate designations in accordance with the historic events which occurred [there]” (Pub. L. No. 87-131, 75 Stat. 335 (1961)). NPS agrees that one historic event which occurred there was the death of Meriwether Lewis. But the primary purpose of the proposed project, to determine if his death in 1809 was a murder or suicide, is not implied by the legislative purpose, which is to celebrate his lifetime accomplishments and to mark his final resting place.

Finally, the application states that “the approval will not create a harmful precedent because of the unique circumstances of the proposed project” (p. 26). To the contrary, if the proposed project was approved, it would, as explained above, violate NPS Management Policies (1988). Park planning dealing with the management of burial sites and cemeteries would be profoundly affected. Allowing the excavation of burials that are not being threatened by park development, operations, or natural forces and based on research questions that will not further archeological knowledge, could set a harmful precedent with reverberating effects throughout the Park System.

The application points out that NPS Management Policies (1988) for burial sites and cemeteries is flexible because disinterments of human remains were allowed in Blackburn Cemetery at Natchez Trace Parkway and at Little Bighorn Battlefield National Monument, where the historical significance outweighed policy prohibiting disturbance to burial sites or cemeteries. These limited occurrences, however, are different from the proposed research. The archeological project at Blackburn Cemetery was not initiated for purposes of archeological research, but was required to mitigate the impact of necessary road development. Similarly, the archeological project initiated at Little Bighorn Battlefield in 1983 was conducted to mitigate impacts to archeological sites and artifacts from threats created by a grass fire and to complete the baseline cultural resource inventory specified in the Park Resource Management Plan. In both cases, NPS Management Policies (1988) allowed for the investigations to mitigate impacts to archeological resources that would have been destroyed by modern development or natural forces.

For the reasons discussed above, your permit appeal document fails to satisfy Section 4 (b)(1) –

(4) of ARPA and its implementing regulations 43 CFR part 7, *Protection of Archaeological Resources*. My review constitutes the final decision. Further, because the proposed project does not satisfy Section 4 (b)(1) - (4), NPS is not required to issue the permit upon request of the Governors of Tennessee, Missouri and Virginia, as specified in Section 4 (j). I thank you for your interest in the Meriwether Lewis Monument.

Sincerely,



Robert Stanton  
Director

Enclosures (5)

cc. James E. Starrs, Professor of Law & Professor of Forensic Sciences  
William M. Bass III, Professor Emeritus and Director of the Forensic Anthropology Center



United States Department of the Interior

OFFICE OF THE SOLICITOR  
SOUTHEAST REGIONAL OFFICE

RECEIVED  
95 JAN 28 AM 10:57  
Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303  
CRIMINAL DIVISION

IN REPLY REFER TO:

JHH  
FWS.SE.0734  
93-1-0072  
LA-9

January 25, 1993

Ronald R. Brunson  
Assistant United States Attorney  
Northern District of Alabama  
1800 Fifth Avenue, North, Room 200  
Birmingham, Alabama 35203-2198

Dear Mr. Brunson:

The purpose of this letter is to follow up on a telephone call you had with John H. Harrington of this office on January 20 concerning the prosecution of arrowhead gatherers at Wheeler National Wildlife Refuge.

Two years ago your office dismissed violation notices written by a refuge law enforcement officer against persons caught with arrowheads taken from refuge lands. These dismissals left refuge personnel somewhat in doubt over their authority and the likelihood of successful prosecutions for arrowhead gathering. In order to reach a mutual understanding on these issues, I thought it might be appropriate to provide you with our views.

First, we interpret the Archaeological Resource Protection Act (ARPA), 16 U.S.C. § 470aa et seq. as prohibiting the collection of arrowheads from the surface of the ground. Arrowheads or, as they are also called, projectile points are included in the definition of "archaeological resource" protected by ARPA. Id. § 470bb(1). Section 6(a) provides that:

[n]o person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title....

Id. § 470ee(a) (emphasis added).

It is true that section 6(g) provides that the criminal penalties for violating this prohibition do not apply to arrowhead gathering. Id. § 470ee(g). Nor may arrowhead removal be the subject of a civil penalty under ARPA. Id. § 470ff(a)(3). However, the absence

of criminal and civil penalties for arrowhead gathering does not mean that ARPA condones or legitimizes this activity on the public lands. The legislative history is replete with examples demonstrating that Congress wished to protect arrowheads on the surface, but not penalize their removal. For example, Representative Udall stated:

[w]hile arrowheads located on the surface of the ground may be considered archaeological resources, and permits may be required to remove them, no civil or criminal penalty may be imposed under this act. Other Acts also regulate the removal of arrowheads. They are unchanged, and some have potential penalties.

125 Cong. Rec. H9088 (Daily ed. October 12, 1979).

The exclusion of arrowhead collecting from the penalty provisions of ARPA was not in the original bill but was added by amendment. Senator Bumpers' interpretation of this amendment is instructive:

[w]hile this amendment is acceptable to the sponsors of the legislation and the members of the committee, it should be noted that removing arrowheads is prohibited under the 1906 Antiquities Act...without an appropriate permit....Persons collecting arrowheads should be familiar with the guidelines of the various land managing agencies and the locations where such activity is permitted.

125 Cong. Rec. S14722 (Daily ed. October 17, 1979).

Thus, we have concluded: that ARPA does not legalize the collection and removal of arrowheads from a national wildlife refuge; that ARPA did not repeal the Antiquities Act by implication; that refuge regulations prohibiting the removal of arrowheads are not "preempted" by ARPA; and that it is incumbent upon the collector to familiarize himself with the refuge rules.

Second, the pertinent refuge regulation states:

[n]o person shall search for or remove from national wildlife refuges objects of antiquity except as may be authorized by 43 CFR part 3.

50 CFR 27.62 (emphasis added).

In discussing this provision, one author has been critical:

[l]ike other agency regulations in the Department of Interior, Fish and Wildlife Service provisions are deficient in that they refer to "objects of antiquity" without further elaboration, and are confusingly cross-

referenced to Title [43] section 3....[T]he novel language of section 27.62, prohibiting the search for antiquities, would never withstand judicial scrutiny.

Rogers, Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals 2 *Envtl. L. & Lit. Rev.* 47, 102-103 (1987) (footnotes omitted).

While the regulation certainly would benefit from a clarifying amendment, we are not so pessimistic as the quoted law journal author. Fear of prosecuting the theft of "objects of antiquity" arose from the decision of the Ninth Circuit in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). In this case, the Court found the Antiquities Act to be unconstitutionally vague because of its use of the term "objects of antiquity." That case was an attempt to prosecute an individual for theft of items only a few years old under the theory that they represented a cultural tradition of long standing. Under the facts of that case, it cannot be doubted that the Court was correct. When presented with reasonable facts, the Tenth Circuit enforced the Antiquities Act against persons who took objects 800-900 years old from ancient sites for commercial motives. See United States v. Smyer, 596 F.2d 939 (10th Cir. 1979). There is a troubling aspect of the Smyer case. In distinguishing the facts of the case from Diaz the Court noted that:

[w]e do not have a case of hobbyists exploring the desert for arrow heads.

596 F.2d at 941.

This is a reference to language in the Diaz case. While describing the vague nature of the Antiquities Act, the Court said:

[t]he 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.

499 F.2d at 114.

We do not view this loose language as fatal to a prosecution for violation of 50 CFR 27.62. The concern of the Diaz and Smyer Courts is quite understandable in the context of the West. There, public domain lands make up a considerable percentage of all lands. Historically, activities on the public lands of the West have been regulated, if at all, by the State. Hence, it is easy to understand the Courts' uneasiness with criminalizing an activity such as arrowhead collecting on the basis of the Antiquities Act. The context at Wheeler Refuge is far different. The lands are not open public domain lands. They are acquired lands for the special

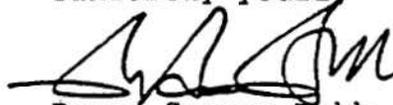
purpose of administering a wildlife refuge. One does not have the same expectations of laissez-faire government on a refuge, as one would have on the vast unpopulated lands of the West.

All this is not to say that the Antiquities Act should be enforced on Refuge lands. Rather, this discussion has attempted to show you that the use of the term "objects of antiquity" in the refuge regulation should not be viewed as an impediment to prosecution of arrowhead gatherers on the refuge.

Third, if the U.S. Attorney is unalterably opposed to prosecuting a violation of the Refuge regulations, we offer for your consideration other sections of the Federal criminal code that would serve as well. Theft of any thing of value belonging to the United States is prohibited in 18 U.S.C. § 641. If the value of the item is less than \$100, conviction is punishable by a fine of not more than \$1,000, by imprisonment for not more than one year, or both. Next, damage to property of the United States is likewise punished. Id. § 1361. The Ninth Circuit approves of prosecution under these statutes in lieu of prosecution under the Antiquities Act. See United States v. Jones, 607 F.2d 269 (9th Cir. 1979).

This office stands committed to assisting you in any way to assure the protection of valuable archaeological resources at Wheeler Refuge. If there is anything further we can do for you, please do not hesitate to call John H. Harrington at (404) 331-6342.

Sincerely yours



Roger Sumner Babb  
Regional Solicitor

cc:

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evaluation of each superintendent of a unit of the National Park System.

**SEC. 207. CONFIDENTIALITY OF INFORMATION.**

16 USC 5937.

Information concerning the nature and specific location of a National Park System resource which is endangered, threatened, rare, or commercially valuable, of mineral or paleontological objects within units of the National Park System, or of objects of cultural patrimony within units of the National Park System, may be withheld from the public in response to a request under section 552 of title 5, United States Code, unless the Secretary determines that—

(1) disclosure of the information would further the purposes of the unit of the National Park System in which the resource or object is located and would not create an unreasonable risk of harm, theft, or destruction of the resource or object, including individual organic or inorganic specimens; and

(2) disclosure is consistent with other applicable laws protecting the resource or object.