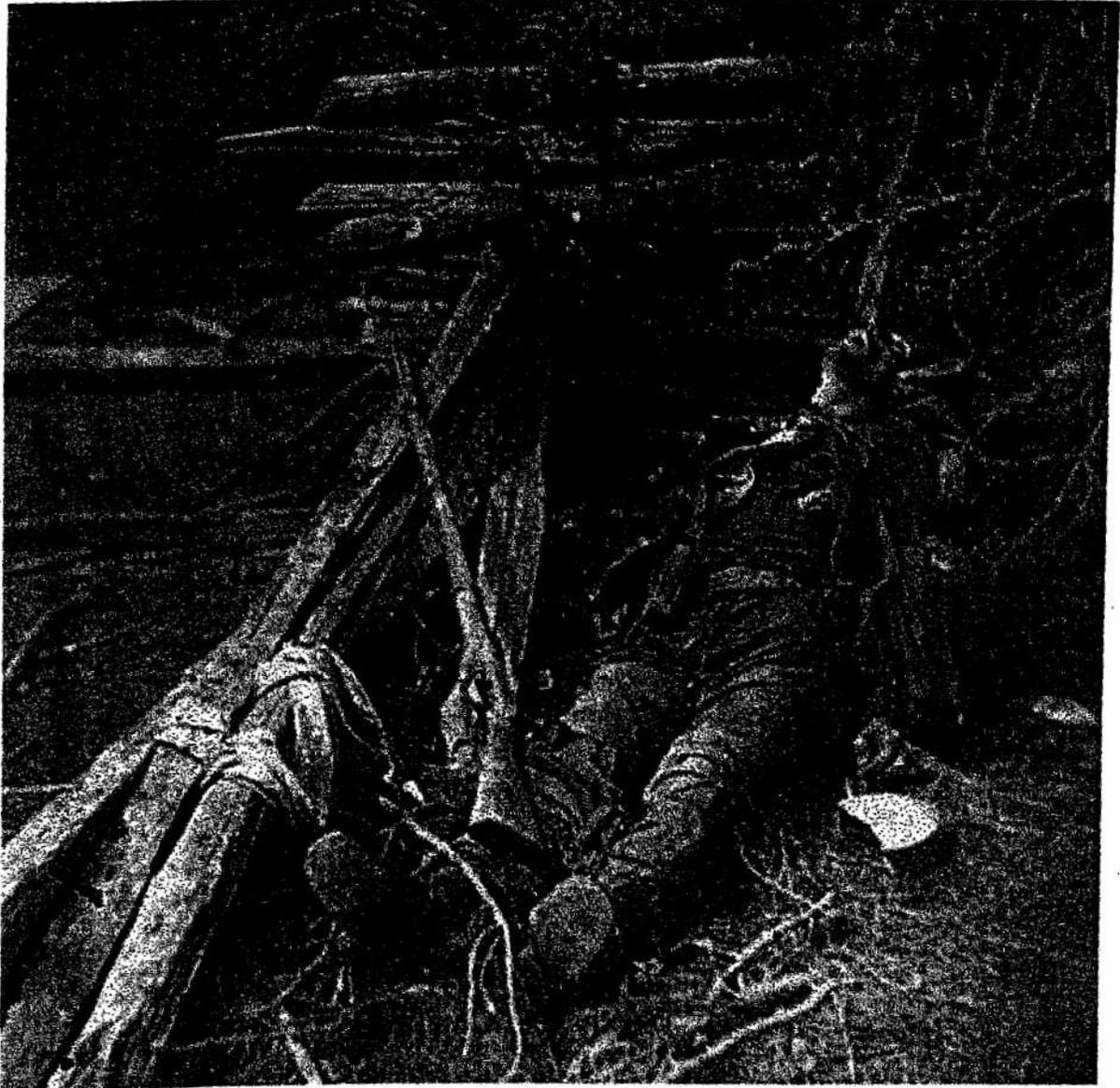


ASSESSMENTS OF DAMAGE TO  
ARCHEOLOGICAL RESOURCES AT  
FREDERICKSBURG AND SPOTSYLVANIA  
NATIONAL MILITARY PARK  
SPOTSYLVANIA COURT HOUSE UNIT  
SPOTSYLVANIA COURT HOUSE, VIRGINIA



Submitted to Fredericksburg and Spotsylvania  
National Military Park  
Criminal Incident Record #98-0138

000524

ASSESSMENTS OF DAMAGE TO  
ARCHEOLOGICAL RESOURCES AT  
FREDERICKSBURG AND SPOTSYLVANIA  
NATIONAL MILITARY PARK  
SPOTSYLVANIA COURT HOUSE UNIT  
SPOTSYLVANIA COURT HOUSE, VIRGINIA

By

John R. Wright  
Keith B. High  
Timothy G. Smith  
National Park Service  
Delaware Water Gap National Recreation Area  
Bushkill, Pennsylvania

and

Noel Harrison  
National Park Service  
Fredericksburg and Spotsylvania National Military Park  
Fredericksburg, Virginia

Submitted to Fredericksburg and Spotsylvania  
National Military Park  
Criminal Incident Record #98-0138

June 1998

000525

## EXECUTIVE SUMMARY

On Tuesday, May 19, 1998, at least 34 instances of unauthorized excavation and removal of archeological resources without a permit as required by the Archeological Resources Protection Act of 1979 (ARPA) as amended occurred in a portion of Fredericksburg and Spotsylvania National Military Park, Spotsylvania Court House Unit, Laurel Hill Area, Spotsylvania Court House, Spotsylvania County, Virginia. Approximately 1.6 acres (0.647 ha) of the battlefield were subjected to illegal metal detector prospecting. This led to the excavation of 11,490.703 cubic inches (6.6497 cu.ft.) of soil which cumulatively disturbed 2,804.32 square inches (19.476 sq.ft.) of the surface. Evidence seized from the two suspects in this incident contained 52 objects related to the Civil War period. The following values were determined as a result of this unauthorized activity.

Repair and Restoration	\$3206.36
Commercial Value of Artifacts	\$95.50
Archeological Value	\$8988.34

The felony threshold for ARPA violation is monetary damage in excess of five hundred (\$500.00) dollars. The monetary damage amount is determined by combining (1) the cost of repair and restoration and the commercial value of the resource, or (2) the cost of restoration and repair, and the archeological value of the resource. In example (1) this amount is \$3301.86, and in example (2) the amount is \$12,194.70. Both assessments exceed the felony threshold.

Cover: Photograph of Spotsylvania Court House, Va., vicinity. Near Mrs. Alsop's house. May, 1864: O'Sullivan, Timothy, Library of Congress, 1977, No. 0297.

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	1
TABLE OF CONTENTS .....	2
LIST OF FIGURES .....	3
LIST OF PLATES .....	3
LIST OF TABLES' .....	4
1.0 INTRODUCTION.....	5
2.0 AREA OF DAMAGE .....	10
3.0 METHODS OF ASSESSMENT .....	15
4.0 DAMAGE ASSESSMENT OF ARCHEOLOGICAL RESOURCES .....	23
4.1 Cost Of Repair And Restoration.....	23
4.2 Commercial Value.....	25
4.3 Archeological Value .....	26
4.3.2 Research Design .....	27
4.3.3 Implementing The Research Design.....	29
5.0 REFERENCES.....	32

## LIST OF FIGURES

Figure 1.	Locator Map, USDOL, NPS, DEWA GIS-Lab .....6	6
Figure 2.	Digital reproduction of portion of USGS 7.5' topographic series Spotsylvania Quadrangle, VA., 1966 (photorevised 1979), with FRSP GIS Data, showing area of unauthorized disturbance, May 1998.....7	7
Figure 3.	Digital reproduction of "Warren's second attack on Laurel Hill, on May 8, 1864, 10:30 a.m.", from Rhea (1997). .....8	8
Figure 4.	USDOL, NPS, FRSP GIS Data with GPS Control, Sign and Area of Impact locations. .... 14	14
Figure 5.	USDOL, NPS, DEWA GIS-Lab, Original Map indicating hole locations of unauthorized excavations at Fredericksburg and Spotsylvania National Military Park, May 1998, Hole Cluster 1.....17	17
Figure 6.	USDOL, NPS, DEWA GIS-Lab, Original Map indicating hole locations of unauthorized excavations at Fredericksburg and Spotsylvania National Military Park, May 1998, Hole Cluster 2.....18	18
Figure 7.	USDOL, NPS, DEWA GIS-Lab, Original Map indicating hole locations of unauthorized excavations at Fredericksburg and Spotsylvania National Military Park, May 1998, Hole Cluster 3.....19	19

## LIST OF PLATES

Plate 1.	Scanned photograph along Hancock Road, looking east of park entrance sign and location of suspect apprehension. ....11	11
Plate 2.	Scanned photograph along Brock Road, looking northwest of park entrance sign. ....12	12
Plate 3.	Scanned photograph along Brock Road, looking southeast of park entrance sign and exhibit shelter. ....13	13

**LIST OF TABLES**

Table 1. Illegal Metal Detector Prospecting Holes determined to have been recently excavated.....21

Table 2. Artifacts recovered during Damage Assessment Activity.....22

Table 3. Repair and Restoration Costs.....24

Table 4. Assessment and Evaluation Costs.....24

Table 5. Commercial Value of Artifacts recovered as evidence. ....25

Table 6. Archeological Value .....30

## 1.0 INTRODUCTION

On May 21, 1998, Dr. David Orr, Senior Archeologist and Chief of the Center for Cultural Resources, at Valley Forge National Historical Park, Northeast Field Area, was contacted by Mr. Michael Greenfield, Supervisory Park Ranger, Fredericksburg and Spotsylvania National Military Park (FRSP) concerning an Archeological Resources Protection Act (ARPA) violation within a portion of the Spotsylvania Court House Unit of the Fredericksburg and Spotsylvania National Military Park, Spotsylvania Court House, Spotsylvania County, Virginia (Figure 1). At approximately 1700 hours, May 21, John Wright, Archeologist at the Delaware Water Gap National Recreation Area (DEWA) was contacted by Dr. Orr concerning availability for performing an assessment of damage of the unauthorized excavation of suspected sites of illegal metal detector prospecting at FRSP. At approximately 0740 hours, May 23, 1998, Mr. Wright, Mr. Keith High, GIS Coordinator, and Mr. Tim Smith, GPS Coordinator, Delaware Water Gap National Recreation Area met with Supervisory Park Ranger Mike Greenfield at the Spotsylvania Exhibit Shelter, Spotsylvania Court House Unit of the Fredericksburg and Spotsylvania National Military Park, Virginia and proceeded to the crime scene after a brief discussion of the incident surrounding the unauthorized excavations which occurred on Tuesday, May 19, 1998.

Fredericksburg and Spotsylvania National Military Park was established by Congress to preserve for historical purposes the breastworks, earthworks, walls and other defenses and shelters used by the Union and Confederate armies during the battles at Fredericksburg, Chancellorsville, Wilderness and Spotsylvania Court House. A cursory search of the maps and files relating to the area of the unauthorized metal detector prospecting was undertaken before going to the site. This cursory search revealed that the area had been the site of a battle between Union and Confederate troops attempting to control the road intersection at Spotsylvania Court House, the shortest route to Richmond (Figure 2). The battle took place between May 8 and 21, 1864. No professional archeological investigations have been undertaken at this location. A review of the park permit files indicate that no authorization was granted, nor was an Archeological Resources Protection Act Permit on file for the excavations.

A visual inspection of the area of the illegal metal detector prospecting was conducted by Archeologist Wright, GIS Coordinator High, GPS Coordinator Smith, Supervisory Park Ranger Greenfield and Park Ranger Mike Duggan. Weather conditions during May 23 consisted of light rain, partly cloudy, and partly sunny sky with temperatures in the upper 60's to low 70's (degrees in F) with variable light winds. The site is located within a wooded area south of Hancock Road west of the intersection of Hancock Road and Brock Road, in the Laurel Hill area (Figure 3). Supervisory Park Ranger Greenfield and FRSP Park Rangers had marked the location of the detector holes with flagging tape and covered them with plastic. Photographs were taken and evidence was collected on Wednesday, May 20, 1998.

An area consisting of approximately 1.6 acres (0.647 ha) of land had been subjected to illegal metal detection prospecting within the boundary of the Spotsylvania Court House Unit, Laurel Hill area, of the Fredericksburg and Spotsylvania National Military Park, Virginia. On May 23, 1998, the area of the unauthorized excavations was assessed for damage. The following report

# Fredericksburg & Spotsylvania

National Military Park

Locator Map

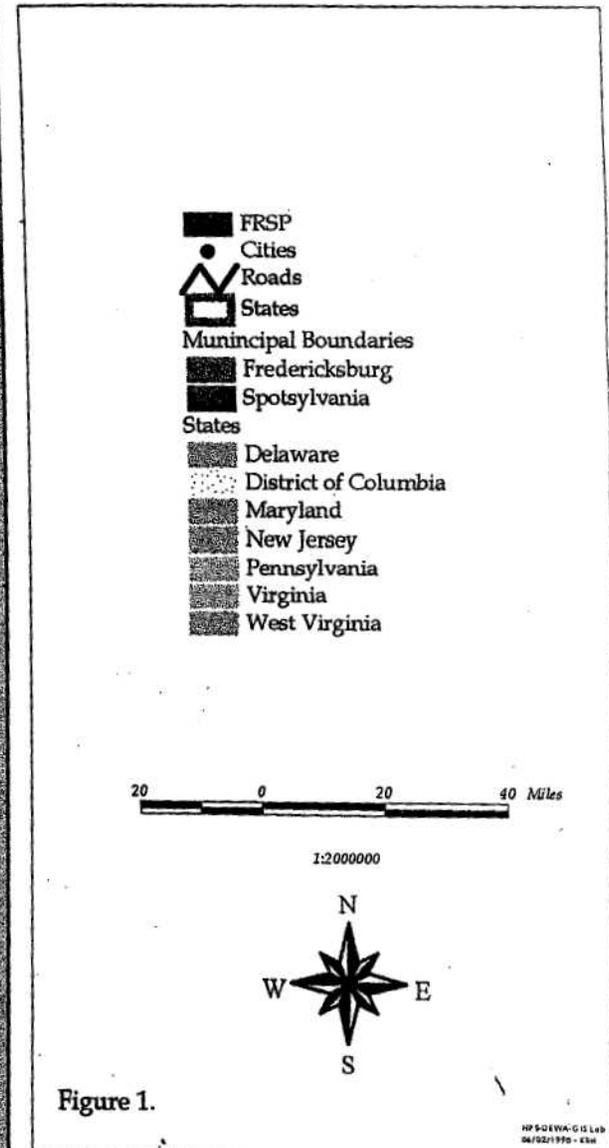
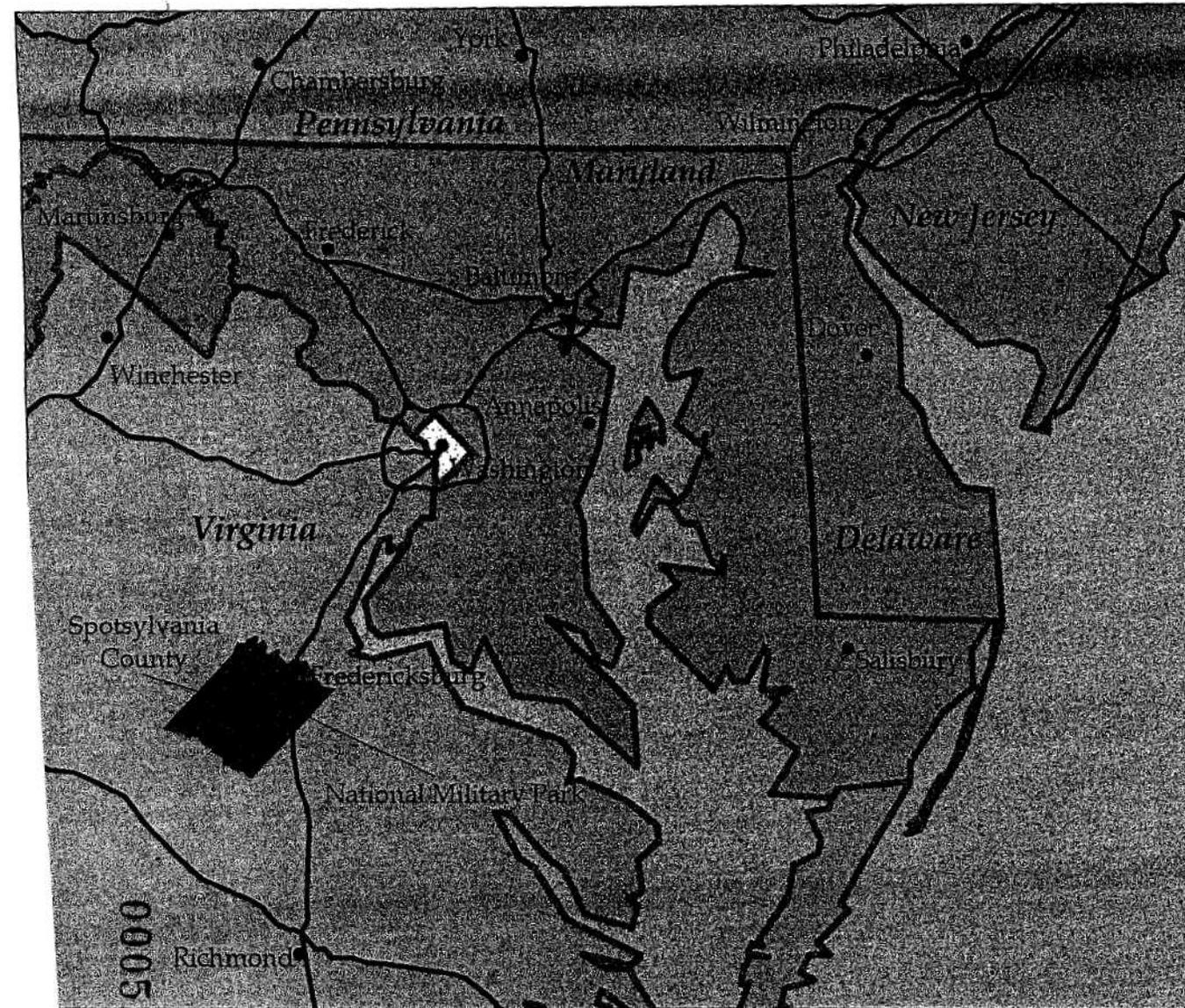
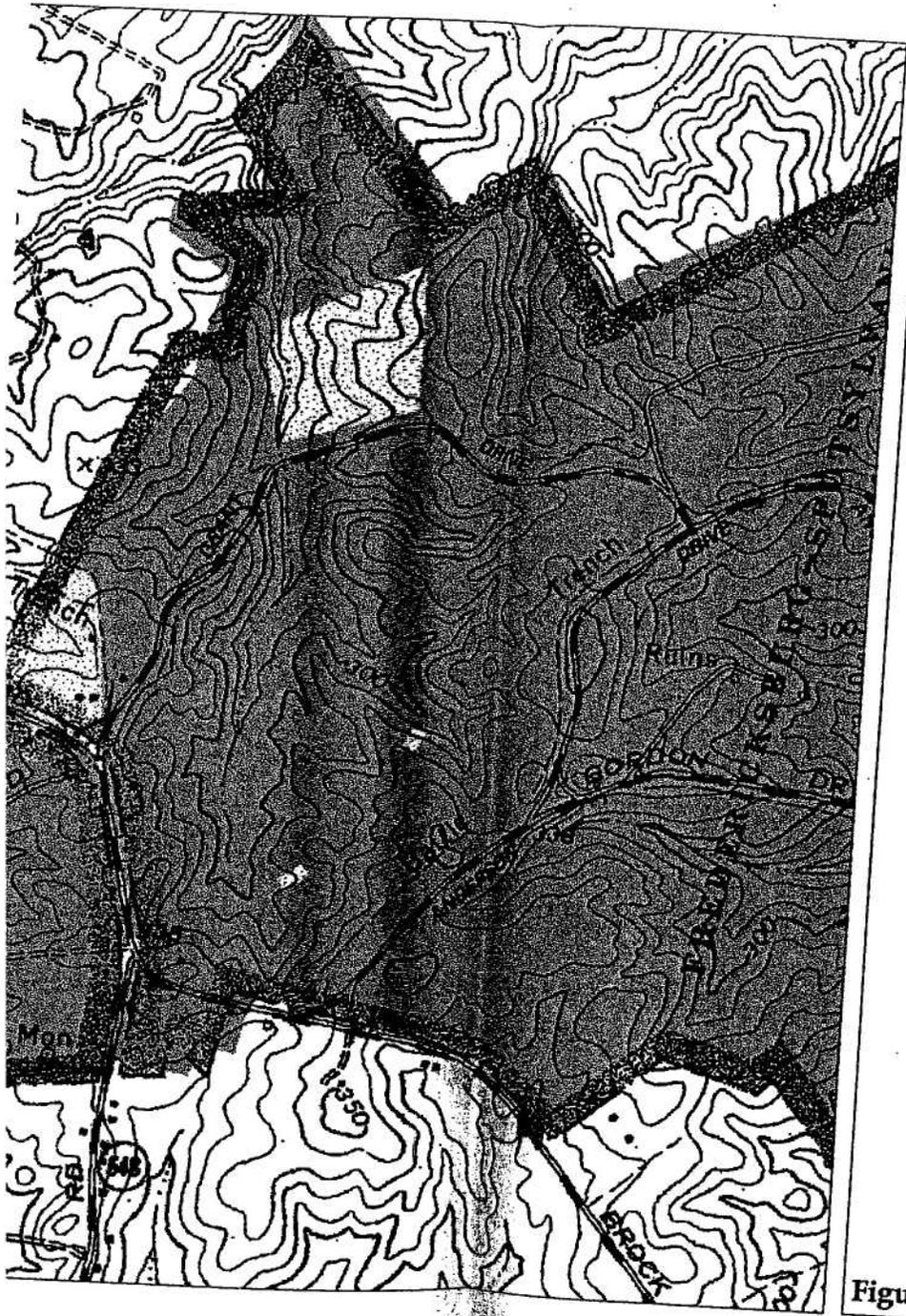


Figure 1.

NP-5021-100-0010  
04/02/1990 - EMB

000531



**Fredericksburg & Spotsylvania  
National Military Park**



**Unauthorized Disturbances  
May 1998**

**Legend**

-  Area of Disturbance
-  Park Entrance Signs
-  Point of Apprehension
-  Control - Datums
- Fredericksburg & Spotsylvania NMP**
-  Federal land
-  Easement land
-  non-Federal land

500 0 500 1000 1500 2000 Feet

100 0 100 200 300 400 500 Meters

1:15000



**Figure 2.**

NPS/OWA-CGL/66  
06/01/1998 - ESK

000532



outlines the monetary assessment of the unauthorized excavation. The archeological resource are older than 100 years and are of archeological interest. The unauthorized excavation damaged an archeological resource in violation of the Archeological Resources Protection Act of 1979, 16 USC 470 (ee), as amended. All field notes, photographs, and artifacts will be curated at the Fredericksburg and Spotsylvania National Military Park, Fredericksburg, Virginia.

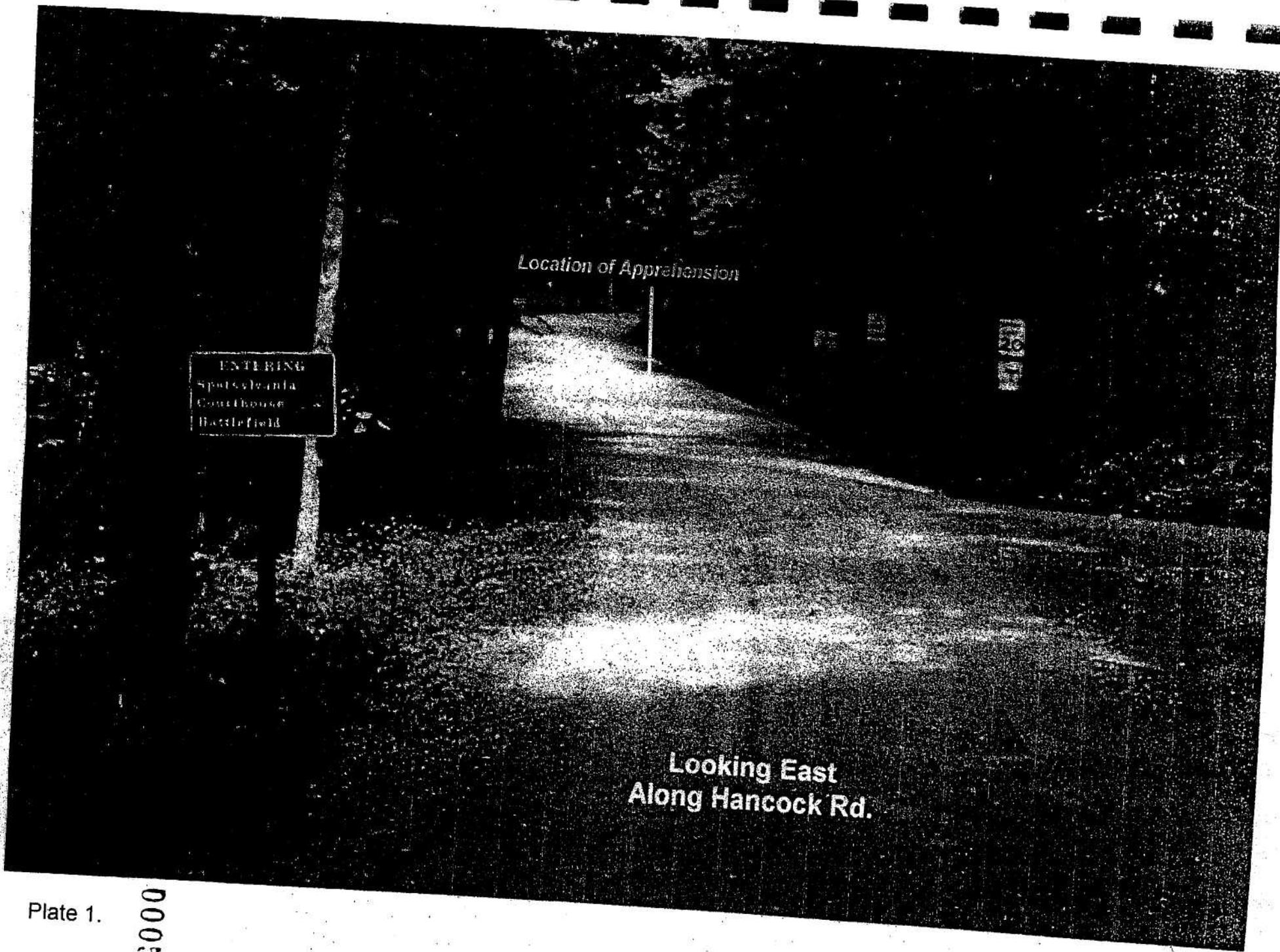
## 2.0 AREA OF DAMAGE

Fredericksburg and Spotsylvania National Military Park preserves, protects, and interprets elements of one of the most traumatic and definitive events in the history of the United States. The Spotsylvania Court House Unit commemorates the sacrifices made by those who fought and died during the engagement of the Union Army of the Potomac and the Confederate Army of Northern Virginia at the two week battle of Spotsylvania Court House, May 8 through 20, 1864. The battle, the second of the classic encounters between Generals Lee and Grant, took place in the cleared fields and woods just northwest of the small crossroads that gives the battle its name. The battlefield preserves significant elements of the battle for posterity and is significant as the place where people, significant in American history, lived, fought and died. The park unit is singularly important for the information it has already yielded or may yield in the future through archeological investigation (Steele 1997).

The unauthorized excavations occurred on United States Government owned land within the Fredericksburg and Spotsylvania National Military Park, Spotsylvania Court House Unit, Spotsylvania County, Virginia (Figure 2)[Plates 1, 2, and 3]. The Spotsylvania Court House Unit of the Fredericksburg and Spotsylvania National Military Park consists of approximately 1470 acres (594.90 ha.) of land.

**2.1 Laurel Hill Engagement:** The site of the recent metal detector prospecting is situated at the heart of the Laurel Hill Engagement of the Battle of Spotsylvania Court House on the site of the Spindle Farm (Figure 3). The Engagement was a series of charges made by Union troops on May 8, 10, and 12, 1864, events (trench warfare) which presaged dramatically the slaughter and futility of World War I. All of the attackers were repulsed during or after they swept across and on either side of the site of the unauthorized excavations, in southerly and southwesterly directions toward fortified Confederate positions and often through burning vegetation that brought horrible deaths to their wounded comrades. The May 8 and 10, 1864 attacks alone, cost the Northern army about 3,000 casualties. A veteran of the battle-hardened Union Iron Brigade termed several of the Laurel Hill assaults "the most terrible twenty-four hours of our service in the war". In attempting to describe the same events in a letter home, one of his comrades remarked, "Gettysburg is a skirmish compared to this fight". The Laurel Hill Engagement represented a landmark in American military history, a sustained demonstration to both sides that extensive fortifications alone could render militarily undistinguished terrain impregnable. Sizable portions of the Union army earmarked for participation in the attacks realized the futility of their mission and advanced only halfheartedly or refused outright to move.

**2.2 Spindle Farm:** The Spindle farmhouse was located approximately 500 ft. (152.4 m) south of the site of the recent illegal metal detector prospecting (Figure 4). No above ground remains of the Spindle Farmstead are present today. The Spindle Farmstead was built by 1854 and the farmhouse was burned to the ground on May 8, 1864, the first day of the Battle of Laurel Hill. The Spindle house was never rebuilt. The site of the farmstead is protected and interpreted by the National Park Service. In 1997, a professional archeological investigation was undertaken by the National Park Service in an attempt to locate subsurface remains of the farmhouse



Location of Apprehension

ENTERING  
Spotsylvania  
Courthouse  
Battlefield

Looking East  
Along Hancock Rd.

Plate 1.

00053

000537

Plate 2.

Looking Northwest  
Along Brock Rd

ENTRANCE  
Spotsylvania  
Courthouse  
Barricade

ENTRANCE

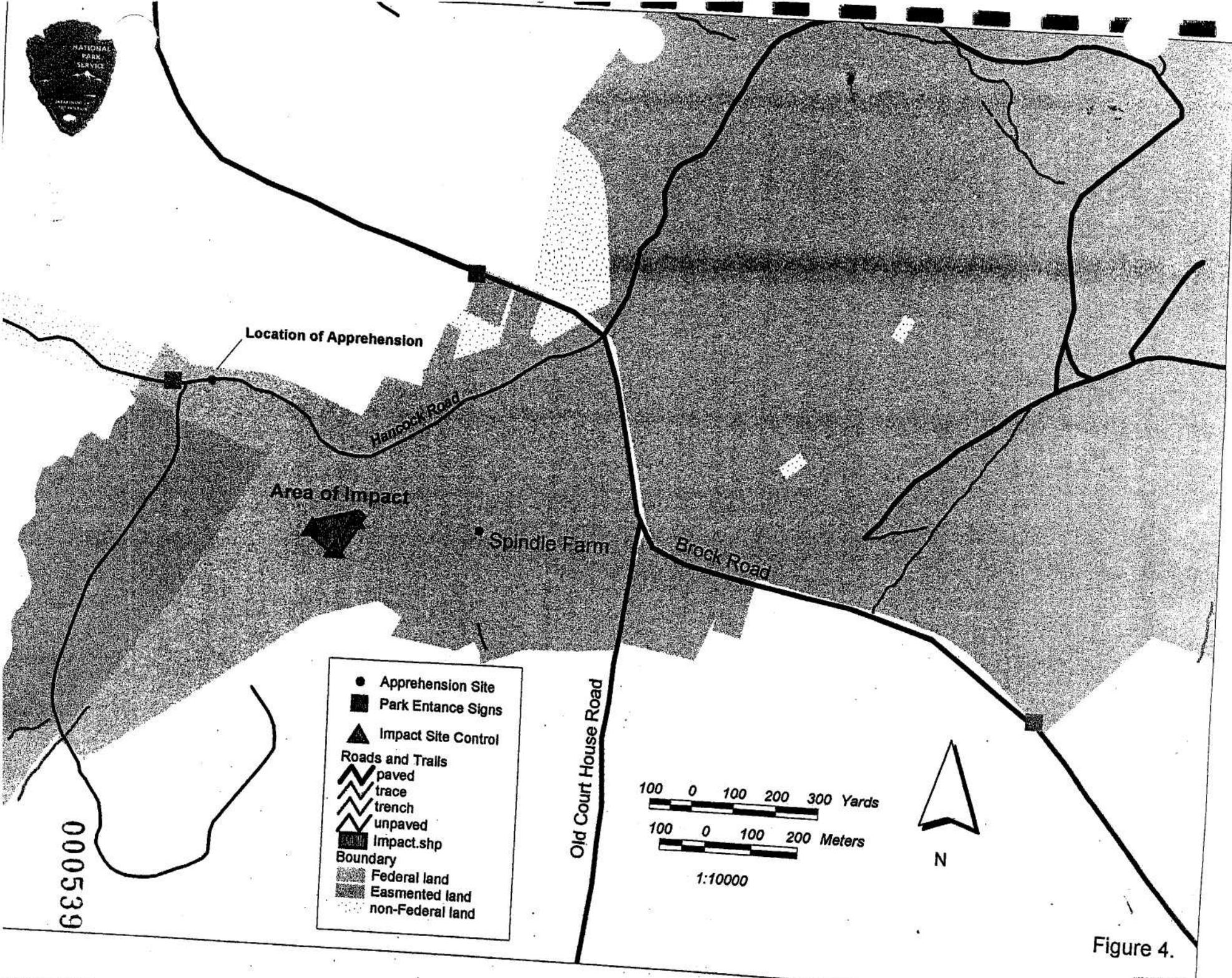
000538

Plate 3.

Looking Southeast  
Along Brock Rd.

ENTERING  
Spotsylvania  
Courthouse  
Battlefield  
← Exhibit Shelter





000539

- Apprehension Site
- Park Entrance Signs
- ▲ Impact Site Control
- Roads and Trails
  - ▬ paved
  - ▬ trace
  - ▬ trench
  - ▬ unpaved
- Impact.shp
- Boundary
  - ▨ Federal land
  - ▩ Easement land
  - non-Federal land

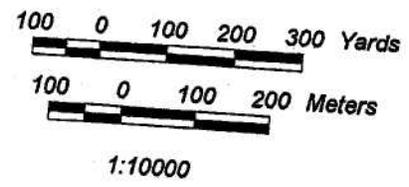


Figure 4.

(personal communication: Dr. Douglas Campana, Center for Cultural Resources, Valley Forge National Historical Park).

### 3.0 METHOD OF ASSESSMENT

The area consisting of the illegal metal detector prospecting holes is located within a wooded section, bordered to the north by Hancock Road, to the south by an unnamed secondary road, to the west by private land, and to the east by the Old Courthouse Road, in the Laurel Hill area (Rte. 648). The impacted area consists of three separate clusters of illegal metal detector prospecting holes. Cluster 1 contains 19 holes, Cluster 2 contains six (6), and Cluster 3, nine (9) (Figures 5, 6, and 7)(Table 1).

The impacted area was described by FRSP Ranger staff as three separate clusters. At each cluster a datum point was established by the placement of an orange pin flag, with its UTM (Universal Transverse Mercator) coordinate determined by GPS equipment (Trimble Pathfinder XL) to an accuracy of +/- 1 - 2 meters after post-processing of the original data. Individual unauthorized excavation hole locations were determined as the bearing (using a Suunto KB-14 sighting compass with a +/- 0.25 degree estimating error) and distance (using an open reel meter tape) from the datum to the estimated center of the hole. Initial bearings were recorded from magnetic north readings and later corrected to true north using a declination factor of 9 degrees 47 minutes west.

Each disturbance was re-excavated carefully by hand, the back-fill screened through 0.25 inch hardware mesh to recover any artifacts not collected or in the case of evidence, the evidence was photographed and collected pursuant to established evidence collection procedures. Any artifacts recovered from the excavation holes were placed in plastic ziplock bags labeled with the hole number, dimensions and depth, date of collection, the case incident number, and initials of the collector.

The grid location for each disturbance was noted in a log, along with the dimensions and depth, and a determination as to the age (either recent or existing) of the unauthorized excavation based on a determination of the back fill at each hole as to the amount of weathering occurred. During the re-excavation of the disturbance, if the fill in the hole was loose and not compacted, and the soil peds were complete and not weathered, and, if present, tool marks on the wall profiles were distinct and fresh, this information was used in the determination of the age of the excavation hole. Additionally, if tool marks on the walls of the illegal metal detector prospecting holes were distinct and clear, then a determination by Supervisory Park Ranger Greenfield as to whether a cast was to be made of the mark.

Elder et al (1985) indicates the soils in the areas of the unauthorized excavation holes consists of Abell, Appling-Wedowee, Cullen, and Cecil Soils belonging to the Appling-Louisburg-Wedowee Soils Association (Elder et al 1985:General Soils Map). The Appling-Louisburg-Wedowee Soils Association consists of deep to moderately deep, well drained soils with dominantly clayey or loamy subsoils on the Piedmont Uplands. A typical Abell Soil consists of

an A horizon 2 inches (5.08 cm) thick of a dark greyish-brown sandy loam over a 10 inch (25.4 cm) thick A<sub>2</sub> horizon consisting of a light pale-brown sandy loam. The subsoil consists of a B<sub>1</sub> and B<sub>2</sub> horizon consisting of brownish yellow and yellowish-brown sandy clay loam 50 inches (127 cm) thick with grey mottles below a depth of about 28 inches (71.12 cm).

22

23

24

Control 1



15

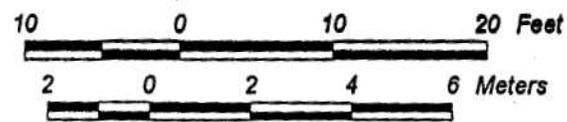
16



N

NAD-27,  
UTM Coords:  
4232504 N  
270523 E

Magnetic Declination :  
9d 47' W



1:150

1

12

11

2

13

14

10

7

9

6

4

5

3

8

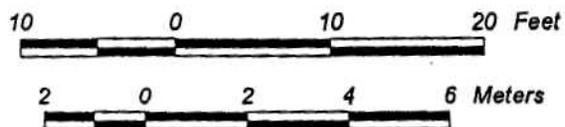
000542

Hole  
Cluster 1



N

Magnetic Declination :  
9d 47' W



1:150

**Control 2**



NAD-27,  
UTM Coords:  
4232550 N  
270474 E

21

18

20

19

17

25

000543

Hole  
Cluster 2

Figure 6.



N

Magnetic Declination :  
9d 47' W

10 0 10 20 Feet



2 0 2 4 6 Meters



1:200

NAD-27,  
UTM Coords:  
4232570 N  
270563 E

26

*Control 3*



27

29

28

30

31

32

33

34

000544

Hole  
Cluster 3

A typical Appling-Wedowee Soil consists of an A horizon 6 inches (15.24 cm) thick of a yellowish-brown or brownish-yellow sandy loam. The subsoil consists of a B horizon consisting of a strong brown and yellowish-red clay 27 to 38 inches (68.58 to 96.52 cm) thick. A typical Cullen Soil consists of an A horizon 6 inches (15.24 cm) thick of a reddish-brown loam. The subsoil consists of a B horizon consisting of a red clay 36 inches (91.44 cm) thick. A typical Cecil Soil consists of an A horizon 1 inch (2.54 cm) thick of a greyish-brown loam over a 7 inch (17.78 cm) thick A<sub>2</sub> horizon consisting of a yellowish brown loam. The subsoil consists of a B horizon consisting of a red clay and red clay loam 38 inches (96.52 cm) thick. The unauthorized excavation holes in Clusters 1 and 2 contained a similar soil profile as the soils of the Appling-Wedowee series, and in Cluster 3 were similar to the soil profile in the Cecil series (Elder et al 1985:Soils Sheet 22).

**Table 1. Illegal Metal Detector Prospecting Holes determined to have been recently excavated.**

Cluster/Hole	Length (in.)	Width (in.)	Radius (in.)	Area (lw)	Depth (in.)	Volume (lwd)
C-1/H-1	7.9	11.8		93.22	5.9	549.998
C-1/H-2	17.7	11		194.7	7.5	1460.25
C-1/H-3	11.4	5.5		62.7	4.7	294.69
C-1/H-4	11	10.2		112.2	4.1	460.02
C-1/H-5	9.4	9.4		88.36	3.9	344.604
C-1/H-6	8.7	7.5		65.25	2	130.5
C-1/H-7	9.1	7.1		64.61	3.1	200.291
C-1/H-8			1.75	3.06	1.2	11.55
C-1/H-9	7.1	5.9		41.89	0.8	33.512
C-1/H-10	3.1	3.5		10.85	1.9	20.615
C-1/H-11	2.8	3.1		8.68	0.6	5.208
C-1/H-12	15.7	10.2		160.14	5.1	816.714
C-1/H-13	9.8	6.7		65.66	3.7	242.942
C-1/H-14	11.8	10.6		125.08	0	0
C-1/H-15	13.4	11.8		158.12	6.1	964.532
C-1/H-16	10.2	8.7		88.74	5.7	505.818
C-1/H-22	5.1	4.7		23.97	2	47.94
C-1/H-23	14.2	7.2		102.24	3.7	378.288
C-1/H-24	9.4	8.3		78.02	4.3	335.486
Subtotal	177.8	143.2	1.75	1547.49	66.3	6802.958
C-2/H-17	9.4	9.1		85.54	3.7	316.498
C-2/H-18	9.4	7.1		66.74	4.1	273.634
C-2/H-19	10.6	11		116.6	3.3	384.78
C-2/H-20	11.4	8.7		99.18	2.4	238.032
C-2/H-21	10.2	9.1		92.82	3.3	306.306
C-2/H-25	12.2	10.6		129.32	3.1	400.892
Subtotal	63.2	55.6		590.2	19.9	1920.142
C-3/H-26	11.4	9.4		107.16	3.9	417.924
C-3/H-27	8.3	6.7		55.61	2.2	122.342
C-3/H-28	9.7	7.5		72.75	3.5	254.625
C-3/H-29	6.3	3.9		24.57	1.8	44.226
C-3/H-30	11	8.3		91.3	7.1	648.23
C-3/H-31	11.4	7.9		90.06	5.1	459.306
C-3/H-32			2.75	17.28	1.2	28.51
C-3/H-33	11	7.1		78.1	3	234.3
C-3/H-34	11	11.8		129.8	4.3	558.14
Subtotal	80.1	62.6	2.75	666.63	32.1	2767.603
TOTAL	321.1	261.4	4.5	2804.32	118.3	11490.703

A total of 34 recent illegal metal detector prospecting holes, consistent with the characteristics of soil weathering, were documented. A total of four (4) metal artifacts; two from Cluster 1 - Hole 12, one from Cluster 2 - Hole 20, and one from Cluster 3 - Hole 29, were recovered during the documentation of the unauthorized excavation holes (Table 2)[Figures 5, 6, and 7]. Three of the four ferrous metal artifacts (Cluster 1 - Hole 12 and Cluster 2 - Hole 20) cannot be identified as they are badly deteriorated, very small fragments, and are more than likely rusted fragments from the artifact removed from its' context. The artifact recovered from Cluster 3 - Hole 29, is identified as a brass, short base, 12 gauge shotgun cartridge (Figure 7). The head-stamp indicates that it was manufactured by Western Cartridge Company, East Alton, Illinois, in business from 1898 to present and is identified as a "Western XPERT 12 ga." Shotgun shell (Sharpe 1954:75). The interior of the cartridge base contains remnants of a paper/cardboard shell casing. The "XPERT" brand name cartridge appeared in the 1940s (IMACS 1984).

**Table 2. Artifacts recovered during Damage Assessment Activity.**

<u>PROVENIENCE</u>	<u>DESCRIPTION</u>	<u>COUNT</u>
Cluster 1 Hole 12	Small ferrous metal fragments	2
Cluster 2 Hole 20	Small ferrous metal fragment	1
Cluster 3 Hole 29	Brass short base 12 ga. Shotgun cartridge (Western XPERT, Western Cartridge Co., East Alton, IL)	1

#### 4.0 DAMAGE ASSESSMENT OF ARCHEOLOGICAL RESOURCES

Damage assessment to Federally owned or controlled archeological resources in violation of the Archeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa-470mm) can be obtained by determining three values: archeological value, commercial value, and the cost of repair and restoration to the resource. Guidelines for conducting such assessments to determine a monetary value are contained in 36 CFR 7.14. The criteria for determining these values and the values obtained are as follows:

##### 4.1 Cost of Restoration and Repair:

...the cost of restoration and repair...shall be the cost already incurred for emergency restoration and repair, which may include, but need not be limited to, the cost of the following: (1) reconstruction of the archeological resource; (2) stabilization of the archeological 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 archeological resource, to protect it from further disturbance; (6) examination and analysis of the archeological resource including recording remaining archeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved; (7) reinterment of human remains...; and (8) preparation of reports relating to any of the above activities (7 CFR 43.14(C)).

The cost of restoration and repair (Tables 3 and 4) was computed using the specified criteria (items 2, 3, 6, and 8) contained in the guidelines quoted above. This value came to \$3206.36.

**Table 3: Repair and Restoration Costs.**

<u>Activity</u>	<u>Rate/Hour</u>	<u>Hours</u>	<u>Amount</u>
Archeologist GS 11/4	\$26.45	12.00	\$317.40
<b>Total</b>			<b><u>\$317.40</u></b>

**Table 4: Assessment and Evaluation Costs**

<u>Activity</u>	<u>Rate/Hour</u>	<u>Hours</u>	<u>Amount</u>
<b>Mapping and Recording Damage</b>			
Archeologist GS 11/4	\$26.45	12.00	\$317.40
GIS Coordinator GS 12/2	\$29.46	12.00	\$353.52
GPS Coordinator GS 11/4	\$26.59	12.00	\$319.08
<b>Subtotal</b>			<b><u>\$990.00</u></b>
<b>Report Preparation</b>			
Archeologist GS 11/4	\$26.45	16.00	\$423.20
GIS Coordinator GS 12/2	\$29.45	08.00	\$235.68
GPS Coordinator GS 11/4	\$26.59	12.00	\$319.08
<b>Subtotal</b>			<b><u>\$977.96</u></b>
<b>Supplies and Materials</b>			
Film (3 rolls Tri-X at \$3.44/roll)			\$10.32
(3 rolls Ektachrome 200 at \$7.38/roll)			\$22.14
Film processing			
(3 rolls Tri-X at \$8.35/roll)			\$25.05
(3 rolls Ektachrome 200 at \$5.20/roll)			\$15.60
<b>Subtotal</b>			<b><u>\$73.11</u></b>
<b>Accession Collection</b>			
Catalog Specimens (\$3.00 per object x 56)			\$168.00
<b>Materials</b>			
Archival bags and boxes			\$48.77
Curation (1 box at \$250.00/box)			\$250.00
<b>Subtotal</b>			<b><u>\$466.77</u></b>
<b>Travel Expenses</b>			
Archeologist Wright			\$131.14
GIS Coordinator High			\$124.99
GPS Coordinator Smith			\$124.99
<b>Subtotal</b>			<b><u>\$381.12</u></b>
<b>Total</b>			<b><u>\$2888.96</u></b>

#### 4.2 Commercial Value

...commercial value of any archeological resource involved in a violation...shall be its fair market value. Where a violation has resulted in the damage of the archeological resource, the fair market value should be determined using the condition of the archeological resource prior to the violation, to the extent that it's prior condition can be ascertained [7 CFR 43.14(b)].

Commercial value was determined by Mr. William Henderson, proprietor of *The Picket Post* Civil War Militaria Shop, Fredericksburg, Virginia. It should be noted that interest and consequently prices of Civil War-era artifacts are increasing with the public interest and that the commercial value of these items is steadily increasing. The commercial value is presented in Table 5. The commercial value of the artifacts recovered as evidence was \$95.50.

**Table 5. Commercial Value<sup>1</sup> of Artifacts recovered as evidence.**

EVIDENCE NUMBER	DESCRIPTION	COUNT	VALUE
#4	Ramrod fragments, Model 1861 Springfield	2 fragments	\$35.00
#5	Ramrod fragments, earlier Model	2 fragments	\$10.00
#6	Artillery Shell fragments	7 fragments	\$10.00
#7	Case Shot fragment	1 fragment	\$1.00
#8	Minnie Balls	7 bullets	\$7.00
#12	Artillery Shell fragments	11 fragments	\$10.00
#13	Case Shot fragments	3 fragments	\$3.00
#14	Cartridge box roller buckle	1	\$2.00
#15	Iron rod fragment	1	\$0.50
#16	Minnie Balls	15 bullets	\$13.00
#16	3-ringer bullet, dropped	1	\$1.00
#16	2-ringer, Confederate Gardner, dropped	1	\$3.00
<b>TOTAL</b>		52	<b>\$95.50</b>

<sup>1</sup> Mr. William Henderson, proprietor of *The Picket Post* Civil War Militaria Shop, Fredericksburg, Virginia, was requested by Supervisory Park Ranger J. Michael Greenfield to examine the artifacts recovered as evidence and to assign a fair commercial value to the items.

### 4.3 Archeological Value

This value shall be appraised in terms of the cost of retrieval of scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the production of a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential [7 CFR 43.14(a)].

Archeology conducted by the National Park Service or permitted by the Service is guided by explicit research designs. These designs are reviewed internally by NPS archeologists and by the State Historic Preservation Officer prior to approval and implementation of the work. Archeological research questions may address specific historical events related to a specific place, questions relating to broad trends in history, and to the social adaptation of people in general. All of these categories of archeological research questions may be posed at the damaged site.

Historic documentation and research is necessary to establish the contexts in which historical archeological sites can be analyzed and interpreted. Archeology in this sense not only supplements but broadens the historical and historic architectural record of the past and serves as a method for clarifying very narrow questions about specific aspects of the past that are not addressed in the documentary or structural record or in verifying or challenging these records. Dating of structures, sites and deposits is one narrow, but important question that archeology can usually address based on established historical cultural typologies (a technique used for the classification of objects based on their form and decoration) or dated artifacts. The use of the archeological record for this purpose gains or diminishes in importance depending on the completeness of the historical record. For example, at FRSP, the dates of construction of most of the major buildings are known but this is not always the case for additions or outbuildings.

The chronology of the Civil War is well documented, so typology diminishes in importance when excavating Civil War sites. However, some Civil War sites, those destroyed during battle, can contribute greatly to our understanding, not so much of the war, but of the material culture of a site at a specific date in time. The artifact assemblages (a set of objects found in association with each other) excavated from dwellings and other structures that were destroyed during the Laurel Hill Engagement during the Battle of Spotsylvania. Such sites are often termed as an interruption of civilian domesticity, and can provide a "snapshot" of material culture of that place on May 8, 1864, very much similar to the sites of Pompeii and Herculaneum of the Roman world.

#### 4.3.1. Previous Archeological Research

An Archeological Overview and Assessment of the park has not been undertaken. The Archeological Overview and Assessment is a study designed to identify those resources which are most significant and most likely to contribute to knowledge about the 1864 Campaign, more specifically, the Battles of the Wilderness and Spotsylvania, and the life ways of the area both

before and after the war. The area damaged by the unauthorized excavation has compromised the integrity of the archeological record for both the military and domestic history of the Laurel Hill Engagement area and its ability to illuminate these trends.

The Spindle Farmhouse Site: Preliminary archeological investigations were performed in 1997, and identified some baseline domestic data for the pre-War and War-period occupations, until the first day of the Laurel Hill Engagement, revealing the impact of the conflict on the domestic population (personal communication: Dr. Douglas Campana, Center for Cultural Resources, Valley Forge National Historical Park). The Spindle farmstead was destroyed on the first day of battle, May 8, 1864 and was never rebuilt. The Spindles were of modest means, possessing 17 slaves and 312 acres of land. They engaged in growing corn, oats, irish potatoes, sweet potatoes, wheat, and hay. In addition, the farm produced 1,500 pounds of tobacco. The farmstead contained 200 improved and 112 unimproved acres. The Spindle House was a wood frame, 2-½ story structure with an orchard and at least one outbuilding located near the residence. A driveway connected the farmstead to Brock Road, just to the east. The exact location of the residential dwelling, outbuildings, slave quarters, and agricultural activity areas are unknown. Confederate entrenchments are located on the southern portion of Spindle's lands. Union entrenchments are located immediately south of Hancock Road and are situated on the northern portion of Spindle's lands.

According to the 1860 U.S. Census, Mrs. Sarah Spindle ("Spindler") owned the 312 acre (126.266 ha) farmstead and oversaw a household of five (5) whites; William H. Spindle, age 22; Mary Spindle, age 22, who owned two slaves; Maria V. Spindle, age 22; Richard Spindle, age seven (7); and Ella T. Spindle, age four (4); and 17 black slaves. Mr. William H. Spindle enlisted in Company B, 30<sup>th</sup> Virginia Infantry on July 11, 1861 and transferred to Company E, 9<sup>th</sup> Virginia Cavalry on September 26, 1861 (Harrison 1986:283). Mrs. Spindle and the Spindle family occupied all or part of a two-story frame house, while the black slaves occupied three additional dwellings. Sarah's husband, Benjamin, had died prior to the census enumerator's visit. She would lose a portion of the land and other property during the settlement of the estate.

Laurel Hill Engagement Area: No previous professional archeological investigations have been undertaken at this area. The use of advanced geophysical prospecting techniques at this battlefield may reveal locations and construction information on earthworks and entrenchments in the highest detail, all without impacting the resource with excavation. This technique has been recently utilized at Petersburg National Battlefield with great success. Continued use of these techniques enhance the development of new methods of remote sensing which will benefit research on historic sites throughout the eastern United States. Magnetic surveys, which measure the iron content in artifacts, features, and soils were a prominent part of these studies. Magnetic surveys are one of the best types of survey to do in wooded areas such as the damaged area.

#### 4.3.2 Research Design

Archeology in the National Park system seeks to understand the histories of all groups of Americans for the benefit of the visiting public, for which the parks are held in trust. Questions about the experiences of the Union and Confederate Troops must be addressed, as well as those

about the displaced Virginians and the slaves on their farms. Only after careful consideration of all of the research values of the site and through selecting strategies that result in minimal ground disturbance are archeological studies conducted. One of the most useful of these strategies is through geophysical prospecting.

Archeology is a quantitative discipline, requiring that sites selected for analysis retain most, if not all, of the artifacts and features left by its occupants. These groups of artifacts and features are then compared with similar sites. The absence of some types of artifacts and features on similar kinds of sites are interpreted through statistical analysis as differences in activities or behaviors between those sites. If specific kinds of artifacts are removed, such as metal and military artifacts were from the damaged area, then the statistical sample recovered through excavation must be larger (increasing the project cost and additional impact to the historic resource), or the site may not be archeologically useful at all to answer those questions.

With the above considerations, the following research questions may be addressed at the area damaged by unauthorized excavation:

1. How did the Battle of Spotsylvania Court House contribute to Military technology/strategy? What is the archeological signature of these changes?
  - A) The Battle of Spotsylvania Court House was one of the bloodiest on American soil. How did the technology of trench warfare develop during the two weeks of conflict here? How may trenches that were constantly evolving in form and function be archeologically distinguished from earlier uses? From later ones? Which defensive innovations arose here? Which offensive ones? How may they be best preserved?
  - B) Is archeology of battle action still possible? What integrity, if any, is left after more than 130 years of artifact collecting? Can controlled metal detecting be used in conjunction with other remote sensing techniques, be used to help plot military movement?
  - C) Field hospitals - Can evidence of treatments and the care of wounded be addressed through archeological investigation? Did property used for field hospitals and headquarters suffer less damage during the battle? Are there differences between the Union and Confederate field hospitals?
  - D) After three (3) years of fighting, what types of weapons were being used by Confederate and Union Forces? Can archeology address the types or nature of equipment carried by the war-weary Confederate troops in comparison to the better equipped Union forces?
  
2. What was the effect of an occupying army on an American population?
  - A) What was the effect on the domestic occupations at the Spindle Farmhouse? The area likely contains the remains of outbuildings and activity areas associated with the farm. Can ethnicity and social status, the customs, consumer choices, be attributed to a distinct ethnic heritage? Households headed by women? Investigation of this area is necessary to complement the excavations conducted at the house site. Based on economic scaling of ceramic artifacts, how much

- economic loss is reflected archeologically? Can health, diet, illness, and other stresses be addressed through archeology? Effects of the battle on health?
- B) What was the effect of the war and occupying army on the cultural landscape? Military engineering created new roads, railroads, field patterns, and drainage patterns. What is the economic impact of the battle? How do the effects of a short, intense battle compare to communities subjected to sieges where there is time for a whole new economy to develop? Artifacts associated with the domestic occupations before and after the battles may be compared through economic scaling to produce indices of economic disruption. These indices may be compared over comparable sites to identify broad patterns that will characterize the war's effect on Virginia's economy.

#### 4.3.3 Implementing the Research Design

The computed volume of soil resulting from the unauthorized excavation amounts to approximately 6.649 cubic feet. To archeologically excavate the equivalent volume of soil would require excavation of three standard excavation units measuring 3.0 by 3.0 by 1.25 feet deep. Units of this size are regularly used to recover contextual information and statistically significant artifact samples that could address the research design posed above. Excavation units of this size are expected to contain complex archeological features such as intersecting hearths, refuse pits, and defensive features, all of which require meticulous hand excavation. It is precisely this type of study that is developed for an Archeological Overview and Assessment project. The archeological value described below is based on excavation of those three controlled excavation units and the costs associated for planning, curation, and reporting (Table 6). The costs below do not include specialized studies if specific categories of information are discovered, such as zooarcheological studies, palynological studies, or forensic studies if human burials are identified.

The research design must be supported by geophysical prospecting surveys. These have been conducted on all significant National Park Service Civil War archeological sites prior to excavation for the past ten years. They serve to identify those areas which will allow for retrieval of information relevant to the research design, so that resources are not disturbed in the hunt for specific types of features. They consequently reduce the cost of excavation.

**Table 6: Archeological Value**

<u>Activity</u>	<u>Rate/Hour</u>	<u>Hours</u>	<u>Amount</u>
<u>Research Design</u>			
<u>Historical Background Research</u>			
Historian (GS-13)	\$33.69	10	\$336.90
<u>Design Archeological Work</u>			
Archeologist (GS-11)	\$26.45	16	\$423.20
<u>Word Processing (GS-5)</u>	\$12.89	4	\$51.56
<u>Map production</u>			
GIS Technician (GS-11)	\$26.59	16	\$425.44
Subtotal			<u>\$1237.10</u>
<u>Archeological Field Work</u>			
<u>Establish Survey Control</u>			
Archeologist (GS-11)	\$26.45	8	\$211.60
Archeology Technician (GS-5)	\$12.89	4	\$51.56
<u>Geophysical Prospecting</u>			
<u>Magnetic Survey</u>			
Archeologist (GS-11)	\$26.45	8	\$211.60
Archeology Technician (GS-5)	\$12.89	8	\$103.12
<u>Resistively Survey</u>			
Archeologist (GS-11)	\$26.45	8	\$211.60
Archeologist (GS-5)	\$12.89	8	\$103.12
<u>Controlled Excavation</u>			
Archeologist (GS-11)	\$26.45	24	\$634.80
Archeologist (GS-5)	\$12.89	24	\$309.36
<u>Back-fill and Restore Excavations</u>			
Archeology Technician (GS-5)	\$12.89	8	\$103.12
<u>Review and Check Field Data</u>			
Archeologist (GS-11)	\$26.45	4	\$105.80
<u>Park Coordination and Administration</u>			
Archeologist (GS-11)	\$26.45	4	\$105.80
Subtotal			<u>\$2151.48</u>
<u>Travel</u>			
Lodging and per diem	\$80.00/day	6 days	\$480.00
Subtotal			<u>\$480.00</u>
<u>Laboratory Processing</u>			
<u>Artifact cleaning</u>			
Archeologist (GS-5)	\$12.89	48	\$618.72
<u>Analyze artifacts</u>			
Archeologist (GS-11)	\$26.45	12	\$317.40
Archeology Technician (GS-5)	\$12.89	48	\$618.72
Subtotal			<u>\$1554.84</u>

<u>Activity</u>	<u>Rate/Hour</u>	<u>Hours</u>	<u>Amount</u>
<u>Curation Activities</u>			
<u>ANCS Cataloging</u>			
Archeologist (GS-11)	\$26.45	16	\$423.20
Archeologist (GS-5)	\$12.89	40	\$515.60
<u>Bags, forms, etc.</u>			\$100.00
<u>Curation (2 boxes)</u>	\$250.00	2	\$500.00
Subtotal			<u>\$1538.80</u>
<u>Report Preparation and Production</u>			
<u>Write report</u>			
Archeologist GS-11	\$26.45	40	\$1058.00
<u>Prepare figures, maps</u>			
Scientific Illustrator (GS-07)	\$15.97	24	\$383.28
<u>Photograph processing</u>	\$14.00/Roll	3	\$42.00
<u>Word processing</u>			
Secretary (GS-05)	\$12.89	16	\$206.24
<u>Copy editing</u>			
Writer/Editor (GS-11)	\$26.45	8	\$211.60
<u>Collating, printing, and binding</u>	\$5.00/Copy	25	\$125.00
Subtotal			<u>\$2026.12</u>
<b><u>TOTAL</u></b>			<b><u>\$8988.34</u></b>

## 5. REFERENCES

- Elder, John H., Jr., Robert Hodges, Richard W. Roads, and Thomas W. Simpson  
1985 *Soil Survey of Spotsylvania County, Virginia*. U. S. Department of Agriculture, Soil Conservation Service and the Virginia Polytechnical Institute and State University.
- Harrison, Noel G.  
1986 *Gazetteer of Historic Sites Related to The Fredericksburg and Spotsylvania National Military Park*. Volume One. (Chancellorsville, Wilderness, and Spotsylvania Court House Battlefields and Regional Sites). U.S. Department of the Interior, National Park Service, Fredericksburg and Spotsylvania National Military Park.
- IMAC  
1984 *Intermountain Antiquities Computer System User's Guide*. University of Utah, Bureau of Land Management, U.S. Forest Service.
- Rhea, Gordon C.  
1997 *The Battles for Spotsylvania Court House and the Road to Yellow Tavern, May 7 - 12, 1864*. Louisiana State University Press, Baton Rouge and London.
- Sharpe, Philip B.  
1953 *Complete Guide to Handloading*. Third edition, second revision. Funk and Wagnalls Company, Inc., New York.
- Steele, Julia, Noel Harrison, and Mike Greenfield  
1997 *Assessment of Damage to Archeological Resources at Fredricksburg-Spotsylvania National Military Park*. U.S. Department of the Interior, National Park Service, Valley Forge National Historical Park, for Fredericksburg and Spotsylvania National Military Park..



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division  
6432 Federal Building  
Salt Lake City, Utah 84138  
(Phone: 801-524-5344)

August 10, 1992

EEL RIVER SAWMILLS, INC.	:	ARPA 90-1
	:	
Complainant	:	Archeological Resources
	:	Protection Act of 1979
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent	:	
.....	:	.....
CRAIG L. BROWN and WESTERN	:	ARPA 90-2
PACIFIC LOGGING & CONSTRUCTION CORP.,	:	
	:	Archeological Resources
	:	Protection Act of 1979
Complainants	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent	:	

DECISION

Appearances: Wesley R. Higbie, Esq., San Francisco, California, for complainants;

Marcia A. Abrams, San Francisco, California, for respondent.

Before: Administrative Law Judge Sweitzer

Statement of the Case

Eel River Sawmills, Inc. ("Eel River"), and Craig L. Brown ("Brown"), President of Western Pacific Logging & Construction Corp. ("Western Pacific") and Western Pacific (hereinafter collectively referred to as "complainants")

000558

seek review of Notices of Assessment imposing upon complainants a civil penalty in the amount of \$43,500 under the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa - 470mm ("ARPA"), for alleged damage to archaeological resources located on the Travis Fire Salvage timber sale in the Mad River Ranger District of the Six Rivers National Forest, California.

The complainants challenge the Notices of Assessment on several grounds:

(1) Complainants argue that the violation of ARPA was inadvertent and that ARPA does not penalize inadvertent acts;

(2) Complainants contend that the penalty should be eliminated or reduced for several specified reasons; and

(3) Eel River asserts that it is not liable for the civil penalty because Brown and another employee of Western Pacific, not Eel River, caused the damage to the archaeological resources.

#### Factual Background

In January, 1988, Sam Morrison ("Morrison"), a hydrologic technician employed by the Forest Service, discovered a "significant" archaeological site on the Travis Fire Salvage timber sale in the Mad River Ranger District of the Six Rivers National Forest in the State of California. Morrison noted evidence of previous logging activity on the site (Tr. 58). This evidence included the presence of an access road where the land had been excavated slightly but which had not been used for 10 years and was overgrown with vegetation (Tr. 260). Morrison mapped, inventoried, photographed and flagged the site (Tr. 59).

On July 25, 1988, Eel River entered into a contract with the Mad River Ranger District on the Six Rivers National Forest to log the Travis Fire Salvage timber sale (Ex. 2). Eel River had contracted with the District to log the Spout timber sale on August 12, 1977 (Ex. B, p. 121). Because of several contract extensions and a fire in the area, logging in the latter area was delayed. Work was proceeding on both sales in the fall of 1988 (Tr. 271-273). Western Pacific was Eel River's subcontractor on the Spout timber sale, while Chris Canevari subcontracted for Eel River on the Travis Fire Salvage timber sale.

The contracts required the purchaser (Eel River) to abate dust to promote the safe use of unsurfaced roads and to

prevent excessive loss of road material. If water was to be used for dust abatement, Section C5.421 of each contract required that water supply locations be agreed upon in advance of use. The contract for the Travis Fire Salvage sale included a sale area map (Ex. A, p. 79), which specified the locations from where the water for dust abatement was to be obtained. It is undisputed that this sale area map did not specify any such locations on the archeological site in question.

Brown, on behalf of Western Pacific, agreed orally to perform the requisite dust abatement for Canevari on the Travis Fire Salvage timber sale (Ex. A, pp. 9, 63). In the fall of 1988, after locating some water sources on the archaeological site, Brown borrowed a tractor from Canevari for the purpose of excavating the remnants of an old road and landing, overgrown by vegetation, to gain access to the water sources for use in dust abatement (Tr. 274-277, 285). Brown directed one of Western Pacific's employees, Jerry Shriner, to clear (excavate) the old road and landing, to improve (excavate) an old water hole, and to construct (excavate) a new water hole and vehicular access thereto on the archaeological site using the tractor and a backhoe (Tr. 285-287; Ex. A, p. 10). The excavation and the construction of the water holes and access routes thereto were not authorized by the Forest Service (Tr. 27, 48).

The parties disagree as to the depth of the blading performed by Western Pacific to excavate the old road, with estimates ranging from 4 feet to just "scraping off the trees that had grown up in the road." (Tr. 78, 290) It is obvious, however, that the excavation and the construction of the water holes and access routes thereto resulted in the movement and jumbling of soil and archaeological resources which made interpretation of the significance of the archaeological resources substantially more difficult and less reliable (Tr. 82, 116-119, 144-147, 195-203).

At the request of the Forest Service, the roads or access routes excavated by Western Pacific on the archaeological site were re-leveled, seeded, mulched, and fertilized during the summer of 1989 (Tr. 302, 307-310). This work was performed by a Western Pacific crew and approved by the Forest Service (Tr. 309).

#### Discussion

Pursuant to 5 U.S.C. § 556(d), the respondent bears the burden of going forward with evidence sufficient to establish a prima facie case as to the fact of violation and the propriety of the penalty assessment. If a prima facie

case is presented, the burden then shifts to complainant(s) to overcome respondent's prima facie case. See Environmental Defense Fund v. Environmental Protection Agency, 548 F.2d 998, 1004-1005, 1012-1015 (D.C. Cir. 1976), cert. denied 431 U.S. 925 (1977). See also Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). Because complainants chose to go forward and present evidence after the conclusion of respondent's case, I must consider all the evidence presented by both parties to determine whether a preponderance of that evidence establishes the fact of the violation and the propriety of the penalty assessment. See United States v. Estate of George D. Estabrook, John J. Estabrook, Leland R. Estabrook, 94 IBLA 38 (1986).

#### I.

#### Inadvertent Acts May Be Penalized Under ARPA

There is no serious dispute or doubt that archaeological resources were excavated, damaged, or otherwise altered in violation of ARPA and its implementing regulations. See 16 U.S.C. § 470ee; 36 CFR 296.4. Complainants contend, however, that the excavation or damage to such resources was inadvertent and thus not subject to the civil penalty provisions of ARPA.

More particularly, complainants argue that in order to preserve ARPA's constitutionality, the civil penalty provision of ARPA must be interpreted as being inapplicable to inadvertent acts of excavation or damage to such resources. They contend that the civil penalty provision, as applied to them by the Forest Service, is unconstitutionally vague because "there was no notice to the Complainants that the old water hole . . . was in fact an archaeological resource." (Complainants' Answering Brief, p. 9)

In support of this contention, complainants rely upon the holding in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). The Diaz court held that 16 U.S.C. § 433, which imposes criminal sanctions for appropriating "objects of antiquity," was unconstitutionally vague because the term "objects of antiquity" did not give adequate notice of what objects were protected by the statute. The Diaz case is inapposite, as ARPA clearly defines "archaeological resource," the objects which are protected by the statute. See 16 U.S.C. § 470bb(i).

Moreover, the water hole itself was not alleged or treated at hearing as being an "archaeological resource," but rather as being part of the "site" where the archaeological resources were located. In light of this fact as well as

the placement of complainants' vagueness argument in the section of their brief entitled "ARPA DOES NOT PENALIZE INADVERTENT ACTS," the only sensible interpretation of complainants' vagueness argument is that ARPA is allegedly vague in its application to complainants' because they did not know that archaeological resources were present at the site of the old water hole.

This allegation raises no issue of vagueness, as it does not call into question whether ARPA gave complainants fair notice that their conduct was prohibited. Rather, the allegation amounts to a claim of ignorance of fact, which is a defense to a violation of the law only if it negates a mental state required as an element of the offense charged. See 21 Am. Jur. 2d Criminal Law § 141. As discussed below, the civil penalty provision of ARPA makes punishable violations of ARPA irrespective of knowledge or intent, and thus complainants' allegation of inadvertence - of ignorance of the fact that archaeological resources were present at the site of the old water hole - is unavailing.

Complainants cite Attakai v. United States, 746 F.Supp. 1395 (D. Ariz. 1990) for the proposition that ARPA applies specifically to purposeful excavation and removal of archaeological resources, not excavations which inadvertently uncover such resources. While the court in Attakai did state this, it is considered not controlling in the present case because the statement is dicta and it appears to be contrary to the plain meaning of ARPA and its legislative history.

In Attakai, members of the Navajo Tribe sought to enjoin the construction of fences and livestock watering facilities by the U.S. Bureau of Indian Affairs (BIA) and Department of the Interior (DOI) on portions of the Hopi Indian Reservation. The court found that the Navajos presented no evidence of excavation of any archaeological resources to support their claim that ARPA was being violated. The court also found that several of the exemptions from ARPA were applicable to the acts sought to be enjoined. The comment regarding the inapplicability of ARPA to inadvertent acts was made without supporting analysis and was superfluous in light of the aforementioned findings.

Contrary to the dicta in Attakai, ARPA and its implementing regulations do not require proof of knowledge or intent to assess civil penalties against a person who violates the Act by excavating or damaging archaeological resources. ARPA establishes an absolute or strict liability standard by which civil penalties may, but need not be, assessed:

Any person who violates any prohibition contained in an applicable regulation . . . may be assessed a civil penalty.

16 U.S.C. § 470ff(i). 36 CFR 296.4, which tracts the language of 16 U.S.C. § 470ee, provides:

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 § 296.8 or exempted by § 296.5(b) of this part.

Because complainants' activities were not conducted pursuant to a permit or exempted, complainants may be found absolutely or strictly liable for excavating and damaging the archaeological resources.

This conclusion is buttressed by a comparison of ARPA's criminal penalty and civil penalty provisions. The criminal penalty provision requires the alleged violator to "knowingly" violate ARPA. Clearly, Congress could have added an element of knowledge or intent to the civil penalty provision as well, but declined to do so.

The legislative history of ARPA confirms that ARPA was designed to allow for the imposition of civil penalties in cases of inadvertent violations so long as:

[T]he civil penalties authorized [are not] used to harass citizens in their normal use of the public lands or to impose heavy penalties on persons who inadvertently violate regulations in a minor way. The regulations promulgated should take those factors into account.

H.R. No. 96-311, June 29, 1979, reprinted in 1979 U.S. Code Cong. & Admin. News 1709.

Because the excavations in question do not constitute a normal use of the public lands, and caused major, not minor, damage, a heavy civil penalty could be imposed in this case. Certainly, excavating is not a normal use of the public lands, at least where, as here, the excavator was required but failed to obtain permission from the Forest Service to perform the excavations. Both of Eel River's timber sale contracts provide in paragraph B6.24:

National Forest water supply locations, access, method of filling trucks, period of water availability and procedures designed to maintain

water quality at each location shall be agreed in advance of use.

In contravention of these contracts, Brown and Western Pacific, working for Eel River, failed to obtain the Forest Service's agreement to the water supply locations on the archaeological site and the access routes thereto.

Brown's claim that it was common practice for loggers to develop water supplies without the Forest Service's permission cannot override the plain terms of the contracts requiring the Forest Service's prior approval. The impropriety and abnormality of the excavations directed by Brown was confirmed by Canevari, who testified that he refused to participate in the excavations without the Forest Service's approval (Tr. 30).

The testimony of all four archaeologists and the archaeological technician leaves little doubt that this abnormal use of the land was more than a minor violation of ARPA and its implementing regulations. While there was evidence to show that the archaeological site had been previously disturbed by logging activities, the more recent damage caused by the excavations directed by Brown was considerable and was much more extensive than the previous damage (Tr. 57-80, 115-120, 233). Moreover, the archaeologists were unanimous in concluding that the archaeological site was of great scientific importance and/or archaeological value (Tr. 108-112, 124-128, 159-175, 221, 234-235; Ex. B, p. 25). Consequently, the violation in question was not minor and imposition of a substantial civil penalty could be justifiable.

## II.

### The Regulations Are Binding and the Penalty is Appropriate

Complainants contend that the computation of the amount of the civil penalty is based upon invalid regulations, 36 CFR 296.14 and 296.16, which they assert are inconsistent with ARPA, and that there is no evidence upon which to base a penalty computation which would be consistent with ARPA. The contention must be rejected because I have no authority to consider the validity of, or to declare invalid, such duly promulgated regulations of the Department of Interior.<sup>1</sup>

---

<sup>1</sup> Similarly, I have no authority to take action upon complainants' contention that their alleged constitutional right to a jury trial has been infringed. This contention  
(continued...)

See ANR Production Co., 118 IBLA 338 (1991). Such regulations have the force and effect of law and are binding upon the Department, including this office. See Id.

More generally, the complainants contend in their Request for Hearing that the penalty should be reduced because Eel River performed restoration work on the site and because the violation was not willful. These are valid points for consideration. However, after weighing these as well as the other factors relevant to the determination of the amount of the penalty to be assessed, I conclude that the amount of the assessed penalty is appropriate.

The applicable statute, 16 U.S.C. § 470ff(a), provides that the amount of a civil penalty shall be determined under ARPA's implementing regulations, taking into account, among other things, the archaeological or commercial value of the archaeological resource involved and the cost of restoration and repair of the resource and the archaeological site involved. The regulations detail the components of the archaeological or commercial value and the cost of the restoration and repair. 36 CFR 296.14. A component of both is the cost of examining and analyzing the archaeological resource. Id.

Respondent presented voluminous expert testimony from several archaeologists regarding the archaeological value and the cost of restoration and repair. Complainants did not present rebuttal expert archaeological testimony, presumably in reliance upon their assertion that respondent's expert testimony was based upon invalid regulations. As discussed above, the validity of the regulations cannot be determined in this proceeding. Respondent relied primarily upon the testimony of Mr. Ken Wilson ("Wilson") to establish the total of \$202,126 as the sum of the archaeological value and the cost of restoration and repair, the maximum penalty permitted under the regulations absent any mitigating factors (Ex. 9; Tr. 175).<sup>2</sup> Wilson's calculations were based upon an excavation cost of \$1,500 per cubic meter of soil. This cost figure is very conservative in light of the bids received by Wilson, which

---

<sup>1</sup>(...continued)

amounts to a claim that the regulatory procedures governing this proceeding are unconstitutional and thus invalid.

<sup>2</sup> In their brief, complainants suggested that Wilson's calculations do not comport with the regulations. Except as otherwise noted herein, Wilson's calculations are found to comport with the regulations.

ranged between \$1,700 and \$3,000 per cubic meter of soil, and the cost estimates of the other archaeologists (Tr. 221, 234-235; Ex. 9).

On the other hand, it appears that certain costs were doubly computed by reason of their inclusion as a component of both the archaeological value and the cost of restoration and repair (Tr. 193-194; Ex. 9).<sup>3</sup> This apparent double counting is the result of assuming that two separate examinations (excavations) of the site would be conducted to first determine the archaeological value and then the cost of restoration and repair (Tr. 193-194). The record suggests that one excavation might be sufficient to determine both the archaeological value and the cost of restoration and repair, and fails to justify the need for the two separate excavations; thus I find the apparent double counting to be inappropriate.

If the maximum allowable penalty were recalculated using an excavation cost of \$2,350 per cubic meter of soil, the median of the bids, and adjusting for the costs which appear to have been inappropriately counted twice, the maximum penalty would compute to \$165,326. This maximum allowable penalty may be reduced, at the discretion of the Federal land manager, based upon certain mitigating factors, including the following:

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

---

<sup>3</sup> The costs which appear to have been counted twice are:

30 Cubic Meters Excavated at \$1,500/cube	\$45,000
C14 - 2 determinations	500
Obsidian Studies	
50 specimens, Sourcing at \$25 each	1,250
50 specimens, Hydration at \$20 each	1,000
Lithic Analysis	3,500
Groundstone Analysis	2,500
Contracting and other business management personnel	10,000
Cultural Resources Program Manager	
(5 233ks)	4,750
Assistant Forest Archaeologist (3 weeks)	2,300

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

36 CRF 296.16(b)(1)(ii) and (v).

There is no dispute that Western Pacific, on behalf of Eel River, performed restoration work at the archaeological site. There is, however, some dispute over whether complainants' alleged violation of ARPA was willful, based upon conflicting evidence of the adequacy of the flagging of the site.

Respondent contends that the site was sufficiently flagged to give adequate notice of its presence, or, in the alternative, that if the flagging was inadequate, the inadequacy was due to purposeful removal of flags by complainants. Complainants maintain that neither they nor any of their agents saw any flags and that the site was not identified on the timber sale area map as required by the Travis Fire Salvage timber sale contract (see Ex. 2, paragraph B6.24). There is evidence supporting both sides of this dispute, but the preponderance of the evidence weighs in favor of a finding that complainants' violation was not willful, especially in light of the finding expressed in the Forest Service's own case report (Ex. A, p.7):

While Brown is recognized as the responsible party for these unlawful acts, there is a question of culpability on the part of the U.S.D.A. Forest Service because the archaeological site is not identified on the Travis Salvage timber sale area map and because Forest Service employee Vern Neal has stated that when he visited the site on November 9, 1988 with Bob Wescom, he (Neal) did not see any flagging in the area denoting an archaeological site.

Because of these conflicting statements by Forest Service employees and the omission of the archaeological site on the timber sale map plus what appears to be the lack of willful intent on the part of Brown, which severely hinders the case, it is recommended that felony charges not be pursued and that charges be limited to petty offenses contained in Title 36 of the Code of Federal Regulations.

The mitigating effects of this finding are tempered, however, by the fact that Eel River violated the terms of the Travis Fire Salvage timber sale contract. Brown's failure to seek Forest Service authorization to establish

access to and construct or improve the water holes on the site was a clear violation of the contract. Had authorization been properly sought, the ARPA violation likely would have been avoided (see Ex. B, p. 5).

Given the foregoing factors, the assessment of a \$43,500 penalty was not unreasonable and indeed appropriate. Wilson stated that he was directed to and did act very conservatively in calculating the penalty (Tr. 159, 164-168, 172-175). The penalty amount is approximately one-fourth of the maximum permissible penalty, as calculated herein, including subtraction of the costs which were apparently counted twice. Without such subtraction, the assessed penalty would approximate one-sixth of the maximum penalty permitted.

In either case, the maximum penalty was sufficiently mitigated to account for the complainants' restoration assistance and lack of willfulness.

### III.

#### Eel River Not Liable

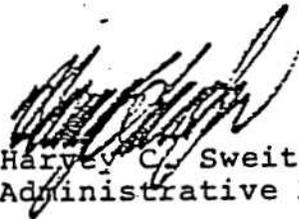
Eel River's contention that it cannot be held liable for the acts of its independent contractor, Western Pacific, has merit. The principle that a person is not vicariously liable for the acts of an independent contractor is well-established. E.g., McCornick v. Nobel Drilling Corp., 608 F.2d 169, 174-175 (5th Cir. 1979).

Respondent's contention that Eel River is liable for the ARPA violation because the activities of Western Pacific are part of "Purchaser's Operations," as that term is defined in paragraph B6.3 of the Travis Fire Salvage timber sale contract, is unavailing. The fact that Western Pacific's activities may be part of Eel River's Operations arguably might support an action for breach of Eel River's contractual duty to refrain from operating equipment on a historical site (see paragraph B6.24 of the contract), but it does not render Eel River liable for statutory penalties incurred by its subcontractor.

This conclusion comports with the rule that penalty statutes should be strictly construed so as not to extend their coverage such as to impose liability on persons who do not clearly come within their terms. 36 Am. Jur. 2d Forfeitures and Penalties § 81. Nowhere does ARPA indicate that under its provisions contractors should be held liable for the acts of their subcontractors.

Conclusion

Based upon the foregoing, the Notice of Assessment against Eel River is hereby declared invalid because Eel River is not liable for the violation in question. The Notices of Assessment against Western Pacific and Brown are hereby declared valid and enforceable because a violation of ARPA did occur and the penalty in the amount of \$43,500 imposed therefor is reasonable and appropriate.



Harvey C. Sweitzer  
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Distribution

By Certified Mail (2 copies each):

Wesley R. Higbie, Esq.  
Hendrickson, Higbie & Cole  
A Law Corporation  
Four Embarcadero Center, Suite 350  
San Francisco, California 94111  
(attorney for complainants)

Marcia A. Abrams, Esq.  
Office of the General Counsel  
U.S. Department of Agriculture  
211 Main Street, Room 1060  
San Francisco, California 94105  
(attorney for respondent)