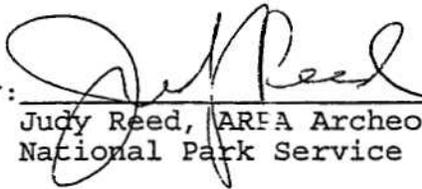


Archeological Report  
for  
Site Number AZ K:11:40 (ASM)  
Arizona

prepared by:  16 June 1994  
Judy Reed, ARPA Archeologist  
National Park Service

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## INTRODUCTION

The following information was prepared for use in prosecuting a violation of the Archeological Resources Protection Act (ARPA). The law requires that evidence be presented that addresses several elements. The elements discussed in this report are identification of the site as an archeological resource of interest, its age, and a damage assessment. Evidence pertaining to the remaining elements of the law is contained in other places in the case report.

## IDENTIFICATION AS AN ARCHEOLOGICAL RESOURCE

The bulldozed site had been recorded in November 1992 and assigned an official Arizona state number: AZ K:11:40 (ASM). This site contains many remains common to an archeological site such as stone tool remnants, pottery sherds, bone fragments, ash-stained soil, and possibly some building material. The variety and quantity of these items seen on the surface are typical of an Anasazi habitation site.

Habitation sites are of primary interest to many archeologists because they contain tangible evidence, which includes artifacts and soil samples, of the occupants' daily life. An infinite number of research questions pertaining to diet, social structures, trade networks, leisure activities, disease, tool technology, and others can be answered through proper treatment and study of this evidence.

It is not unusual for people who occupied sites like this one, to have buried their dead in structures or in the midden, although no human remains were discovered on the surface during our April 1994 site visit. A plan to mitigate the damage sustained thus far and remove the enticement for further destruction will also determine whether or not bulldozing disturbed human remains.

## AGE OF THE ARCHEOLOGICAL SITE

Anasazi is a cultural designation used by archeologists that refers to the most extensive sedentary prehistoric culture in the Southwest U.S. that generally occurred between AD 1 and 1700. Painted ceramics examined at the site are indicators that this particular site dates between AD 1000 and 1200, revealing that it is somewhere between 800 and 1000 years old. A small sample of pottery sherds were collected to provide evidence of age (refer to Attachment A for collection unit locations).

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#### DESCRIPTION OF DAMAGE

There are two episodes of damage apparent at AZ K:11:40 (ASM). The older damage consists of dumping of a dirt pile and creation of a push pile of dirt in the northern end of the site. These disturbances were recorded during the November 1992 examination of the site and not included in the damage assessment provided in this report.

The newer visible damage sustained was by the use of heavy equipment. The surface of the site not covered by the old backdirt piles was bladed to an unknown depth and the southwestern third of the site was removed and apparently piled along its western most <sup>EAST</sup> quarter in three mounds (Attachment A). The blading, digging, and dumping did not necessarily occur in the order given. There may be human burials or prehistoric walls that were exposed and disturbed by the equipment operator and then covered up with the midden fill taken from the southwestern end of the site. Although the possibility exists for a NAGPRA violation (disturbing human remains without reporting the discovery), it has not been confirmed and, therefore, is not included in this damage assessment at this time.

Approximately 14,500 cubic feet of prehistoric midden was dug from its original placement in the archeological site and piled in the locations labeled Mounds 1, 2, and 3 on the attached site map (Attachment A). The costs associated with the archeological value of the damaged portion of the site, the commercial value of the artifacts contained in the excavated midden, and the cost to restore/repair the damage sustained by the site are provided on the attached "Damage Assessment." Archeological value in this case is the estimated cost of an excavation project limited to the damaged portion of the midden, if the work had been accomplished according to current professional archeological standards and in accordance with Navajo Nation regulations and mandates.

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DAMAGE ASSESSMENT

The Archeological Resources Protection Act requires that a damage assessment be determined concerning the resource's archeological value, commercial value, and costs for restoration and repair. The dollar figures below include archeological costs normally incurred in a professionally executed project.

Archeological Value

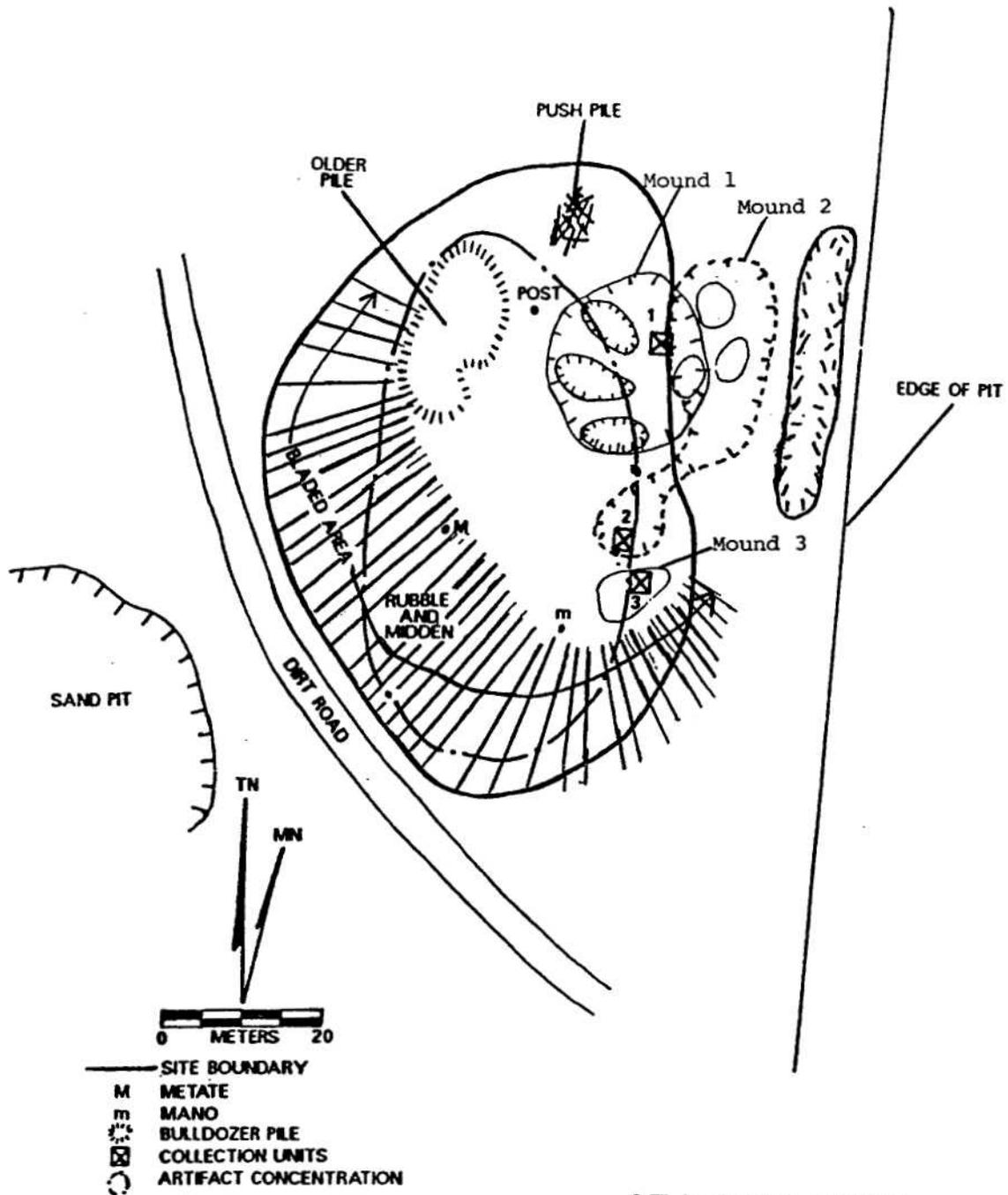
preparation of a research design (personnel, supplies) . . . . .	\$ 1,480
fieldwork (personnel, vehicles, supplies) . . . . .	24,120
laboratory processing and analysis of artifacts (personnel, supplies) . . . . .	17,230
report preparation (personnel, supplies) . . . . .	10,830
artifact curation (through the Museum of Northern Arizona) . . . . .	<u>3,850</u>
subtotal	\$ 57,510

Commercial Value

painted ceramics @ \$5.00 each (est. no: 3,828)	\$ 19,140
plain and corrugated ceramics @ \$2.00 each (est. no: 3,828)	7,656
projectile points @ \$25.00 each (est. no: 6)	150
metates @ \$125.00 each (est. no: 29)	3,625
manos @ \$25.00 each (est. no: 104)	<u>2,600</u>
subtotal	\$ 33,171

Restoration and Repair Costs

archeological recording of site damage (fieldwork, travel time) . . . . .	\$ 630
transportation of archeologists (724 miles @ \$ .25/mile) . . . . .	181
research design (personnel, supplies) . . . . .	740
fieldwork (personnel, vehicle, supplies) . . . . .	8,040
laboratory processing and analysis (personnel, supplies) . . . . .	13,230
report preparation (personnel, supplies) . . . . .	10,830
artifact curation (through Museum of Norther Arizona) . . . . .	<u>3,850</u>
subtotal	\$ 37,501



AZ K:11:40 (ASM)

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Itemized Listing of Costs  
Site Number AZ K:11:40 (ASM)  
Damage Assessment

Archeological Value

Personnel costs are based on requirements of the Navajo Nation's Archaeology Department (NNAD) as provided to me by Dr. Anthony L. Klesert. Basically, the costs are compounded beyond what Dr. Klesert determined necessary for the Restoration & Repair section of the damage assessment. Using the Restoration & Repair figures, increases would be necessary in preparation of research design, field time, and analysis for the Archeological Value. The Archeological Value answers the questions "How much would it have cost to professionally excavate 14,500 cubic feet at this site?"

preparation of research design  
personnel costs & supplies  
for 6 days @ \$740/3 days = \$ 1,480

fieldwork  
personnel, vehicles, supplies for  
90 days @ \$8,040/30 days = \$ 24,120

laboratory processing and analysis of artifacts  
personnel, supplies identical to  
Restoration & Repair for this item (i.e.,  
material culture analysis) = \$ 13,230

minimum soil sample analysis (for pollen,  
botanical, etc. information usually  
performed on contract by the job) = \$ 4,000

report preparation  
personnel, supplies could conceivably be  
the same as for Restoration Repair if  
report meets only minimum standards = \$ 10,830

artifact curation  
through the Museum of Northern Arizona  
would be virtually identical to same item  
under Restoration & Repair section = \$ 3,850

subtotal \$57,510

Restoration & Repair Costs

Added to Dr. Klesert's estimates for future restoration and repair costs were time and transportation costs to complete the first steps in restoration and repair (i.e., our site visit and follow up report). Salary for Judy Reed is \$27/hour for a total of 15 hours (\$405). Salary for Anthony Klesert is \$15/hour for 15 hours (\$125).

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### Commercial Value

Site 29SJ1360 at Chaco Culture NHP was used as a comparable site for determining the ratios of:

stone artifacts-to-ceramic artifacts: @ 29SJ1360 93% of the artifacts are ceramics and 7% are stone artifacts. 93% of 8,232 (the total estimated number of artifacts in the bulldozed area) is 7,656 ceramics and 7% of 8,232 is 576 stone artifacts.

projectile point-to-stone artifacts: @ 29SJ1360 there were 14 projectile points for every 1,000 stone artifacts. In other words, 1% of the 29SJ1360 stone artifacts were projectile points. 1% of 576 (the total estimated number of stone artifacts at AZ K:11:40-ASM) is 6 projectile points.

painted ceramics-to-plain ceramics: @ 29SJ1360 about half of the ceramics are painted and half are plain. 50% of the sherds are painted and 50% are plain. Half of 7,656 ceramics from AZ K:11:40 (ASM) is 3,828. Therefore, there is an estimated 3,828 painted ceramics and 3,828 plain ceramics in the bulldozed area of AZ K:11:40 (ASM).

manos-to-ground stone assemblage: the estimated 8,232 artifacts from AZ K:11:40 (ASM) is ca. 60% of the total number of artifacts from 29SJ1360; @ 29SJ1360 there were 175 complete manos. 60% of 175 is 104, and should be a good estimate for manos in the bulldozed portion of AZ K:11:40 (ASM).

metates-to-ground stone assemblage: the estimated 8,232 artifacts from AZ K:11:40 (ASM) is ca. 60% of the total number of artifacts from 29SJ1360; @ 29SJ1360 there were 49 complete or mostly complete metates. 60% of 49 is 29, and should be a good estimate for metates in the bulldozed portion of AZ K:11:40 (ASM).

*These were the critical deficiencies in Glass' qualifications & his proposal.*

Notes: Regarding Steve Glass' Proposal (SEE ATTACHED)

Qualifications and Background - Ask if Glass has ever prepared an archeological report for an ARPA investigation.

Ask if Glass has ever participated in an ARPA investigation and to what extent.

Ask if Glass has had any ARPA training and from whom.

Ask his total time in the field doing archeological survey.

Ask his total time in the field doing archeological excavation.

Ask how many Archeological Research Designs he has written.

Ask how many Archeological Research Designs he has written for projects on Navajo Nation land.

Ask how many Archeological Research Projects he has directed.

Ask how many Archeological Research Projects on Navajo Nation land he has directed.

Ask if he is specialized in any one or more aspects of archeology and name them.

Ask if he has ever obtained a permit to carry out archeological projects on Navajo Nation land.

#### Overall Comments

Glass' "Outline of Restoration and Preservation Plan" sounds like a bid proposal to do a project. If accepted as a "tentative plan", it will set the stage for a process of negotiation. There are 1,000 ways to skin a cat, some good, some bad, some just different. In this ARPA case, the Navajo Nation has already decided what to do to "restore and repair" the site. If the defendants want to propose an alternative way, they need a really good reason why it should, if not must, be done another way. For example, something the Nation has proposed is illegal or, at the very least, contrary to the Navajo Nation's cultural resource management policies. And IF there is a really good reason, present it with details of who, when, quantities of hauled fill dirt, and how much each line item would cost.

The differences in their proposed approach is to curate the artifacts in the ground and bury the entire site in layers of stuff so heavy equipment can drive over it and not adversely impact it. I have two questions concerning this: 1) Why go to the expense of buying geotextile and geogrid, placing it over the site and burying the whole thing when requiring (and enforcing) avoidance of the

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site is less intrusive, costs less, and is a far better way to preserve what's left? and 2) There is still the possibility that human remains or structural walls were bladed, seen, and covered up by the new mounds. Is their proposal to bury the site an attempt to avoid verifying whether or not human remains were disturbed?... which would be another violation of another federal law.

Ask if the prosecution's restoration/repair process violates any law.

Ask if the prosecution's restoration/repair process is contrary to any Navajo Nation policy on cultural resource management.

Ask if Glass met with anyone of authority with the Navajo Nation to develop his restoration/preservation plan.

Ask if the defendant's proposal for restoration/repair presumes that it is better to bury the site (and expect people to drive all over it) than to educate the drivers to avoid the site.

Ask why no dollar amounts were affixed to the defendant's proposal for restoration/repair.

Ask Glass if he is familiar with responding to Requests For Proposals (RFP) to do archeological work.

Has Glass been to AZ K:11:40 (A.M) to examine the site's condition since the latest episode of bulldozing? If yes, did he have permission from appropriate people?

Ask Glass if he knows what the archeological elements of ARPA are. If yes to this and question immediately above, ask Glass if he thinks his "Plan" is more similar to and RFP or ARPA report.

#### Comments Pertaining to Specific Items in Glass' Plan

ref: "Restoration, second paragraph" - Isn't "determination of pre-disturbance topography through interviews with mine personnel" more of a law enforcement activity rather than and archeological responsibility?

ref: "Restoration, third para - digital base mapping must include cost of using/having/maintaining equipment; doing fieldwork; map production; and field verification of final product.

ref: "Restoration, 4th para" - whether or not to use geotextile is a Navajo Nation decision; it has its good points and its bad points. Adding intrusive materials to an archeological site must be cautiously considered and usually done sparsely and may require consultation (an extra step, therefore an extra cost)

Ask Glass if he is familiar with Section 106 of the National Historic Preservation Act. If yes, ask Glass if, in his opinion, treatment using the geotextile and geogrid to the extent he proposes would or would not have to reviewed following the full 106

procedure.

Ask Glass who sells the products (geotextile and geogrid) and approximately how much it costs (per unit, per this site, per something).

ref: "Restoration, 6th para" - Again, the difference to curate artifacts in the ground at the site vs in a repository that meets Federal standards is a philosophical one and the choice is left up to the Navajo Nation, assuming the choice does not violate other laws. For example, 36 CFR 79, *Curation of Federally Owned and Administered Archeological Collections*, requires all artifacts that are excavated (whether or not legitimately or illegally) to be cataloged and curated at a facility (like the Museum of Northern Arizona) that meets certain qualifications and takes care of the objects according to certain guidelines. Federal agencies are not allowed to excavate and rebury artifacts (except funerary items through the NAGPRA process) in order to curate them. If the Navajo Nation has adopted 36 CFR 79, or adheres to it, then they are not allowed to curate objects within the site after they have been dug up either. Even if the objects are curated by reburying, all documentation (notes, maps, drawings, reports, analysis, data, photography, etc.) still needs to be archived properly.

Ask Glass if he knows of a Navajo Nation Resolution and other than NAGPRA (or whatever they may be called) that allows or promotes the reburying of excavated artifacts as a method to curate the items.

ref: "Preservation, 2nd para" - Covering the whole site with geotextile! Again, a philosophical decision to be made by the Navajo Nation. In my opinion this alternative is way too intrusive. Do they believe it necessary because they expect heavy equipment to be driving over the site in the future? I would consider geotextile an alternative for sites that are experiencing natural erosion that cannot be deflected with less intrusive materials.

ref: "Preservation, 4th para" - The statement to reclaim the archeological site according to the company's "site closure plan" is revealing. It would be my guess that the site closure plan is for revegging/reclaiming the borrow pit, which is suppose to be void of archeological sites. Revegging/reclaiming the surface of an archeological site has other concerns (i.e., the archeological resource) that must be considered.

Ask Glass if the "site closure plan" had specific measures for reclaiming/revegetating the surfaces of archeological sites.

## Outline of Restoration and Preservation Plan

The following constitutes an outline of a Restoration and Preservation Plan for archaeological site AZ K:1140 (ASM) ("the Site") prepared by Stephen E. Glass of Environet, Inc.

The primary elements of the Plan are:

### Restoration

- **Preparation of research design**

A research design will be prepared that details the Site's history, scope of work to be accomplished, methodology, research domains, project goals, staffing, etc. The research design will be prepared by an archaeological contractor with appropriate permits for conducting archaeological fieldwork on Navajo Nation lands.

- **Determination of pre-disturbance (ARPA related) topography**

Interviews with mine personnel, review of available aerial photography, and on-site transect investigations will be utilized to determine pre-disturbance topography.

- **Total station mapping of AZ K:11:40**

A digital coordinate system based map will be developed for the archeological Site and the area immediately surrounding the Site. The purpose of this mapping is to accurately map in areas of disturbance, existing Site features and establish a base for restoration and reclamation of the surrounding habitat.

- **Placement of "marker" material**

The trenches through the midden (ARPA related disturbance) will be lined with geotextile fabric to provide a water permeable disturbance boundary marker for future researchers.

- **Soil screening**

Dirt from the three new piles will be screened through 1/4-inch mesh screens prior to replacement in the lined trenches.

- **Field analysis**

Lithic, ground stone, and ceramic specialists will conduct field analysis and documentation of diagnostic artifacts prior to replacement in the geofabric-lined trenches.

- **Preparation of restoration report**

A report detailing the results of the restoration activities and field analysis of artifacts will be prepared and submitted to the appropriate agencies.

## Preservation

- Off-site restoration

The mined out areas adjacent to AZ K:11:40 will be brought up to grade by the placement of haul-back sands. The purpose of the build-up is to prevent site degradation due to erosion and/or slope failure.

- Geogrid installation

The archaeological Site will be covered with geotextile (geogrid) material to disperse the weight of vehicles and/or equipment that might stray onto the Site following implementation of restoration/preservation measures.

- Capping

An engineered cap will be applied to the restored Site using haul-back material from the mining operation. Engineering methods will be used to determine the appropriate thickness of the cap for achieving stability and protection from excessive compaction. The purpose of the cap is to provide long-term protection to the Site, and a suitable growth medium for reclamation activities.

- Reclamation

The capped Site will be revegetated consistent with Arizona Silica Sand Company's Site closure and reclamation plan.

- Restoration report

A restoration report will be prepared detailing the methodology and results of Site restoration and protection.

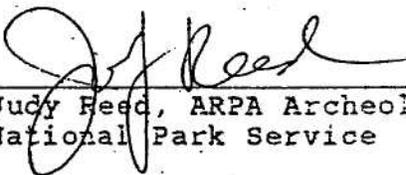
Supplemental Archeological Report

for

Site Number AZ K:11:40 (ASM)

Arizona

prepared by:



18 January 1995

Judy Reed, ARPA Archeologist  
National Park Service

000583

## INTRODUCTION

This information provides details of how I determined the dollar amount which was included in my more concise original report dated 16 June 1994 for damage to archeological site number AZ K:11:40 (ASM). I assigned a dollar amount to only those artifacts excavated without a permit. ARPA requires that monetary values be determined for archeological value, commercial value, and restoration/repair costs and provides for civil and criminal prosecution whether or not the affected artifacts and other materials from the site are physically taken away.

All costs reflect minimum requirements in professional archeology and are allowable in the Archeological Resources Protection Act (16 USC 470 ff) and its Final Uniform Regulations (43 CFR Part 7). I used actual costs when known (e.g., salaries, travel, etc.) and conservative estimates for projected costs.

Unauthorized excavation is one of several prohibited actions under 16 USC 470 ee (a). The amount of unauthorized excavation that has taken place is extensive. Several tractor loads of the archeological midden was dug and dropped on another portion of the site. Photograph 1 shows the size of the excavated archeological fill that is now Mound 1, the largest of the three piles.

There are minimum standards for professional archeologists. These standards are described in the various written policies established by the Navajo Nation, National Park Service, and Forest Service, to name a few. Since site AZ K:11:40 (ASM) is in the Navajo Nation, I adhered to their requirements. I computed the costs for the amounts shown in the "Archeological Value" and "Commercial Value" sections, while Dr. Anthony Klesert prepared those for "Restoration and Repair Costs." I have prepared approximately 30 archeological reports that included damage assessments for ARPA investigations. Likewise, Dr. Klesert has many years experience working for the Navajo Nation in designing, reviewing, and approving archeological projects involving excavation. My resumé is attached (Attachment A).

## RESTORATION AND REPAIR COSTS

During the April 12<sup>th</sup> site visit, I discussed with Dr. Klesert and others present the different strategies that could be undertaken to mitigate the bulldozing damage. We agreed that the best course of action would be to remove the artifacts from the backdirt piles as soon as possible and level out the dirt. The reasons are two-fold:

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1. The site with the over-laying mounds is actually an island surrounded by mined-out land. What was a buried archeological site, is now largely above ground in several cone shaped piles that are visible from a great distance. As a result, the greater visibility of the site will attract people who will pick them up and carry them away.

2. Cone-shaped piles of dirt erode much faster than a relatively flat landscape. The artifact laden piles will move through the site via the erosional process mixing with the undisturbed archeological deposits that remain.

The most effective and efficient way to retrieve the scientific data from the damaged portions of this site is to hand-excavate the three new piles of dirt (Mounds 1,2, and 3; Attachment B), screen the dirt through  $\frac{1}{4}$ -inch mesh screens, and collect the artifacts found. Ordinarily, sites are dug by measured vertical levels within a horizontal grid system in order to record the location of features, artifacts, samples, and soils. Since the piles contain mixed layers and levels, the provenience and context of any recovered features, artifacts, samples, and soils, has been destroyed. The potential archeological information is therefore limited to a general understanding of the site as a whole rather than to comparing portions of the site to one another. This also means that there is no reason to grid the dirt piles or dig them in a systematic way. Given this approach, restoration and repair costs are estimated as follows:

Research Design: A Project Director archeologist must prepare a research design detailing the site's known history, scope of work to be accomplished, project goals, necessity of the work, research orientation and benefits, methods to be used to accomplish project goals, staffing, and so on. A research design for this particular project should take 3 days to prepare.

Estimated cost: \$740.00 (personnel and supplies)

Preliminary Fieldwork: The 12 April 1994 site visit resulted in recording some preliminary information and a discussion of how to best treat the site now that its status has changed to a restoration problem. Although several archeologists were on site and participated in the documentation and discussions, only the salaries and costs associated with two of the archeologists (Reed and Klesert) are considered. Costs incurred for Reed's time is \$405 and \$225 for Klesert. Their transportation costs were \$120.75 and \$60.75, respectively.

Actual cost: \$811.50

Fieldwork: First, an updated map documenting the current nature of the site must be prepared. This will be done using a transit and metric measuring tape. (Note: The technique used to draft the map shown as Attachment B did not include using a transit.) The next step in the fieldwork is the major effort of labor and will consist of shoveling and screening all the dirt from the three new piles

through ¼-inch mesh and collecting all artifacts for analysis. There is an estimated 14,513 cubic feet of dirt to be screened. Without having to follow a regular grid or dig in formal vertical units, shovelling and screening will proceed relatively quickly. It is estimated that fieldwork will require about 30 person days to complete, with a Project Director and two Archeological Technicians.

Estimated cost: \$8,040.00 (personnel, vehicle, and supplies)

Laboratory Analysis: The number and variety of artifacts found in the bulldozer piles directly influences the time and types of research needed to accomplish basic analysis. Surface artifacts within a 2 x 2 meter square on each of the three mounds were collected so that we could estimate quantities and variety of artifacts. We recovered 20, 14, and 19 surface artifacts from collection units in Mounds 1, 2, and 3, respectively. We selected collection locations in order to recover a sample of artifacts representing the variety of artifacts involved. We collected the usual gamut of chipped stone, pottery sherds, ground stone, and bone.

The collection units contained slightly less than twice as many surface artifacts in areas the same size across the remaining portions of the mounds. Based on this information we would conservatively expect to recover at least 20 artifacts per cubic meter of screened soil, or at least 8,232 artifacts from Mounds 1, 2, and 3. These must be washed and labelled prior to analysis, and then qualified ceramic and stone tool specialists must analyze them as to type, material, function or form, and cultural affiliation. These analyses will become integral parts of the final technical report. It is estimated that analysis will require about 55 person days to complete.

Estimated cost: \$13,230.00 (personnel and supplies)

Report: A technical report must be prepared, presenting the results of the fieldwork and analysis. At a minimum, the report will provide background information, field methods, research orientation, data, results of analyses, and interpretation. It is estimated that report preparation will require 45 days for the Project Director to complete.

Estimated cost: \$10,830.00

Artifact and Document Curation: All recovered artifacts must, by law, be curated in perpetuity at a sanctioned facility. Since the site is located on the Arizona portion of the Navajo Nation Reservation, curation will be with the Museum of Northern Arizona, in Flagstaff.

Estimated cost: \$3,850.00

**TOTAL ESTIMATED COST FOR RESTORATION AND REPAIR (rounded): \$37,501**

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#### ARCHEOLOGICAL VALUE

The language contained in 43 CFR 7.14(a) provides the following definition for "archeological value."

"...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."

An estimate must be made based on the answer to the question: "How much would it have cost to professionally excavate 14,500 cubic feet of archeological fill from the site?" Since this is a site administered by the Navajo Nation it is most helpful to refer to the costs estimated by Dr. Klesert in the above "Restoration and Repair" section. To those costs, expenses would have to be added for the development of a more research oriented scope of work (rather than a salvage strategy), fieldwork (because a more controlled and slower excavation technique would have been necessary), and analysis (since excavation of undisturbed contexts result in the collection of soil and feature samples).

I very conservatively estimate that a research design would require an additional 3 person days to prepare, fieldwork an additional 60 person days, and laboratory processing/analysis another \$4,000 for soil samples containing pollen, plant, and other remains.

**TOTAL ARCHEOLOGICAL VALUE: \$57,510**

#### COMMERCIAL VALUE

The language contained in 43 CFR 7.14(b) defines "commercial value" as the "fair market value." The fair market value of pottery sherds (referred to as ceramics in the original report) was based on prices posted at Tiqua Gallery, 812 Canyon Road, Santa Fe, New Mexico, when I prepared my initial report. At that time the gallery was selling only painted sherds and they were \$5.00 each. I reduced the estimated fair market value of the corrugated and plain sherds by \$2.00 each since they are usually less attractive to buyers.

I revisited the Tiqua Gallery as part of writing this supplemental report. They had modified their prices to \$4.00 for any painted, plain, or corrugated pottery sherd. I purchased one each of these types. The price adjustment, if I were to do so, would increase the commercial value by \$3,828. Photocopies of the receipt and

pottery sherds are attached (Attachment C). I also have photocopied some of the pottery sherds collected from AZ K:11:40 (ASM) for comparison (Attachment D).

Fair market prices for projectile points, metates, and manos were obtained by using a popular collector's guide (Hothem 1991) and the many price lists I have obtained from other sellers of antiquities.

Although I have seen chipped stone artifacts that are not formal tools for sale on the open market, it is rare so I did not include them in the commercial value estimate. However, pottery sherds, projectile points, metates, and manos are frequently bought and sold. In order to estimate how many of each of these artifact types might be recovered when the mounds of backdirt are screened, I researched how many are typically found at comparable sites. One such site for purpose of comparison is 29SJ 1360 and is located at Chaco Canyon National Historical Park in northwestern New Mexico.

We have already estimated that at least 8232 chipped stone and ceramics artifacts have been displaced by the bulldozer. Using site 29SJ 1360's inventory for base line data shows that about 93% of these should be ceramics and 7% chipped stone artifacts. Six projectile points should be expected from the chipped stone assemblage. These numbers are reflected in my initial report under the "commercial value" section, as the 7,656 ceramics and 6 projectile points assigned a fair market value.

Estimated counts for metates and manos, the majority of which are usually recovered from buried contexts at sites such as AZ K:11:40 (ASM), were also figured by comparison to 29SJ 1360's inventory. The comparison shows that for every 8232 artifacts excavated from 29SJ 1360, there were 104 whole (i.e., salable) manos and 29 whole metates. Those quantities are reflected in my initial report (under "commercial value").

**TOTAL COMMERCIAL VALUE: \$33,171**

References Cited

- Hothem, Lar  
1991 Arrowheads and Projectile Points - Identification and Values. Collector Books, P.O. Box 3009, Paducah, Kentucky 42002-3009.
- Klesert, Anthony L.  
1994 Letter with attachment to Judith Reed dated April 19, 1994. Original in possession of the National Park Service, Resources Protection Unit, Santa Fe, New Mexico.

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Attachment C

000590

**TIQUA GALLERY**  
812 CANYON ROAD SANTA FE, NM 87501

CUSTOMER'S ORDER NO.

DEPT.

DATE

1/12/95

NAME

ADDRESS

Sherds and receipt for their purchase from Tiqua Gallery, Santa Fe, NM.

SOLD BY		CASH	C.O.D.	CHARGE	ON ACCT.	MOSE. REID.	PAID OUT
QUAN.		DESCRIPTION			PRICE	AMOUNT	
3	1	S/keras				12	00
	2				14		73
	3				12		73
	4						
	5						
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REC'D BY

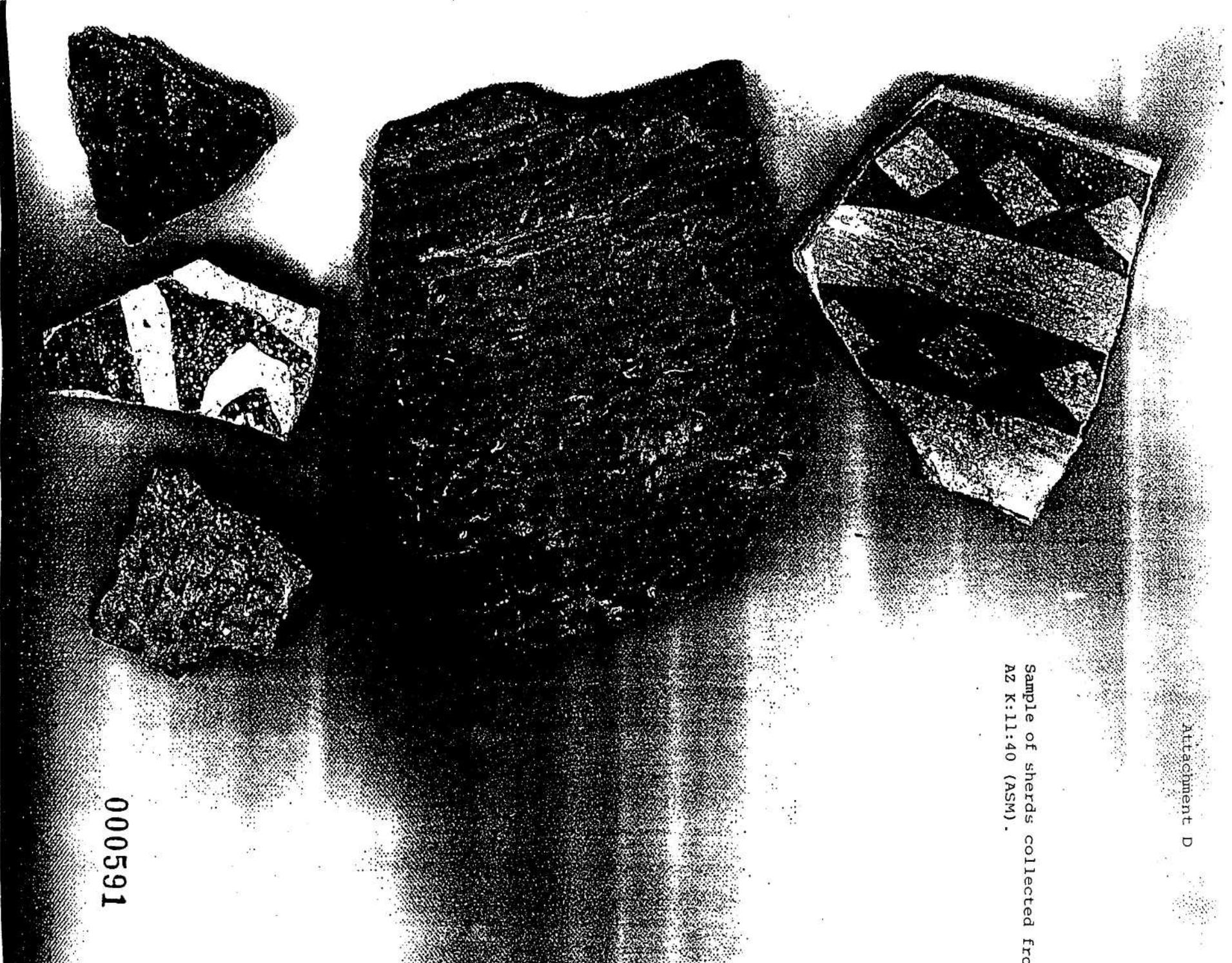
NO REFUNDS - EXCHANGES ONLY

KEEP THIS SLIP FOR REFERENCE

TOPS  FORM 48320 ©



Sample of sherds collected from  
AZ K:11:40 (ASM).



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1 Heidi L. McNeil, Esq.  
2 SNELL & WILMER  
3 One Arizona Center  
4 Phoenix, Arizona 85004-0001  
5 (602) 382-6366  
6 Attorneys for ARIZONA SILICA SAND COMPANY

RECEIVED

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BUREAU OF IND AFFAIRS  
EXECUTIVE SECRETARIAT  
BEFORE THE HEARINGS DIVISION  
OFFICE OF HEARINGS AND APPEALS  
UNITED STATES DEPARTMENT OF THE INTERIOR



9 IN THE MATTER OF THE )  
10 REQUEST FOR A HEARING )  
11 BY ARIZONA SILICA SAND )  
12 COMPANY )  
13 Sand & Gravel )  
14 Permit No. 14-20-0603-8992 )

REQUEST FOR A HEARING  
TO CONTEST THE NOTICE OF  
ASSESSMENT ISSUED BY THE  
BUREAU OF INDIAN AFFAIRS

Snell & Wilmer  
LAW OFFICES  
One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000

- 16 TO: HEARINGS DIVISION, OFFICE OF HEARINGS AND APPEALS, U.S.  
17 DEPARTMENT OF THE INTERIOR, 4015 WILSON BOULEVARD,  
18 ARLINGTON, VIRGINIA
- 19 TO: WILSON BARBER, JR., AREA DIRECTOR OF THE NAVAJO AREA  
20 OFFICE OF THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN  
21 AFFAIRS, P.O. BOX 1060, GALLUP, NEW MEXICO
- 22 TO: THOMAS TIPPECONNIC, ACTING AREA DIRECTOR, BUREAU OF INDIAN  
23 AFFAIRS, NAVAJO AREA OFFICE, P.O. BOX 1060, GALLUP, NEW  
24 MEXICO

25 Pursuant to 43 C.F.R. §§ 7.15(g) and 7.37(a), Arizona  
26 Silica Sand Company ("ASSC") requests a hearing on the Notice of  
Assessment issued by the Acting Area Director, Bureau of Indian  
Affairs, Navajo Area Office. The Notice of Assessment at issue  
is dated August 16, 1994, and was received by ASSC on August 25,

000592

1 1994. A copy of the Notice of Assessment is attached as Exhibit  
2 "1".<sup>1</sup>

3  
4 MEMORANDUM OF POINTS AND AUTHORITIES

5 I. BACKGROUND FACTS

6 ASSC is an Arizona corporation that mines sand on the  
7 Navajo reservation in Arizona pursuant to the Bureau of Indian  
8 Affairs ("BIA") Lease/Permit No. 14-20-0603-8992. The BIA  
9 issued its first Notice of Violation on April 18, 1994, pursuant  
10 to the Archaeological Resources Protection Act of 1979 ("ARPA"),  
11 16 U.S.C. § 470aa--mm and 43 C.F.R. § 7.4(a). A copy of the  
12 first Notice of Violation is attached as Exhibit "5". No  
13 proposed penalty amount was stated in the first Notice of

14  
15 <sup>1</sup>. ASSC previously filed a Notice of Appeal concerning the  
16 Notice of Assessment with the Bureau of Indian Appeals. Both a  
17 Notice of Appeal and this Request for a Hearing have been filed  
18 because the Notice of Assessment stated that ASSC should file an  
19 appeal with the Interior Board of Indian Appeals, 4015 Wilson  
20 Boulevard, Arlington, Virginia 22203, in accordance with 43  
21 C.F.R. §§ 4.310-4.340. A copy of the Notice of Appeal is  
22 attached as Exhibit "2". However, this is a proceeding under  
23 the Archaeological Resource Protection Act ("ARPA") which  
24 provides that, following a Notice of Assessment, the next course  
25 of action is to request a hearing from the Hearings Division,  
26 Office of Hearings and Appeals, U.S. Department of the Interior.  
A copy of the ARPA is attached as Exhibit "3". The two  
provisions setting forth this process are 43 C.F.R. §§ 7.15(g)  
and 7.37(a). Counsel for ASSC discussed this discrepancy with  
Wilson Barber, Jr., Area Director of the Navajo Area Office of  
the Department of the Interior. During that conversation, it  
was agreed that the correct procedure would be to request a  
hearing as provided in the ARPA and also send a Notice of Appeal  
to the Board of Indian Appeals for notice purposes. See Letter  
to Mr. Barber dated September 15, 1994, attached as Exhibit "4".  
ASSC respectfully requests that the Hearings Division make a  
determination as to the correct course of action in order to  
assure that only one administrative process is pursued.

1 Violation. The first Notice of Violation was based on alleged  
2 damage that occurred on Navajo Nation land near Houck, Arizona  
3 on or about October 26, 1993. Subsequently, the BIA issued a  
4 second Notice of Violation, dated July 7, 1994, and received by  
5 ASSC on July 11, 1994, that included a proposed penalty amount  
6 of \$70,672.00. A copy of the second Notice of Violation is  
7 attached as Exhibit "6".

8 Representatives of ASSC and the BIA met at the lease site  
9 on July 16, 1994, and at the Navajo Area BIA office on July 17,  
10 1994, to discuss the issues involved. Thereafter, the BIA  
11 issued a Notice of Assessment in the amount of \$70,672.00 that  
12 was dated August 16, 1994, and received by ASSC on August 25,  
13 1994. See Exhibit "1". On August 19, 1994, between the time  
14 that the Notice of Assessment was mailed and received, ASSC  
15 filed a timely Petition for Relief with respect to the second  
16 Notice of Violation pursuant to the ARPA, 43 C.F.R. § 7.15(c).  
17 A copy of the Petition for Relief is attached as Exhibit "7".

18  
19 **II. THE BASIS FOR CHALLENGING THE ASSESSMENT**

20 **A. The BIA Issued the Notice of Assessment Prematurely.**

21 The initial Notice of Violation was issued by the BIA on  
22 April 18, 1994. See Exhibit "5". The second Notice of  
23 Violation, with the proposed penalty amount of \$70,672.00, was  
24 issued on July 7, 1994, and received July 11, 1994. See  
25 Exhibit "6". According to 43 C.F.R. § 7.15(c) and as specified  
26 in the second Notice of Violation, ASSC had 45 days from the

1 date of its receipt -- until August 25, 1994 -- to either seek  
2 informal discussions, file a Petition for Relief, take no action  
3 and/or accept and pay any proposed penalty. During the 45-day  
4 period, ASSC timely mailed its Petition for Relief on August 19,  
5 1994. See Exhibit "7". In addition, 43 C.F.R. § 7.15(e)  
6 provides that a Notice of Assessment is not to be issued "until  
7 expiration of the period for filing a petition for relief, upon  
8 completion of review of any petition filed, or upon completion  
9 of informal discussions, whichever is later."

10 Before the BIA even received the Petition for Relief and  
11 without waiting the required 45 days, the BIA issued a Notice of  
12 Assessment to ASSC. See Exhibit "1". The Notice was dated  
13 August 16, 1994, and received by ASSC on August 25, 1994. See  
14 Letter to BIA from H. McNeil dated August 30, 1994, attached as  
15 Exhibit "8". This premature issuance of the Notice of  
16 Assessment must be rescinded because it violates the express  
17 provisions of the ARPA and denies ASSC the right to have its  
18 Petition for Relief considered.

19  
20 **B. The Proposed Penalty Amount is Excessive.**

21 As stated in ASSC's Petition for Relief, the \$70,672.00  
22 penalty amount is erroneous for the following reasons:

- 23 1. The damage is overstated and therefore the proposed  
24 penalty amount is excessive and unfair; and  
25 2. The proposed penalty will impose an undue financial  
26 hardship on ASSC.

1           Ironically, ASSC did not directly cause any damage. In  
2 fact, as soon as ASSC learned of the existence of the  
3 archaeological site at issue, the ASSC site supervisor  
4 immediately staked boundary markers around the site to prevent  
5 any disturbance. At ASSC's direction, the site supervisor also  
6 instructed all employees to stay away from the site. Despite  
7 these precautions, an employee of ASSC who is a member of the  
8 Navajo Nation, used certain excavating equipment to place a load  
9 of dirt on top of the archaeological site. Even though he knew  
10 he was violating ASSC's orders, he took this action because he  
11 was trying to further ensure the protection of the site -- not  
12 destroy or disturb it. The employee's action, although it  
13 allegedly may have caused damage to the area, was with good  
14 intentions in all respects. Finally, no archaeological  
15 resources were taken from the site at issue.

16           In addition, ASSC already pays the Navajo Nation  
17 substantial monies in terms of royalties, taxes, and employee  
18 wages. Specifically, since 1981, ASSC has paid the Navajo  
19 Nation more than half of its profits. Furthermore, ASSC has not  
20 been very profitable over the years; to pay such a high penalty  
21 would seriously jeopardize the continued existence of the  
22 Company. Indeed, ASSC made no profit during the fiscal years of  
23 1990-1991 and 1991-1992, and suffered significant losses during  
24 that time. As a result, the \$70,672.00 penalty amount  
25 constitutes a tremendous hardship to ASSC.  
26

1 C. There is No Basis or Support for the Proposed Penalty  
2 Amount.

3 The proposed penalty amount has no basis or support in the  
4 facts for several reasons. First, in response to a Freedom of  
5 Information Act request, the BIA sent only general information  
6 regarding this archeological site. Nothing in this release  
7 contains any specific information to support a damage amount to  
8 the site at issue. Second, it is ASSC's understanding that this  
9 is the first Notice of Violation of its type issued by the BIA  
10 office in Gallup, New Mexico, and thus there is no precedent for  
11 the amount of damages proposed. Third, it is ASSC's  
12 understanding that the Navajo Nation intends to conduct no  
13 further research on the site at this time. Further, the Navajo  
14 Nation was well aware of the archaeological site prior to the  
15 alleged disturbance last year and did not pursue research of the  
16 area. Fourth, the Notice of Violation fails to set forth a  
17 concise statement of facts believed to show the alleged  
18 violation as required by 43 C.F.R. § 7.15(b). Again, these  
19 additional factors support the contention that the \$70,672.00  
20 damage assessment is unreasonable, excessive and without basis  
21 in fact or law.

22 Finally, the Notice of Assessment stated that it was  
23 relying on a damage report prepared by Judy Reed of the ARPA  
24 Task Force, National Park Service, and Anthony L. Klesert of the  
25 Navajo Nation Archaeology Department. However, this report is  
26 only a generalized summary of the site's condition and is not

1 sufficient to support the \$70,672.00 assessment. In fact, the  
2 damage assessment itself admits that "[t]he dollar figures below  
3 include archeological costs normally incurred in a  
4 professionally executed project." It does not provide any  
5 support for repair costs associated with this specific project.  
6 Thus, there is an insufficient factual basis to support the  
7 BIA's \$70,672.00 penalty amount contained in the Notice of  
8 Assessment.

9  
10 III. PREFERENCE AS TO DATE AND PLACE FOR A HEARING

11 ASSC respectfully requests that a hearing be conducted at  
12 the BIA office in Phoenix, Arizona, on a date that is mutually  
13 convenient to the parties.

14  
15 IV. THE NATURE OF THE RELIEF SOUGHT

16 ASSC requests that the Notice of Assessment be rescinded  
17 and that the BIA, Navajo Area Office, be directed to consider  
18 the matters contained in the Petition for Relief prior to  
19 determining the amount to be assessed.

20 ASSC further requests that the Board of Indian Appeals and  
21 the Office of Hearings and Appeals make a determination as to  
22 which administrative route this matter should proceed.

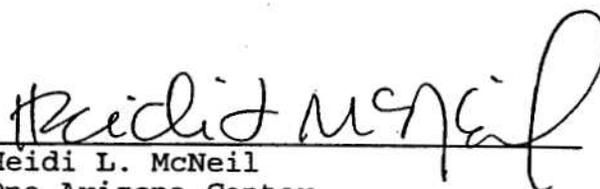
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V. CONCLUSION

For all the foregoing reasons, the Notice of Assessment should be rescinded.

RESPECTFULLY SUBMITTED this 30th day of September, 1994.

SNELL & WILMER

By 

Heidi L. McNeil  
One Arizona Center  
Phoenix, Arizona 85004-0001  
Attorneys for ARIZONA SILICA SAND  
COMPANY

ORIGINAL of the foregoing sent by certified Express Mail with a return receipt requested this 30th day of September, 1994, to:

Hearing Division  
Office of Hearings and Appeals  
U.S. Department of the Interior  
4015 Wilson Boulevard  
Arlington, Virginia 22203-1923

COPY of the foregoing sent by certified mail with a return receipt requested this 30th day of September, 1994, to the following additional interested persons:

Board of Indian Appeals  
Office of Hearings and Appeals  
U.S. Department of the Interior  
4015 Wilson Boulevard  
Arlington, Virginia 22203-1923

Mr. Wilson Barber, Jr.  
Area Director  
U.S. Department of the Interior  
Bureau of Indian Affairs  
Navajo Area Office  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

1 COPY of the foregoing sent by  
2 regular mail this 30th day of September,  
3 1994, to the following additional  
4 interested persons:

5 Mr. Thomas Tippeconnic  
6 Acting Area Director  
7 U.S. Department of the Interior  
8 Bureau of Indian Affairs  
9 Navajo Area Office  
10 Post Office Box 1060  
11 Gallup, New Mexico 87305-1060

12 Solicitor of the Department of the Interior  
13 U.S. Department of the Interior  
14 Office of the Solicitor  
15 Immediate Office  
16 1849 C. Street NW  
17 Washington, D.C. 20240

18 Mr. Peterson Zah  
19 Tribal Chairman  
20 Navajo Nation  
21 Post Office Box 308  
22 Window Rock, Navajo Nation  
23 Arizona 86515

24 Ms. Ada Deer  
25 Assistant Secretary - Indian Affairs  
26 M/S 4160 MIB  
U.S. Department of the Interior  
18th and C Streets, NW  
Washington, D.C. 20240

Ms. Genni Denetsone  
Acting Assistant Area Director  
U.S. Department of the Interior  
Bureau of Indian Affairs  
Navajo Area Office  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

Snell & Wilmer

LAW OFFICES

One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000

1 Ms. Mary Lou Drywater  
2 Supervisor, Minerals Section  
3 U.S. Department of the Interior  
4 Bureau of Indian Affairs  
5 Navajo Area Office  
6 Post Office Box 1060  
7 Gallup, New Mexico 87305-1060

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13 *Cynthia L. Abbott*  
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Snell & Turner  
LAW OFFICE  
One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000



# United States Department of the Interior



BUREAU OF INDIAN AFFAIRS

Navajo Area Office  
P.O. Box 1060

Gallup, New Mexico 87305-1060

IN REPLY REFER TO:

ARES/543

## Notice of Assessment

APR 16 1994

### CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Arizona Silica Sand Company  
11201 North 23rd Avenue #106  
Phoenix, Arizona 85029

An investigation has revealed that you are responsible for damage to an archaeological site (archaeological resource), AZ K:11:40 (ASM), on Indian Lands in or near Houck, Arizona. The damage occurred during the course of unauthorized mining for sand on or about October 26, 1993. The specific location of the damaged site is T22N, R29E, Unplatted, UTM Coordinates, 390538N, 694950E, Apache County, Arizona.

During the course of the investigation and meeting on March 16, 1994, James Burkewitz, plant manager for Arizona Silica Sand Company, stated that an employee of Arizona Silica Sand Company with the use of a front-end loader placed "dirt" on top of the archaeological site. Archaeologists from the Navajo Nation Historic Preservation Department, the Navajo Nation Archaeology Department, and the National Park Service (ARPA Task Force) established that the use of heavy machinery has severely impacted site AZ K:11:40 (ASM). The damage occurred after the archaeological inventory was conducted by Plateau Mountain Desert Research, Contract Archaeologists. Further, damage occurred before any notice to proceed was issued by the Navajo Nation Historic Preservation Department, which provided specific conditions that "the proposed undertaking will have no effect on the identified historic properties provided that site AZ K:11:40 is avoided by a minimum of 50 ft. (15.2 m) during all construction activities and that a temporary fence be erected along the edge of the project area that is adjacent to the site . . ." Fencing of this site was not in place on the March 16, 1994 meeting at the lease site. Further, Arizona Silica Sand Company had prior knowledge of the location of the archaeological site as evidenced by Plateau Mountain Desert Research Archaeological survey report and during the course of soliciting for an archaeological inventory.

At your requested meeting of July 17, 1994, James Burkewitz confirmed that an employee of Arizona Silica Sand Company placed "dirt" on top of the archaeological site. Further, Mr. Burkewitz stated that the archaeological contractor had notified Arizona

EXHIBIT "1"

000602

Silica Sand Company of the archaeological site. Arizona Silica Sand Company agreed to move the project to a different location. The location and project area are recorded in the archaeological survey report. The Arizona Silica Sand Company had been operating since 1966 and (prior to January, 1993) have never conducted an archaeological inventory as required under the National Historic Preservation Act for undertakings on Indian Lands: According to Mr. Burkewitz, as part of the environment assessment, BLM suggested that they arrange for an archaeologist to conduct an archaeological survey. However, ground disturbing activities were conducted prior to completion of the Navajo Nation Historic Preservation Department's Cultural Resource Compliance Form. The Navajo Nation Historic Preservation Department acts as the agent of the Bureau of Indian Affairs for archaeological services, pursuant to Public Law 93-638 contract. The Bureau of Indian Affairs' Area Director gives final approval for the Cultural Resource Compliance Form that is originated by the Navajo Nation Historic Preservation Department. Further, permission was not sought or granted to excavate or remove archaeological site AZ K:11:40, (ASM).

Judy Reed of ARPA Task Force, National Park Service and Anthony L. Klesert of the Navajo Nation Archaeology Department, determined the archaeological resource's "Archaeological Value," "Commercial Value," and "Restoration and Repair Costs." Therefore, I have determined the amount of penalty to be \$70,672.00, which includes the commercial value of the items, plus the cost of restoration and repair of the damaged archaeological resource. The administrative cost for the Navajo Nation Historic Preservation will be billed separately.

If you do not agree with our action, you have the right to appeal this decision to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with 43 CFR 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed and include a copy of the decision. Copies of your notice of appeal must be sent to (1) the Assistant Secretary-Indian Affairs, M/S 4160 MIB, U.S. Department of the Interior 18th and C Streets, NW, Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties.

If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period.

No extension of time may be granted for filing a notice of appeal. If you have any questions concerning this order, you may call (602) 871-5151, extension 5338 or submit your inquiry to:

000603

BIA - Navajo Area Office  
P. O. Box 1060  
Branch of Real Estate Service  
Subsurface/Minerals & Mining Section  
Gallup, New Mexico 87305-1060

Sincerely,

A handwritten signature in cursive script, appearing to read "H. J. ...", is written over a horizontal line.

ACTING Area Director

000604

1 Heidi L. McNeil, Esq.  
2 SNELL & WILMER  
3 One Arizona Center  
4 Phoenix, Arizona 85004-0001  
5 (602) 382-6366  
6 Attorneys for ARIZONA SILICA  
7 SAND COMPANY

8 BEFORE THE INTERIOR BOARD  
9 OF INDIAN APPEALS

10 UNITED STATES DEPARTMENT OF THE INTERIOR

11 IN THE MATTER OF THE APPEAL OF  
12 ARIZONA SILICA SAND COMPANY  
13 Sand & Gravel Permit No. 14-20-0603-8992

14 )  
15 )  
16 ) NOTICE  
17 ) OF APPEAL  
18 )  
19 )  
20 )

- 21 TO: BOARD OF INDIAN APPEALS, OFFICE OF HEARINGS AND APPEALS, U.S.  
22 DEPARTMENT OF THE INTERIOR, 4015 WILSON BOULEVARD, ARLINGTON,  
23 VIRGINIA
- 24 TO: WILSON BARBER, JR., AREA DIRECTOR OF THE NAVAJO AREA  
25 OFFICE OF DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN  
26 AFFAIRS, P.O. BOX 1060, GALLUP, NEW MEXICO
- TO: THOMAS TIPPECONNIC, ACTING AREA DIRECTOR, BUREAU OF INDIAN  
AFFAIRS, NAVAJO AREA OFFICE, P.O. BOX 1060, GALLUP, NEW MEXICO

YOU ARE HEREBY NOTIFIED that Arizona Silica Sand Company ("ASSC") appeals  
the Notice of Assessment issued by the Acting Area Director of the Bureau of Indian Affairs,  
Navajo Area Office, on August 16, 1994. A copy of the Notice of Assessment is attached

LAW  
One Ariz  
Phoenix, Arizon  
(602) 382-6000

1 as Exhibit "1."<sup>1</sup> This Notice of Appeal is made pursuant to the provisions contained in 43  
2 C.F.R. §§ 4.310-4.340.

3 As the initial statement of reasons for this appeal and the relief sought, ASSC states  
4 as follows:

5 The Bureau of Indian Affairs issued the Notice of Assessment prematurely.  
6 An initial Notice of Violation was issued by the Bureau of Indian Affairs ("BIA") on April  
7 18, 1994 -- no proposed penalty amount was stated at that time. A copy of the initial Notice  
8 of Violation is attached as Exhibit "2". Another Notice of Violation, with the proposed  
9 penalty amount of \$70,672.00, was issued on July 7, 1994 and received July 11, 1994. A  
10 copy of the July Notice of Violation is attached as Exhibit "3". According to 43 C.F.R.  
11 § 7.15(c) and as specified in the July Notice, ASSC then had 45 days from the date of receipt  
12 of the July Notice -- until August 25, 1994 -- to either seek informal discussions, file a  
13 Petition for Relief, take no action and/or accept and pay any proposed penalty. During the  
14 45-day period, ASSC timely mailed its Petition for Relief on August 19, 1994. However,  
15 before the BIA even received the Petition for Relief and without waiting the required 45 days,  
16 the BIA issued a Notice of Assessment to ASSC, which was dated August 16, 1994 and  
17 received by ASSC on August 25, 1994. See Letter to BIA from H. McNeil dated August 30,  
18 1994, attached as Exhibit "5". This premature issuance of the Notice of Assessment must be

19  
20  
21 <sup>1</sup>. The Notice of Assessment indicated that the next course of action for ASSC was to  
22 file an appeal with the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington,  
23 Virginia 22203, in accordance with 43 C.F.R. §§ 4.310-4.340. However, this is a proceeding  
24 under the Archaeological Resource Protection Act ("ARPA") which provides that, following  
25 a Notice of Assessment, the next course of action is to request a hearing from the Hearings  
26 Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson  
Boulevard, Arlington, Virginia 22203-1923. See, 43 C.F.R. §§ 7.15(g) and 7.37(a).  
Counsel for ASSC discussed this discrepancy with Wilson Barber, Jr., Area Director of the  
Navajo Area Office of the Department of the Interior. During that conversation, it was  
agreed that the correct procedure would be to request a hearing as provided in the ARPA and  
also file a Notice of Appeal with the Board of Indian Appeals for notice purposes. See, letter  
to Mr. Barber dated September 15, 1994, attached as Exhibit "4". ASSC intends to timely  
file its request for hearing as provided by 43 C.F.R. §§ 7.15(g) and 7.37(a).

LAW OFFICE  
One Arizona  
Phoenix, Arizona  
(602) 382-6000  
J001

1 rescinded because it violates the express provisions of the Archaeological Resource Protection  
2 Act and denies ASSC the right to have its Petition for Relief considered.

3 2. **The \$70,672.00 penalty amount is excessive.** The penalty amount is excessive  
4 because, among other reasons, the damages are overstated and will pose an undue hardship  
5 on ASSC. See Petition for Relief dated August 19, 1994, attached as Exhibit "6".

6 3. **The penalty amount is without basis.** The penalty amount is erroneous  
7 because it is without proper basis or support. The Navajo Nation was well aware of the  
8 archaeological site prior to the alleged disturbance last year and as soon as ASSC learned of  
9 the existence of the archaeological site at issue, ASSC took proper steps to protect the area.  
10 See Petition for Relief, attached as Exhibit "6".

11 4. **Requested relief.** ASSC requests that the Notice of Assessment be rescinded  
12 and that the BIA, Navajo Area Office, be directed to consider the matters contained in the  
13 Petition for Relief prior to determining the amount to be assessed.

14 ASSC further requests that the Board of Indian Appeals and the Office of Hearings and  
15 Appeals make a determination as to which administrative route this matter should proceed.<sup>2</sup>

16 DATED this 23<sup>rd</sup> day of September, 1994.

17 SNELL & WILMER

18  
19 By Heidi L. McNeil  
20 Heidi L. McNeil  
21 One Arizona Center  
22 Phoenix, Arizona 85004-0001  
23 Attorneys for ARIZONA SILICA  
24 SAND COMPANY

25 <sup>2</sup>. If it is determined that this matter will proceed under this appeal to the Board of Indian  
26 Appeals -- instead of through the Hearings process as outlined in the ARPA -- then ASSC  
requests the opportunity to submit a full brief along with supporting legal authority.

STATE OFFICES  
One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000

1 It is hereby certified that:

2 ORIGINAL of the foregoing was  
3 sent by certified mail with a  
4 return receipt requested this  
5 23<sup>rd</sup> day of September, 1994, to:

6 Board of Indian Appeals  
7 Office of Hearings and Appeals  
8 U.S. Department of the Interior  
9 4015 Wilson Boulevard  
10 Arlington, Virginia 22203

11 COPY of the foregoing was sent by  
12 certified mail with a return receipt  
13 requested this 23<sup>rd</sup> day of September,  
14 1994, to the following additional  
15 interested persons:

16 Mr. Wilson Barber, Jr.  
17 Area Director  
18 U.S. Department of the Interior  
19 Bureau of Indian Affairs  
20 Navajo Area Office  
21 Post Office Box 1060  
22 Gallup, New Mexico 87305-1060

23 Mr. Thomas Tippeconnic  
24 Acting Area Director  
25 U.S. Department of the Interior  
26 Bureau of Indian Affairs  
Navajo Area Office  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

Solicitor of the Department of the Interior  
U.S. Department of the Interior  
Office of the Solicitor  
Immediate Office  
1849 C. Street NW  
Washington, D.C. 20240

Mr. Peterson Zah  
Tribal Chairman  
Navajo Nation  
Post Office Box 308  
Window Rock, Navajo Nation  
Arizona 86515

LAW OFFICE  
One Arizona  
Phoenix, Arizona  
(602) 382-4000  
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Ms. Ada Deer  
Assistant Secretary - Indian Affairs  
M/S 4160 MIB  
U.S. Department of the Interior  
18th and C Streets, NW  
Washington, D.C. 20240

Ms. Genni Denetsone  
Acting Assistant Area Director  
U.S. Department of the Interior  
Bureau of Indian Affairs  
Navajo Area Office  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

Ms. Mary Lou Drywater  
Supervisor, Minerals Section  
U.S. Department of the Interior  
Bureau of Indian Affairs  
Navajo Area Office  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

Cynthia L. Abbott

3078080

Snell & Wilmer  
LAW OFFICES

One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000  
Fax: (602) 382-6070

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

SALT LAKE CITY, UTAH

September 15, 1994

Direct Line: (602) 382-6365

VIA TELECOPY AND REGULAR MAIL

Wilson Barber, Jr.  
Area Director  
United States Department of the Interior  
Bureau of Indian Affairs  
Navajo Area Office  
P.O. Box 1060  
Gallup, New Mexico 87305-1060

Re: **Arizona Silica Sand Company/Request for a  
Hearing Following a Notice of Assessment**

Dear Mr. Barber:

Thank you for taking the time to speak with me on the phone today. The purpose of this letter is to summarize our conversation.

As we discussed, the Archaeological Resource Protection Act ("ARPA") specifically provides that, once a Notice of Assessment has been issued, the next course of action is to request a hearing from the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. The two provisions setting forth this administrative process are 43 C.F.R. §§ 7.15(g) and 7.37(a).

In contrast, the Notice of Assessment issued to Arizona Silica Sand Company ("ASSC") dated August 16, 1994 indicated that ASSC's next course of action should be to appeal to the Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203. Although this is the normal course of action in most Indian appeals, the ARPA specifically directs ASSC to request a hearing from the Office of Hearings and Appeals.

Therefore, based on this information and our phone conversation, on behalf of ASSC, we will request a hearing from the Hearings Division as indicated in the ARPA. In addition, in order to ensure that all procedures have been properly followed and that we do not create two separate proceedings, we will also send a copy of our request for a hearing to

EXHIBIT "4"

000610

# Snell & Wilmer

Wilson Barber, Jr.  
September 15, 1994  
Page 2

the Board of Indian Appeals. Your assumption that the Hearings Division will most likely forward this matter to the Board of Indian Appeals may be correct. Nonetheless, in this manner we hope to ensure that all procedures are properly followed and that we do not end up creating two separate proceedings.

Once again, thank you for taking the time to discuss this matter with me. If my understanding of the above is erroneous in any respect, please contact me as soon as possible. If I do not hear from you by September 16, 1994, I will assume that my understanding as set forth herein is accurate.

Very truly yours,

SNELL & WILMER

*Don Zavala*

Don Zavala  
Applicant for Admission to  
the State Bar of Arizona

DZ/cia

cc: Heidi L. McNeil

3076679

000611



IN KIPPLY KIPPER TO.

ARES/543

# United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Navajo Area Office  
P.O. Box 1060

Gallup, New Mexico 87305-1060



## NOTICE OF VIOLATION

### CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Arizona Silica Sand Company  
11201 North 23rd Avenue #106  
Phoenix, Arizona 85029

An investigation has revealed that you are responsible for damage to an archaeological site near Houck, Arizona, on Navajo Nation lands. The damage occurred on or about October 26, 1993, during the course of unauthorized mining for sand, an activity that was conducted outside of the permit or contract authority, or without a permit or a contract. The specific location of the damaged site is T22N, R29E, Unplatted, Apache County, Arizona.

You have damaged an archaeological resource located on Indian Lands, in violation of the Archaeological Resources Protection Act of 1979 (ARPA, 16 USC 470aa--mm) and 43 CFR 7.4(a).

The proposed penalty amount will be assessed after the damages have been ascertained [see 43 CFR 7.15(a)]

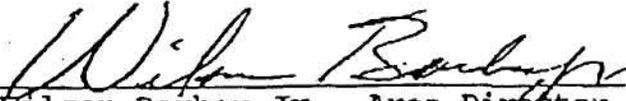
You have 45 days from the service of this notice, to take one of the following actions: seek informal discussions with the Bureau of Indian Affairs, Navajo Area Office, at (602) 871-5151, extension 5338; file a petition for relief, and take no action, but await issuance of the Notice of Assessment. Any Petition for Relief must comply with the requirements of 43 CFR 7.15.(d).

Upon completion of the review of any petition, at the conclusion of the informal discussions, or upon passage of 45 days, if you take no action, I will, if appropriate, issue a Notice of Assessment. If one is issued, you will have the right to a hearing before an Administrative Law Judge of the Department of the Interior, Office of Hearings and Appeals, if you wish to appeal. I will advise you of the proper procedures for appealing the Notice of Assessment, in any Notice of Assessment that I issue.

EXHIBIT "5"

000612

You have the right to seek judicial review of any final administrative decision assessing a civil penalty.

  
Wilson Barber Jr., Area Director  
Bureau of Indian Affairs,  
Navajo Area Office

4-18-94  
Date



IN REPLY REFER TO:  
ARES/543

United States Department of the Interior



BUREAU OF INDIAN AFFAIRS

Navajo Area Office  
P.O. Box 1060

Gallup, New Mexico 87305-1060

JUL 07 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Arizona Silica Sand Company  
11201 North 23rd Ave. #106  
Phoenix, Arizona 85029

Gentlemen:

The total damages have now been ascertained on the archaeological site that was damaged during the course of an unauthorized mining for sand, identified in the Notice of Violation dated April 18, 1994. The proposed penalty amount is \$70,672.

You have 45 days from the service of this notice to take one of the following actions: seek informal discussions with the Area Director, Bureau of Indian Affairs; file a petition for relief; or take no action, but await issuance of the notice of assessment. Any petition for relief must comply with the requirements in 43 CFR 7.15(d).

Upon completion of the review of any petition or conclusion of the informal discussions, or passage of 45 days if you take no action, I will, if appropriate, issue a notice of assessment. If one is issued, you will have the right to a hearing before an Administrative Law Judge of the Department of Interior, Office of Hearings and Appeals, if you wish to appeal. I will advise you of the proper procedures for appealing the notice of assessment in any notice of assessment that I issue.

You have the right to seek judicial review of any final administrative decision assessing civil penalty.

Sincerely,

*Ganni Dentson*  
ACTING Assistant Area Director

EXHIBIT "6"

000614

# ARIZONA SILICA SAND COMPANY

TELEPHONE  
AREA CODE 602-888-2602

P. O. BOX 108  
HOUCK, ARIZONA 86506



## PETITION FOR RELIEF

August 19, 1994

RECEIVED

AUG 29 1994

SNELL & WILMER

Certified Mail

Returned Receipt Requested

Ms. Genni Denetsone  
Acting Assistant Area Director  
Bureau of Indian Affairs  
Navajo Area Office  
UNITED STATES DEPARTMENT OF INTERIOR  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

Re: Arizona Silica Sand Company/July 7, 1994 Letter

Dear Ms. Denetsone:

This letter is intended to serve as Arizona Silica Sand Company's Petition for Relief to 43 C.F.R. section 7.15 (d) with respect to the proposed penalty amount of \$70,672 set forth in your July 7, 1994 letter pertaining to alleged damages identified in the Notice of Violation dated April 18, 1994. Copies of the April 18 and July 7 letters are attached as Exhibits 1 and 2. Arizona Silica Sand Company (the "Company") takes issue with the proposed penalty amount for the following reasons:

1. The damage is overstated and therefore the proposed penalty is excessive and unfair;
2. The proposed penalty will impose an undue financial hardship on the Company;
3. To the extent an employee of the Company violated the Archaeological Resource Protection Act by disturbing an archaeological site, such action was wholly unintentional and negligent at best;
4. No archaeological resources were taken from the area at issue.

EXHIBIT "7"

SANDMASTER OIL WELL FRACTURING SANDS

000615

Additionally, factual and legal grounds that support the Company's position that it should not be assessed a penalty in the proposed amount are:

1. Through a timely and proper Freedom of Information Act Request, Heidi McNeil of Snell & Wilmer, counsel for the Company, has sought detailed supporting documentation for the proposed penalty in terms of how the specific amount was determined. A copy of the Request is attached as Exhibit 3. To date, no such documentation has been provided; accordingly, the proposed amount is without proper basis or support.
2. It is the Company's understanding that this is the first Notice of Violation of its type issued by your agency and there is no precedent for the amount of damages proposed. Again, this supports the contention that this amount is unreasonable, excessive and without basis in fact or law.
3. It is the Company's understanding that the Navajo Nation intends to conduct no further research on the site at this time. Further, the Navajo Nation was well aware of the archaeological site prior to the alleged disturbance last year.
4. As soon as I learned of the existence of the archaeological site at issue, I directed the Company's supervisor to stake boundary markers around the site to prevent any disturbance of the site. I also instructed the supervisor to direct all employees to stay away from the site. My supervisor did direct the employees to conduct no activities near the site. Nevertheless, one of the employees, a member of the Navajo Nation - in direct violation of these explicit orders - used the excavator equipment to drop a load of dirt on top of the archaeological site. His reasoning in doing so was to protect the site - not destroy or disturb it. Therefore, any disturbance of the site was without malice or intent; in fact, the employee's motives were good intentioned in all respects.
5. The Company already pays the Navajo Nation substantial monies in terms of royalties, taxes, and employee wages. Specifically, since 1981, the Company has paid the Navajo Nation more than one-half of its profits. The Company has not been extremely profitable over the years; to pay such a high penalty would seriously jeopardize the continued existence of the Company. Indeed, the Company made no profit during fiscal years 1990-1991 and 1991-1992 and suffered

-Ms. Genni Denetson  
August 19, 1994  
Page 3

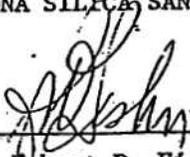
significant losses during that time. The proposed penalty represents a tremendous hardship to the Company.

6. The Notice of Violation fails to set forth a concise statement of facts believed to show the alleged violation as required by 43 C.F.R section 7.15(b)

Based on the above, it is clear that the proposed penalty is excessive, unreasonable and without basis in fact or law. To the extent any penalty is appropriate, a more fair sum would be \$2,000. Accordingly, the Company is prepared to settle this entire matter at this time by the immediate payment of \$2,000. I would appreciate being notified if this sum is agreeable to resolve this matter.

ARIZONA SILICA SAND COMPANY

By:



Robert D. Fisher, President

Date:

8-22-94

RDF:RR

cc: Heidi L McNeil, Esq  
Ms. Mary Lou Drywater

000617

Snell & Wilmer  
LAW OFFICES

One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000  
Fax: (602) 382-6070

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

SALT LAKE CITY, UTAH

August 30, 1994

Heidi L. McNeil (602) 382-6366

**BY TELECOPY and**

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Thomas Tippeconnic  
Acting Area Director,  
BIA - Navajo Area Office  
Branch of Real Estate Service  
Subsurface/Minerals & Mining Section  
Post Office Box 1060  
Gallup, New Mexico 87305-1060

Re: *Arizona Silica Sand Company/Notice of Assessment, received August 25, 1994*

Dear Mr. Tippeconnic:

This letter is in regard to the Notice of Assessment, dated August 16, 1994, and received by Arizona Silica Sand Company ("ASSC") on August 25, 1994. A copy of the Notice is attached.

Pursuant to 43 C.F.R. § 7.15 (e), the Notice of Assessment is not to be issued "until 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." The Notice of Violation (dated July 7, 1994) was received by ASSC on July 11, 1994; accordingly, ASSC had 45 days -- or until August 25 -- in which to undertake any of the responsive actions delineated in the letter. Additionally, on July 12, 1994, I sent a letter to Genni Denetsone confirming that ASSC had 45 days from July 11th in which to take one of the actions set forth in Ms. Denetsone's July 7th letter before issuance of a Notice of Assessment. Ms. Denetsone never contacted me to controvert my understanding in this regard. A copy of my July 12th letter is attached hereto.

Notwithstanding the express provisions of 43 C.F.R. § 7.15(e), the Notice of Assessment was issued on August 16, 1994. Moreover, ASSC filed a timely Petition for Relief on August 19, 1994 (a copy of which is attached hereto). On this basis, it is clear that the Notice of Assessment is premature and has not been issued in compliance with the procedures set forth in 43 C.F.R. § 7.15.

**EXHIBIT "8"**

Member: LEX MUNDI, an international association of independent law firms with members in the United States and 60 countries throughout the world.

000618

# Snell & Wilmer

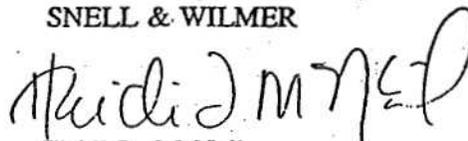
Mr. Thomas Tippeconnic  
Acting Area Director  
August 30, 1994  
Page 2

Additionally, the Notice of Assessment states that an appeal of the decision must be made to the Interior Board of Indian Appeals in accordance with 43 C.F.R. § 4.310-4.340 and that such appeal must be made within 30 days of receipt of the decision. This appeal procedure does not comport with the applicable rules and regulations. Specifically, 43 C.F.R. § 7.16(g) sets forth the review process for a party dissatisfied with the Notice of Assessment. A copy of the relevant provisions are enclosed.

I would appreciate it very much if you would contact me as soon as possible and advise as to (1) why the Notice of Assessment was issued prematurely and (2) why the review procedures set forth in 43 C.F.R. § 7.16 are not being followed in this instance. I look forward to your prompt response to this matter.

Yours very truly,

SNELL & WILMER



Heidi L. McNeil

HLM:gkb

Enclosures

cc: Robert Fisher  
Mary Lou Drywater (By telecopy)

000619



1 Indian lands unless such activity is pursuant to a permit issued  
2 under section 470cc of this title . . . ."

3 The standard of proof in a civil case is one of a  
4 preponderance of the evidence. That is a tipping of the scales in  
5 favor of the claim being made. To find that the civil defendant is  
6 responsible the agency must convince the ALJ that the facts are  
7 complete. (Id.)

8 **FACTS**

9 ASSC has operated a silica sand mining operation on Navajo  
10 Nation lands since 1966 pursuant to BIA Lease/Permit No. 14-20-  
11 0603-8992. According to the National Historic Preservation Act, 16  
12 U.S.C. 470 et seq., and the corresponding regulations at 36 C.F.R.  
13 §800, the Act at 16 U.S.C. 470ff requires a Federal agency with  
14 jurisdiction over a federally licensed undertaking to take into  
15 account the effects of that undertaking on properties included in  
16 or eligible for the National Register of Historic Places. These  
17 undertakings include applicants for Federal permits for land-  
18 modifying projects, such as mining for sand.

19 Archaeological clearance based on an archaeological survey is  
20 required for land-modifying projects. 36 C.F.R. part 800. ASSC  
21 was aware of this requirement and requested an archaeological  
22 survey of part of its leased area in a letter to the Navajo Nation  
23 Cultural Resource Management Program on January 30, 1981 (BIA  
24 exhibit A). The survey, dated February 26, 1981 (BIA exhibit B)  
25 found no cultural resources in the 600 square foot area surveyed.  
26 On March (date illegible) 1981 the National Park Service wrote a  
27 letter to ASSC granting archaeological clearance on the 600 square

000621

1 foot area, but more importantly to this case, put ASSC on notice to  
2 the effect:

3 Should any previously unrecorded and/or previously  
4 undetected cultural material be discovered during  
5 construction operations, all work must cease in the  
6 immediate area of the exposed resources. Archaeologists  
7 from this office and the Navajo Nation Cultural Resource  
8 Management Program should be notified to arrange an on-  
9 site inspection to determine the significance and  
10 disposition of the archaeological remains.  
11

12 (BIA exhibit C) (the Navajo Nation Survey, BIA exhibit B  
13 also contained similar language)  
14

15 Mr. Jim Burkewitz, ASSC plant manager, stated in his  
16 deposition that ASSC was not aware of archaeological site AZ  
17 K:11:40 (the damaged archaeological site disputed in this case)  
18 until it was uncovered by ASSC employee Johnny Matt using an ASSC  
19 front-end loader during a regular work day in June or July of 1991.  
20 Mr. Matt stated in his deposition that he disturbed the site  
21 because he was moving topsoil in the process of reaching silica  
22 sand.

23 According to the depositions of all three ASSC employees, Mr.  
24 Burkewitz, Mr. Matt and Mr. Goldtooth, ASSC employees were not  
25 warned to avoid this site until this first incidence of damage was  
26 committed. The depositions also reveal that the employees were not  
27 disciplined for disobeying this warning an additional two more  
28 times, and a fence was not erected around the site until March 23,  
29 1994, approximately two years and nine months later.

30 Although ASSC was made aware by the National Park Service in  
31 its letter of March 1981 (BIA exhibit C) of the requirement to stop  
32 all activity should an archaeological site be discovered and of its  
33 duty to request an on-site inspection from Navajo Nation and NPS

000622

1 archaeologists, it did not comply with these requirements after  
2 discovery of the site in June or July of 1991.

3 ASSC did not have an archaeological survey conducted of this  
4 site until November of 1992 when it hired Plateau Mountain Desert  
5 Research (PMDR). The PMDR survey was submitted to ASSC on January  
6 28, 1993. (ASSC exhibit 9)

7 In its January 28, 1993 survey contracted by ASSC, PMDR  
8 determined that archaeological site AZ K:11:40 was considered an  
9 "archaeological resource" and "of archaeological interest" under  
10 the ARPA uniform regulations at 43 C.F.R. 7.3.

11 PMDR went on to state in its survey that the: "Site has been  
12 heavily disturbed by quartz sand mining activities, especially  
13 bulldozing." It is unclear whether this heavy disturbance is the  
14 same admitted to by Johnny Matt and Jim Burkewitz, believed to have  
15 occurred in the summer of 1991 or whether it consists of further  
16 damage to the site, since the PMDR survey took place a year and a  
17 half later. Plant Manager, Jim Burkewitz admitted in his  
18 deposition that three separate incidents of damage occurred to his  
19 knowledge due to actions of ASSC employees.

20 A Bureau of Land Management (BLM) Inspection Report dated  
21 October 26, 1993 reflects that during a regular inspection of the  
22 site, BLM discovered a "stockpile [which] was found to contain many  
23 artifacts - pottery sherds and sandstone slabs. Apparently, mining  
24 has disturbed an archaeological site. The site may correspond to  
25 site AZ K: 11: 40." (BIA exhibit D) This is apparently the second  
26 documented incidence of damage to the site. The 1993 PMDR report  
27 was the first documentation of damage to the site but not the first

000623

1 reported incidence, which ASSC has admitted occurred in June or  
2 July of 1991.

3 On December 22, 1993 at the request of the Navajo Nation  
4 Historic Preservation Department, the Bureau of Indian Affairs  
5 issued a: " 'Cease and Desist' order to prevent ASSC from  
6 conducting further ground disturbing activities, until an  
7 assessment is made of the archaeological site that is reported to  
8 have been damaged." (BIA exhibit E)

9 The BIA cease and desist order contained two request to ASSC:  
10 "the operator is to cease operations within the area of the  
11 disturbed archaeological site and contact the State Historical  
12 Preservation Office to arrange an inspection of the damaged site."  
13 On January 25, 1994 A BLM Inspection Report states that: "**The**  
14 **operator has not complied with either of the requests.**" (emphasis  
15 added) (BIA exhibit F)

16 In the same BLM Inspection Report, BLM states that: "The  
17 stockpile with abundant artifacts in it has been removed. . . .The  
18 site itself has been disturbed by dozer activity." This is the  
19 third documented incidence of damage to the site by ASSC and direct  
20 evidence of, at the least, flagrant disregard for the BIA's cease  
21 and desist order and, at the worst, intentional destruction of  
22 evidence of damage to the site as memorialized in BLM's inspection  
23 report of October 26, 1993.

24 The BIA and the Navajo Nation requested that a fence be  
25 erected to protect the site, first mentioned to the company in the  
26 December 22, 1993 Cease and Desist order (BIA exhibit E). This  
27 request was repeated orally in the meeting between all parties on

1 March 16 1994 (BIA exhibit G). A follow-up inspection on March 22  
2 revealed that a fence was not in place (BIA exhibit H). The fence  
3 was erected on March 23, 1994. This is slightly less than three  
4 years from the first known damage to the site by ASSC employee  
5 Johnny Matt which occurred in June or July of 1991, and after two  
6 admitted and further documented incidents of damage to the site.

7 On April 12, 1994 archaeologist Judith Reed from the National  
8 Park Service ARPA task force, Dr Anthony Klesert of the Navajo  
9 Nation, archaeologist Rolf Nabahe also of the Navajo Nation and  
10 others visited the site. (See BIA exhibit I, Judy Reed Resume,  
11 Exhibit J, Dr. Anthony Klesert's Resume, and Exhibit K, Rolf  
12 Nabahe's resume) On June 16, 1994 Judith Reed compiled a report  
13 based on this site visit which set forth her and Dr. Klesert's  
14 opinions as to costs of the alleged damage. This report was  
15 supplemented on January 18, 1995. (See ASSC exhibits 5-8) A  
16 Notice of Violation (NOV) was issued by the BIA on April 19, 1994  
17 pursuant to ARPA. A second NOV was issued on July 7 which included  
18 a proposed civil penalty amount of \$70,672.00. BIA made a  
19 procedural error and did not allow the full 45-day period for ASSC  
20 to respond. However it corrected this error and took into  
21 consideration ASSC's Petition for Relief. In August, 1995 the BIA  
22 issued a revised NOA again assessing a penalty of \$70,672.00 (See  
23 ASSC exhibits 16 (a)-(e))

24  
25  
26  
27  
000625

1           CALCULATING THE AMOUNT OF DAMAGE

2           The amount of the civil ARPA penalty is the actual damage  
3 amount assessed. This is determined by calculating the  
4 archaeological or commercial value of resources destroyed and  
5 adding either, but not both, to the cost of restoration and repair  
6 of the materials or the area that was damaged. 16 U.S.C.  
7 470ff(a)(2); 43 C.F.R. §7.16(a); (ASSC exhibit 10 at 4) This is  
8 exactly what was done by the three archaeologists assisting the  
9 government in this case and the best evidence of their work can be  
10 found in their reports (ASSC exhibits 5 through 8). The commercial  
11 value may be determined by the going price of similar objects  
12 offered for sale. The archaeological value is described as the  
13 cost of scientific data recovery that would have been attainable  
14 prior to the violation. This language assumes that the site  
15 disturbance has created a situation of forced excavation even  
16 though no further data recovery may occur in the near future.  
17 (ASSC exhibit 10 at page 4).

18           There is no minimum or maximum amount stated by the Act or the  
19 regulations for civil ARPA penalties. Subsequent violations by the  
20 same person shall allow the maximum amount of the penalty to be  
21 **double** the cost of restoration and repair plus **double** the  
22 archaeological or commercial value. 43 C.F.R. §7.16(2).

23 Civil and criminal archaeological site damage calculations are  
24 conducted in the same manner, but the application of the  
25 information varies. In civil actions, damage calculations become  
26 the penalty amount (ASSC exhibit 10, technical brief prepared by  
27 Sherry Hutt at page 4). Criminal actions have been more common in

1 the past, an issue made much of by ASSC in its Petition for Relief  
2 and discovery, but ARPA investigative work is the same regardless  
3 of whether the case will eventually be pursued criminally or  
4 civilly. (Id at 5)

5 National Park Service Archaeologist Judith Reed has prepared  
6 approximately thirty (30) archaeological case reports including  
7 damage assessments for ARPA civil and criminal violations. She  
8 worked on the ARPA task force for over four years and attended a  
9 forty-hour ARPA course conducted by Judge Sherry Hutt, author of  
10 the ARPA technical brief cited by ASSC as exhibit 10.

11 Ms. Reed computed the costs for amounts shown in the  
12 "Archaeological Value" and "Commercial Value" sections of her  
13 report and Dr. Anthony Klesert prepared those for "Restoration and  
14 Repair costs". Dr. Klesert has worked for the Navajo Nation as  
15 Director of its Archaeology Department since 1982. He represents  
16 the Navajo Nation on preservation issues and is the principal  
17 Investigator for 500 projects per year. He supervises 45 full-time  
18 employees and manages budgets in excess of \$2,000,000 annually so  
19 he is thoroughly aware of actual costs (i.e. salaries, travel, etc)  
20 and estimations for projected costs. (BIA exhibit L, April 19,1994  
21 letter from Dr. Anthony Klesert to Judith Reed containing his  
22 report concerning damage at site AZ K:11:40)

23 Mr. Stephen Glass, ASSC's expert witness has a B.A. in  
24 Southwest Studies, prehistoric resource utilization. His resume  
25 does not state that he is an archaeologist, and he has admitted  
26 that he has never conducted an ARPA investigation or created a  
27 damage assessment. He also has admitted that his Outline of

000627

1 Restoration and Preservation Plan has a totally different purpose  
2 than an ARPA damage assessment and contains his personal choice for  
3 restoration which is the reburial of all artifacts retrieved. It  
4 does not contain any cost estimates for his suggested restoration  
5 process. This lack of cost estimates is singularly unhelpful in  
6 attempting to determine a civil penalty amount. All three  
7 archaeologists assisting the government in this case have suggested  
8 that Mr. Glass' restoration plan would probably cost more than the  
9 \$70,672.00 assessed in the ARPA damage assessment report. Federal  
10 agencies also have an obligation under the law to curate federally  
11 owned and administered archaeological collections. 36 C.F.R. §79.

12 Mr. Glass states that his reburial restoration process is more  
13 consistent with the "Navajo traditional way". The Navajo policy of  
14 reinterment normally applies only to the reinterment of human  
15 remains and funerary articles. In any event, the applicability of  
16 these theories to the present site is irrelevant at this time and  
17 certainly not a decision for Mr. Glass and ASSC to make. The  
18 Navajo Nation has already given considerable time and thought to  
19 its preferred method of damage assessment for this ARPA violation  
20 and that method is clearly enunciated in Ms. Reed and Dr. Anthony  
21 Klesert's report.

22  
23 **MITIGATION OR REDUCTION OF DAMAGES**

24 Although ASSC has admitted to committing subsequent  
25 violations, and those violations are documented, the BIA has not  
26 doubled the penalty amount. These subsequent violations have  
27 however, gone into BIA's determinations on whether to mitigate or

000628

1 reduce the penalty amount. BIA has given careful thought to  
2 mitigation of damages in this case and has determined that  
3 reduction of the penalty amount would not be appropriate, given the  
4 above-mentioned lack of compliance and subsequent violations on  
5 ASSC's part. The BIA is also under an obligation imposed by the  
6 regulations at §7.16 (vii)(3) to: "consult with and consider the  
7 interests of the affected tribe prior to proposing to mitigate or  
8 remit the penalty. BIA and the Navajo Nation have consulted and  
9 the tribe is not interested in mitigation.

10 43 C.F.R. §7.16 (b) states that: "The Federal Land Manager **may**  
11 assess a penalty amount less than the maximum amount of penalty and  
12 **may** offer to mitigate or remit the penalty." Mitigation is  
13 entirely discretionary, it is not a requirement for the Federal  
14 Land Manager. (ASSC exhibit 10 at 4)

15 **INTENT**

16 In a civil ARPA case intent is not an issue (except to a  
17 limited extent in the consideration of mitigation which has already  
18 been considered and decided against). (ASSC exhibit 10 at 5) A  
19 person may be held liable civilly even if the person had no  
20 knowledge of the prohibited activity if the destructive actions  
21 occurred while in the employ of that person or under that person's  
22 supervision. (Id at 5) ASSC had a duty to undertake an  
23 archaeological survey of this area. It did not do so. ASSC had a  
24 duty to cease operations in the vicinity of the archaeological site  
25 AZ K: 11:40 after it first discovered the site in 1991. It did not  
26 do so. ASSC had a duty to contact the Navajo Nation and Park  
27 Service archaeologist after it first discovered the site in 1991.

1 It did not do so until it was cited by a BLM inspection for further  
2 damage to the site in late 1993, and the inspection did not occur  
3 until 1994. ASSC did not put up the fence requested by the Navajo  
4 Nation and the BIA until March of 1994.

5 Inadvertence, carelessness, thoughtlessness and inattention  
6 are all negligence. Where there is a duty to act or a contractual  
7 obligation to take action, the failure to act is negligence.  
8 Negligence may exist even where there is no ill will or no desire  
9 that injury occur. (Id.)

10 **RESPONDEAT SUPERIOR**

11 According to the doctrine of respondeat superior, "an employer  
12 is vicariously liable only for the behavior of an employee who was  
13 acting within the course and scope of his employment." Pruitt v.  
14 Pavelin, 141 Ariz. 195, 205, 685 P.2d 1347, 1357 (App. 1984);  
15 Scottsdale Jaycees v. Superior Court of Maricopa County, 17 Ariz.  
16 App. 571, 574, 499 P.2d 185, 188 (1972). Johnny Matt has admitted  
17 in his deposition that he removed topsoil from the site because he  
18 was looking for silica sand. Mr. Jim Burkewitz has also admitted  
19 that Mr. Matt first uncovered the site with ASSC's front-end loader  
20 during the course of a regular business day.

21 In Arizona "[t]he conduct of a servant is within the scope of  
22 employment if it is of the kind the employee is employed to  
23 perform, it occurs substantially within the authorized time and  
24 space limit, and it is actuated at least in part by a purpose to  
25 serve the master." Love v. Liberty Mut. Ins. Co., 158 Ariz. 36,  
26 38, 760 P2d 1085, 1087 (App. 1988). As explained by the court in  
27 Ray Korte Chevrolet v. Simmons, 177 Ariz. 202, 207, 571 P.2d 699,

1 704 (App. 1977):

2 Under Arizona law, an employee is acting within the scope of  
3 his employment while he is doing any reasonable thing which  
4 his employment expressly or impliedly authorizes him to do or  
5 which may reasonably be said to have been contemplated by that  
6 employment as necessarily or probably incidental to the  
7 employment.

8 Smith v. American Express Travel Services, 1 Ariz. 1994, 876

10 P.2d 1166. The facts of this case show that the ASSC employees  
11 were clearly within their scope of employment when they damaged  
12 the archaeological site not only once but three times. ASSC was  
13 itself negligent in failing to inform the proper authorities upon  
14 the discovery of the archaeological site and further failing to  
15 erect a fence in a timely manner and comply with the BIA's request  
16 to avoid, and have its employees avoid, further destruction of the  
17 site

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RESPECTFULLY SUBMITTED this \_\_\_\_ day of March, 1996.

By \_\_\_\_\_  
Tonianne Baca  
Attorney/Advisor  
Southwest Regional  
Solicitor's Office  
U.S. Department of the Interior

Peter Tasso  
Navajo Nation  
Department of Justice

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Department of the Interior  
REGIONAL SOLICITOR  
Albuquerque, New Mexico

UNITED STATES OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS

ARIZONA SILICA SAND COMPANY,	:	IBIA 94-186-A
Complainant,	:	
v.	:	Archeological Protection
	:	Resources Protection Act
	:	of 1979
ACTING NAVAJO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	16 U.S.C. §§ 470aa-11
Respondent,	:	
and,	:	
THE NAVAJO NATION,	:	
Intervenor.	:	Decision

FACTUAL AND BACKGROUND DISCUSSION

This is a case under the Archeological Resources Protection Act of 1979 ("ARPA"). The law is codified at 16 U.S.C. § 470aa-11. Implementing regulations are found at 43 C.F.R. Pt. 7, Subpart A.

The parties are: Arizona Silica Sand Company, complainant; Acting Area Director, respondent; and the Navajo Nation, intervenor.

The following factual statement is taken from the "Stipulation of Facts and Law" filed jointly by the parties on March 11, 1996, documentary evidence and testimony of record, or are factual specifications of the undersigned.

The complainant has mined sand on the Navajo Indian Reservation under a permit since 1966. ASSC pays royalties and taxes to the Tribe. It employs principally Navajos and has an annual payroll of more than \$300,000.00 a year.

In 1981, ASSC was told by the Tribe that it should stop work upon discovery of archeological materials in the permit area. Respondent Exhibit B.

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ASSC became aware of an archeological site AZ K:11:40 (ASM) (the "Site") in June or July, 1991. An employee unintentionally uncovered a portion of the site. ASSC's owner and supervisor do not speak Navajo. Many ASSC employees speak both Navajo and English. The undersigned finds no mention in the record of the actual extent of English language capabilities of ASSC's Navajo employees. An employee sometimes serves as interpreter. (Tr. at p. 312.)

The record affirmatively shows that a single employee, Johnny Matt, was told in 1991 by James Burkowitz, "We don't need to go into that area. Just go around it and leave it alone." (Tr. at p. 304.) Generalized comments appear to have been made; however, the record does not give a positive picture of to whom, how often or how vigorously the point to stay away from the site was stressed. (Tr. at p. 312.) No evidence of efforts to secure the area after the 1991 site discovery appear in the record. There is no evidence of monitoring by ASSC supervisory personnel.

In November, 1992 ASSC hired Plateau Mountain Desert Research ("PMDR") to conduct an archeological survey of the area on which ASSC operates to identify and evaluate the cultural resources present. The survey was completed January 28, 1993.

The report determined that the site was an "archeological resource" and "of archeological interest" under 43 C.F.R. Section 7.3. The site is not a Navajo sacred place or a traditional cultural property. PMDR's 1993 report found that the site had "been heavily disturbed by quartz sand mining activities, especially bulldozing" prior to its report.

Dine (Navajo people) policy and traditional concerns are described in ASSC Exhibit 15, "Navajo Nation Policy for the Protection of Jishchaa' [any place or item associated with the burial of an individual]: Gravesites, Human Remains, and Funerary Items.": "Dine traditional and spiritual values shall be observed in dealing with jishchaa', human remains, and associated funerary items, burials, and/or the relocation and transfer of gravesites." ASSC Exhibit 15, p. 3. Ground disturbance in artifact areas is a serious tribal concern.

". . . [T]he soil associated with a burial is considered contaminated by death." Id. "Development projects...often disturb burials." Id. "In such instances, the Navajo Nation must take steps to ensure the protection of human remains. It must also protect its people from association with human remains." Id. Procedures associated with a touching or disturbance of such soil are therefore "considered both offensive and dangerous." Id. So much so that individuals involved in burial issues must be warned that "handling human remains, direct exposure to jishchaa' or [even] discussion of burial issues may affect their overall health in the immediate future or sometime during their lifetime." Id.

These are the Dine beliefs. They are the fundamental views upon which the Dine population survives. The Navajo Tribe as a government in the exercise of its tribal powers of self-government [55 I.D. 14] has the responsibility of protecting not only jishcaa', the human remains but of protecting its members from contamination from such matters. These are serious concerns for both the Tribe and population affected. I do not see the true depth of such concerns reflected in the issues presented or pleadings submitted by the parties.

I find an element of paternalism in certain arguments made by ASSC and its insistence upon substituting its own preferred procedures based upon misinterpretation of Navajo beliefs and traditions (Tr. at p.p. 126-28) for the thinking of the Tribe as well as its attribution of pecuniary conspiracy to the Tribe and BIA because the latter have taken the stance that a penalty accompany what is viewed by them as a violation of law.

There is disingenuousness in ASSC representations about certain matters about which ASSC has actual or direct knowledge contrary to what it asserts. E.g.'s ASSC claims lack of identification about who the "Federal Land Manager" is but was sufficiently capable of identifying the latter for purposes of filing a timely petition for relief under 43 C.F.R. Section 7.15(d).

ASSC characterizes or tip-toes up to the brink of suggesting that ARPA is primarily a commercial profiteering statute. It falls short of being boxed in as making the point. ASSC Post-Hearing Brief, p. 4. While increased commercial activity for private gain was indeed a factor, the primary catalyst for ARPA was the profound void left by the Ninth Circuit decision in United States v. Dias, 449 F.2d 113, (9th Cir., 1974) which found the U.S. Antiquities Act of 1906 to be unconstitutional. U.S. Code Cong. & Admin. News 96 Stat. 1710-11. The Antiquities Act had been the general statute commonly used to address problems of removal or damage to archeological resources on lands owned or controlled by the government.

ARPA was, in fact, designed to get everybody. It has both a criminal and civil component. See 16 U.S.C. §§ 470ee and 470ff. Activities affecting or damaging archeological resources, even unintentional ones, have been called absolute or strict liability acts. Fel River Sawmills, Inc. v. United States, ARPA 90-1, (decided August 10, 1992), p. 6. See also ASSC Exhibit 10, p. 5.

Until ARPA, Indian interests and concerns have generally been shunted aside as inconsequential or simply dismissed out of hand, or worse, paternalistically appropriated for them. ARPA is viewed as a threat to many interests. "The GE Mound: An ARPA Case Study," American Antiquity, Vol. 60, No. 1, 1995, p.p. 132, 139.

Under ARPA, tribes are affirmatively consulted in matters such as penalty mitigation. 43 C.F.R. Section 7.16(b)(2). Indian lands, archeological resources and artifacts have been treated in the past as up for grabs by commercial profiteers, weekend pseudo-archeologists who do not realize or deny the harm they are doing [See GE Mound case study discussion, p. 132.] and resource or development entrepreneurs who view requirements for vigilance in Indian archeological matters as a nuisance. The world view of each denies the visceral, human and social importance of these matters to the affected population simply because it is in their own parochial interest to do so. ARPA counteracts the effects of such attitudes and in combination with tribal contracts and self-governance compacts [See discussion, *infra*.] the affected populations through their tribes have, for the first time, a clear say in matters vital to their culture. Neither the relational issues involved in this case nor the law applicable to them is simple.

ASSC argues that representatives of the respondent are playing a "button button who's got the button game" regarding responsibility for developing ARPA archeological data and about whom the Notice of Violation (NOV) and Notice of Assessment (NOA) decision-maker is [ASSC Prehearing Memorandum, p. 5] but has in its possession, since early in the dispute, a clear written statement that BIA and the Tribe maintained a contractual relationship regarding archeological functions. See specifically ASSC Exhibit 16c. "The Navajo Nation Historic Preservation Department acts as the agent of the Bureau of Indian Affairs for archeological services, pursuant to Public Law 93-638 contract." See also Testimony Anthony Klesert, p.p. 130-31.

I do not credit the testimony of Stephen Glass or the decisional/processing flow chart he prepared with probative weight. Mr. Glass testified that he outlined the technical brief prepared by Judge Sherry Hutt (ASSC Exhibit 10) which is widely regarded by most authorities, the undersigned included, as a seminal guide to ARPA. Mr. Glass personally consulted with Judge Hutt regarding his chart's accuracy. However, Mr. Glass specifically testified that in developing the chart he did not point out or take into account the existence of a tribal 638 contract with the Bureau of Indian Affairs. He did not because he had no knowledge at all about the Indian Self-Determination Act, *supra*, and therefore had no basis for factoring the Navajo Tribe's role into the ARPA process. As previously noted, relational issues under modern tribal contracting and compacting laws which interface silently with regulations, as yet unchanged, written with a federal administrative model in mind play havoc in all areas of Indian affairs.

A "638" contract is the popular name in Indian country for tribal contracting of programs under the Indian Self-Determination and Education Assistance Act, codified, as amended, at 25 U.S.C. § 450-450n. If a tribe declines to contract further under 638 or the contract is terminated the government resumes performance of the contracted function. A self-governance compact under 25 U.S.C. §§ 458aa-hh is a process by which a tribe takes over

a program from the United States and is given the money used by the government to perform the task, hopefully on a secure basis. The government thereby ends its future capability to perform the compacted function. Unlike a contract, there is no retreat for the compacting tribe irrespective of its success at performance.

Regulation and code changes in the identification of actors, signators and ultimate decision-makers for now tribally operated Indian programs previously performed by the United States have not kept abreast with the deluge of 638 contracts and compacts under recent tribal contracting and self-governance legislation. The result is that not merely the general population but even the feds and tribes themselves are confused about who does what and how, since regulations written for a federal administrative model do not properly address the new reality in Indian country. Such is the nature of things in a system, which for political reasons is downsizing at warp speed and not adjusting its systems or procedures in an orderly or coherent way to conform mandate to practice. The administration of federal Indian affairs may safely be characterized at all levels and in all programs as a system in free fall.

The parties were specifically asked by the judge sua sponte at the hearing to address the apparent 638 contract issue, because the point has major bearing on ASSC's principal argument that someone other than the Federal Land Manger, specifically the Tribe, called all the shots in issuing the NOV and NOA and the work preliminary thereto.

ASSC treats the Tribe's 638 contract as new information. Without apparent examination of the law or its factual application, ASSC also summarily and incorrectly characterizes the Act, one of the most broad-based and significant pieces of modern Indian legislation, as primarily directed to "educational" matters. 1/

Nothing could be further from the truth. See Federal Respondent and the Navajo Nation's Post-Hearing Brief, pps. 11-16. The Indian Self-Determination Act, as it is popularly shortened to, extends to every program affecting Indians from law enforcement to health, and more, in every agency performing functions or providing Indian services.

1/ ASSC's Post-hearing Brief, p. 12. To the extent that ASSC may have placed reliance without examination of the law upon text in Volume II, p. 488, lines 11 and 12 of the Transcript of proceedings, which was not reviewed prior to order preparation, and not corrected, it did so at its own risk. Review of text beginning with "basically" ending with "system" by the undersigned revealed that there is either omission or inaccuracy in presentation of language. Also found was the insertion of page 451 between pages 505 and 506 of Volume II of the transcript.

On the other side of the coin, the Federal Respondent and the Tribe aren't exempted from excoriation. The initial NOV issued in the matter even under principles of notice pleading is, for lack of better description, "terse." The initial NOA processing and confused review instructions provided to ASSC assumed comedic proportions. Fortunately, the parties have been civilized and proceeded intelligently beyond the latter confusion. Basic facts, such as site disturbance, have been acknowledged and stipulated to. The extent and frequency of disturbance, however, is disputed.

Until 1991, ASSC has not been charged with any ARPA violations. The parties stipulated to the fact that site disturbance was reported in both 1991 and 1992. The record is not fully clear about whether the 1992 and BLM report of disturbance constitute one or two separate incidents of damage. The government and Tribe tend to refer to the matters as two separate disturbances. The difference in the description of damage, as described in Stipulation B and that contained in ASSC Exhibit 9, p. 4, last paragraph, strongly suggests further more extensive disturbance. The testimony of Judy Reed supports the likelihood of additional disturbance. The testimony of Burkowitz however, is that mining did not occur on the site between July 1991 and September 1992. (Tr. at p. 306.) His testimony is not inconsistent given the overall time frame involved.

It seems questionable whether matters pertaining to an area not in active operation were at the forefront of ASSC's concerns or that upon reassumption of mining after a year and a half that archeological issues as opposed to operational issues were on ASSC's mind. I make no finding in this respect.

Regarding the existence of the site, the record shows communication but no specific form of across-the-board formal notification or proscription was issued to all ASSC employees, including persons with only periodic contact with the site. Kenneth Goldtooth who is the individual said to have, after the 1991 incident, to have dumped top soil on the site (Tr. at p.p. 313-14.) is shown only to have worked in the area on an as needed or periodic basis. That he knew of the directive is only suggested but not specifically established in the record.

It has been said by ASSC in its arguments seeking equity that Mr. Goldtooth, when he moved dirt onto the site, was simply trying to protect it. Request for Hearing, p. 5. I find this claim unsupported in view of positive testimony that Mr. Goldtooth told Johnny Matt that he moved it onto the site "because he had no place to put his overburden." (Tr. at p. 314.) When this occurred is not clear, presumably, it was before October 26, 1993.

ASSC received its first NOV under ARPA on April 18, 1994 for the alleged damage to the site. The site is located on the Navajo Reservation near Houck, Arizona. The subject damage was observed by BLM on October 26, 1993.

On December 22, 1993, a cease and desist order was issued by the Navajo Nation Historic Preservation Office ("NHP") directing ASSC to stop "ground

disturbing activities" and to erect a fence around the site. Respondent's Exhibit E. ASSC marked the site with stakes and red tags. (Tr. at p. 166.) The stakes were knocked over. (Tr. at 324.) In spite of the order, ASSC claims that it was not told to erect a fence until March, 1994. A BLM representative informed ASSC, gratuitously, that tagging the site was sufficient. ASSC Prehearing Memorandum, p. 1. The remarks were without regard to the specific instruction to erect a fence in the cease and desist order. No fence was put in place until March 23, 1994. The last one erected—the first ones were stolen—is still in place.

An examination of damage and costs under ARPA was conducted by Judith Reed, National Park Service archeologist, and Dr. Anthony Klesert, on April 12, 1994. As previously noted, the Bureau of Indian Affairs ("BIA") issued a NOV to ASSC on April 18, 1994. The report was supplemented on July 15, 1994 with permit data supplied by Dr. Nabahe.

Reed and Klesert evaluated the physical condition of the site, took measurements, estimated artifact numbers, compared the current condition of the site to the description of the area as described by ASSC consultant PMDR in its January 23, 1994 report, evaluated the site and obtained and compiled relevant cost data.

Judith Reed compiled the full report but prepared only the commercial value and cost of restoration and repair components of the damage for purposes of 43 C.F.R. Section 7.14(a) and (c). Anthony Klesert prepared the archeological value portion under 43 C.F.R. 7.14(b). Both represent their figures as consciously low. (Tr. at p. 55 and Tr. at p. 123.) The report, issued on April 12, 1994, was supplemented to reflect permit data prepared by Dr. Nabahe. (Tr. at p. 180.)

A second NOV was issued by BIA on July 7, 1994. The latter included a proposed civil penalty. The amount was \$70,672.00. Informal discussions occurred between ASSC and BIA in July 1994 as permitted by 43 C.F.R. Section 7.15. Nothing was resolved.

BIA jumped the gun by issuing a NOA to ASSC on August 16, 1994. It didn't wait the required forty-five day period that ASSC had to file a petition for relief under 43 C.F.R. Section 7.15(d). As a result, ASSC filed both a petition for relief (August 19, 1994) and a request for hearing 43 C.F.R. Section 7.15(g) (September 30, 1994).

The NOV and NOA were apparently drafted by Dr. Rolf Nabahe of NHP for approval and signature by the Federal Land Manager. ASSC Prehearing Memorandum, p. 4 referencing Nabahe Deposition, February 16, 1996, ASSC Exhibit B.

The record shows that on September 26, 1994 ASSC filed a notice of appeal challenging the NOV with the Board of Indian Appeals. Correspondence indicates that ASSC was initially given conflicting or incorrect instructions

about further review after the NOV. (Letter to Area Director from Don Zavala, dated September 15, 1994.) BIA acknowledged error.

August 23, 1995, BIA issued a revised NOA in view of its procedural error (Prehearing Memorandum, p. 2). It assessed the same penalty as before: \$70,672.00. The revised NOA addressed specific points raised in ASSC's petition for relief which include factors relating to mitigation and other matters.

ASSC requested a hearing by filing received by the Salt Lake City Office of Hearings and Appeals on October 4, 1994. The case was reassigned to a judge, now retired, in the Phoenix Office of Hearings and Appeals. The case was reassigned to the undersigned.

#### POINTS RAISED IN REQUEST FOR HEARING

The following matters were raised by ASSC in its request for hearing:

1. The [August 16, 1994] NOA issued prematurely and should be rescinded. [This issue is moot. BIA acknowledged error and reissued a NOA on August 23, 1995.]

2. The proposed penalty is erroneous: (a) It is overstated, excessive and unfair because ASSC did not directly cause any damage. When it learned of damage it tagged the site. ASSC supervisors instructed employees to stay away from the site. Notwithstanding an employee sought to protect the site by placing dirt on it. No resources were taken from the site and ASSC already pays the Navajo Tribe substantial monies in the form of royalties, taxes and employee wages and (b) The proposed penalty will impose undue financial hardship on ASSC.

3. There is no basis or support for the proposed penalty amount. Information obtained by ASSC under FOIA contains no damage information about the site. Because BIA has no prior experience issuing NOV's there is no precedent for the damage/penalty amount. The Tribe upon learning of the 1993 disturbance undertook no research and has not indicated an intention to perform research in the future. The NOV fails to state a concise statement of facts to show violation under 43 C.F.R. Section 7.150(b).

4. The NOA is deficient because it relies upon a damage report prepared by Judy Reed and Anthony Klesert which contains only a general summary of site conditions and does not provide factual support for repair costs associated with the specific project.

#### STIPULATED DISPUTED LEGAL ISSUES

1. Whether BIA and/or the Navajo Nation complied with the procedures set forth in ARPA and its implementing regulations for computing the proposed penalty amount against ASSC.

2. Whether the calculations of Judith Reed and Rolf Nabahe [sic] [Anthony Klesert?] complied with ARPA and its implementing regulations.

3. Whether BIA considered any mitigating factors as set forth in 43 C.F.R. Section 7.16.(b)(1).

4. Whether ASSC is liable under the doctrine of *respondeat superior* for the actions of its employees and agents.

5. The relevance and admissibility of other pending matters between ASSC and BIA and/or BLM and the Navajo Nation and whether they are related to the present case.

6. Whether intent is an issue in the assessment of a civil penalty under ARPA.

7. The relevance and admissibility of the amount of attorneys' fees and expert fees incurred by ASSC in connection with defending against or appealing any agency decisions unrelated to the alleged ARPA violation by ASSC.

#### DISCUSSION AND CONCLUSION:

Items five and six above have not been pursued or developed by the parties in this proceeding. The issues are therefore treated as abandoned. The issues are hereinafter identified according to the number assigned to them in the preceding section. The issues will not, however, necessarily be dealt with in strict numerical order.

Before beginning, I note that ASSC's post-hearing brief focuses upon and addresses issues either not previously identified or has changed the description of identified issues so that they appear to be new. These are: That use of commercial value is inappropriate because no artifacts were taken from the site and, as to the penalty assessment and mitigation, the argument that a standard of reasonableness applies and that BIA or its delegate has the burden of proof of showing compliance with that standard.

With respect to the addition of new issues, I state simply that issue identification in adjudication generally and this proceeding specifically is not a work in progress. The issues were locked in on March 11, 1996. They will not be augmented.

Insofar as the burden of proof is concerned, what has to be proved and by whom is clear: "Pursuant to 5 U.S.C. Section 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. (Citations omitted.)" Eel River Sawmills, Inc. v. United States of America, *supra* at p. 4.

A "prima facie case" is defined as "A case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded." Black's Law Dictionary, (Rev. 4th Ed., 1968), p. 1353. Id. Central to determining whether a prima facie case is made out by respondent are issues, one and two, supra, which will be subsequently addressed.

### MITIGATION, (NO. 3)

The issue as framed does not address all aspects of the question raised by ASSC. It vigorously asserts that mitigation was not considered at all by BIA or its contractual delegate. The record shows to the contrary. The second aspect of the issue is that ASSC wants the Administrative Law Judge, alternatively, to compel BIA or its contractual delegate to act upon the mitigation factors set out in 43 C.F.R. Section 7.16(b) or to reduce the penalty assessed to ASSC under 43 C.F.R. Section 7.15(g)(3).

ASSC disregards the content of the reissued NOA and adopts the apparent position of its expert, Stephen Glass, who relied upon his own interpretation of Dr. Nabahe's deposition to form the opinion that BIA or its contractual delegate did not consider mitigation at any level. ASSC was viewed as a multiple violator. BIA consulted with the Tribe, as required under 43 C.F.R. Section 7.16(b)(2), the latter did not want to mitigate.

ASSC argues in its post-hearing brief that the Federal Land Manager has the duty to provide legal authority for its refusal to mitigate and also to show that the refusal to mitigate is reasonable. There is no such responsibility. Likewise, the Administrative Law Judge has no authority to direct or order a party, any party, to exercise discretion in a particular way.

The classic definition of a public functionary's "discretion" is "a power or right conferred upon them by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." Black's Law Dictionary, supra at p. 553. "Uncontrolled by others" is the key phrase. The Federal Land Manager is vested with discretion under 43 C.F.R. Section 7.16(b) but must consult with the affected tribe and consider its interests.

An Administrative Law Judge cannot compel an exercise of discretion but may only measure whether the exercise or non-exercise thereof was arbitrary. Or simply stated, was the act done in a reasoned way such that the decision is supported by the facts as found? See generally Citizens to Preserve Overton Park v. Volpe, 401 U.S. 814, 824-826 (1971). That is an act separate and apart from deciding penalty issues de novo. The Administrative Law Judge's powers under 43 C.F.R. Section 7.15(g)(3) and their exercise are discussed elsewhere.

It is not possible to draw hard conclusions regarding mitigation at this juncture because there are other interrelated issues such as the relevance of

"intent" and "fairness under respondeat superior" which must first be addressed and resolved.

I note specifically that ASSC's actual financial condition as opposed to its claim of hardship does not appear to have been factually considered. Not because of dereliction on the part of the Federal Land Manager, its contractual delegate or the Tribe but because it doesn't appear that ASSC provided or that the former had any hard data upon which to make a true factual evaluation of hardship at the time of revised NOA preparation. The record does not show when ASSC provided its financial records to BIA, its contractual delegate or the Tribe but clearly it had not done so prior to preparation of the revised NOA. Other elements of 43 C.F.R. Section 7.16 were considered at some level in the revised NOA.

**IS INTENT A PART OF PENALTY ASSESSMENT UNDER ARPA? (NO. 6)**

My answer is no. I have examined and re-examined the parties' arguments concerning the relevance of intent to the assessment process and was unable for a period to put my finger on the source of disconnect in their arguments.

The variance in the parties' views derives in part from semantics and in other part because no one appears to have analyzed the mechanics of the penalty calculation and assessment process on an item-by-item basis.

The views of the parties as to damage assessment calculations under 43 C.F.R. Section 7.14, can best be explained as follows: BIA or its contractual delegate: Archeological Value or Commercial Value + Cost of Restoration and Repair = damage = assessed penalty. ASSC's apparent view is: Archeological Value or Commercial value + Cost of Restoration and Repair minus Mitigation = damage = assessed penalty.

The answer about who is correct depends upon whether one views mitigation as part of the formal assessment process or as a after-the-fact deduction which reduces the penalty. Again definitions are important. "Mitigation" by definition means "[A]batement or diminution of a penalty or punishment imposed by law." Black's Law Dictionary, supra at p. 1153. The United States Supreme Court also adheres to the view that mitigation is a reduction in or lessening of the amount of a penalty. Mullen v. United States, 212 U.S. 516, 521 (1909).

The formula for determining or calculating penalty assessment, at least in a maximum amount, is set forth in 43 C.F.R. Section 7.16(a). That a distinction is drawn between assessment and mitigation or that they are two separate, seriatim processes is borne out by 43 C.F.R. Section 7.16(b). That section states that the Federal Land Manager may set a penalty amount less than the maximum "or" he may mitigate or remit or forego a penalty.

Based upon these factors, I conclude that "intent" is not a part of damage calculation or determination but is instead a factor to be considered after the penalty is determined as a factor bearing upon penalty reduction.

IS ASSC LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR (NO.4)?

The parties have stipulated to the application of Arizona law.

ASSC contends that it is not liable for damage to the archeological site reflected in the NOV because it was committed by two employees acting against orders to leave the site alone. ASSC exonerates itself from responsibility while conceding damage specifically asking that the rule narrowly restricting the application of penalty statues so as to exclude persons who do not clearly come within their terms be here applied. ASSC cites as support for its position Eel River Sawmill, Inc. V. United States, supra, which found no liability for the acts of a subcontractor. ASSC alleges that it "strictly forbade" its employees from conducting any activities near the site and that the employees failed to follow these instructions. ASSC concedes that "two of its employees used heavy equipment to deposit dirt and midden on top of the site." ASSC Prehearing Brief, p. 14. Id.

Both complainant and respondent agree that the applicable rule is that an employer is liable only for the behavior of an employee who was acting within the course and scope of his employment. Pruit v. Pavelin, 141 Ariz. 195, 205, 685 P. 2d 1347, 1357 (App. 1984).

ASSC argues that because the employees defied orders, they were acting beyond the scope of employment, which fact precludes ASSC from being found liable for damage caused by them. ASSC tends to address issues upon a morass of undifferentiated facts when asserting particular propositions.

First, on March 3, 1981, ASSC was instructed that if any previously undiscovered archeological materials should be discovered in its permit area that immediate work should cease. ASSC concedes, and the parties have stipulated that an employee, Johnny Matt, inadvertently uncovered a portion of the site in June or July, 1991. This was pre-warning. A prohibited act, damage to the site, therefore occurred under 43 C.F.R. Section 7.4 while an ASSC employee was moving topsoil looking for silica sand which act is within the scope of his employment.

My review of the record shows no strict prohibition or edict by ASSC supervisory personnel of the type claimed in the brief.

Mr. Goldtooth was working at his job, using a bulldozer taking off overburden and reclamation when he dumped dirt and midden on top of the site, a violation of 43 C.F.R. Section 7.14(a). He was an employee not a subcontractor of ASSC doing the very type of work ASSC hired him to do. I do not find the circumstances of this case to equal to those described in the Eel River decision relied upon by ASSC. I add further that there are two aspects of the Eel River opinion with which I disagree: one, is the limitation upon liability as therein determined; the second is the decision's generalized treatment of the statutory penalty calculation formula under

43 C.F.R. Section 7.14 as double counting after having had benefit of expert explanations in this proceeding of the penalty calculation components which are addressed in a subsequent section.

Under Arizona standards, I conclude that ASSC is or may be held liable under the doctrine of *respondeat superior* for the actions of its employees which violate 43 C.F.R. Section 7.4.

**HAS BIA AND/OR THE NAVAJO TRIBE COMPLIED WITH ARPA  
PROCEDURES AND IMPLEMENTING REGULATIONS FOR COMPUTING  
THE PROPOSED PENALTY AGAINST ASSC? (NO. 1)**

It is difficult perceptively to see how this issue, as framed, is different than issue No. 2 (Whether the calculations of Judith Reed and Rolf Nabahe [Anthony Klesert?] complied with ARPA and its implementing regulations?)

Based upon the parties' submissions there are clearly two separate points made: (1) Was the procedural decisional process and path specified in the regulations followed (i.e. Did the proper parties perform specific tasks as directed in the regulations?) and (2) Were the damage calculations prepared by Reed and Klesert done in accordance with the regulations and, if so, are they substantively valid.

I will treat the first issue mentioned in the preceding paragraph as what is being asked under stipulated issue No. 1 to be addressed in this section.

ASSC claims that the Federal Land Manager has not been identified, that tribal employees, not BIA, made the final decision that a violation of ARPA occurred and issued the NOV and the NOA. It offers the decision/processing flow path chart by Stephen Glass, found non-probative, in support of its general position.

ASSC was specifically informed by the Acting Area Director that the Tribe had a 638 contract with BIA to perform archeological functions. It obviously did not know the significance of the representation and did not apparently inquire about what it meant. The system is as described in the respondent's and Tribe's post-hearing brief. BIA no longer performs archeological program functions on the Navajo Reservation. All functions, except formal decisional acts including signing decisional documents, are vested in the Tribe.

As for the question: who is the Federal Land Manager, as noted, ASSC's representations are viewed as disingenuous. ASSC filed its petition for relief with the office of the Navajo Area Director as required under 43 C.F.R. Section 7.15(d). Petitions for relief are to be filed with the Federal Land Manager. ASSC knew who it was when filing for affirmative

relief but nonetheless professes lack of specification of the official's identity for other purposes.

The Navajo Area Director is the Federal Land Manager for the Navajo Area. His is a delegated authority to administer Indian lands and affairs within the area over which he is chief field officer which authority flows from Secretarial delegation of authority. 25 U.S.C. § 1a; 200 DM Parts 1 and 3; 230 DM 3.1. Executive authority over Indians is itself a delegated power from Congress. The latter derives from the Indian Commerce Clause of the United States Constitution (Art. I, section 8, clause 3.)

ASSC asserts as somehow significant that four different individuals signed the various NOV's and NOA's although each clearly indicates the official status of the signatory. The April 18, 1994 NOV was signed by the Navajo Area Director; the July 7, 1994 NOV was signed by an Acting Navajo Area Director; the August 16, 1994 NOA was signed by an Acting Navajo Area Director and the revised August 23, 1994 NOA was signed by an Acting Navajo Area Director. In the role of public functionaries, identity is not relevant. Authority is vested in the position not the person.

In the situation at hand, BIA (Navajo Area) contracted out its full archeological program to the Navajo Tribe who, pursuant to federally-approved contract, performs all base archeological program functions that previously would have been performed by BIA except discretionary approval and signatory functions. That is retained by the BIA under a 638 contract. Federal Respondent's and Navajo Tribe's Post-Hearing Brief, p.p. 8-16.

The Tribe, specifically NHP, acting as agent of BIA and its chief field officer (the Area Director) upon notification of site disturbance caused investigation to be performed of the damage to the archeological site. The professional services of archeologists Judith Reed and Anthony Klesert, were obtained. They, along with Dr. Nabahe, the drafter of the relevant NOV and NOA, and others made a site visit.

Dr. Nabahe, through his tribal supervisors, based upon the Reed/Klesert report requested a NOV be issued. Ultimate or final approval for NOV issuance was given by the Area Director. The same general process occurred regarding NOA issuance. (Tr. at p.p. 180-81 and 232.)

The Tribe did what BIA would have done but for the 638 contract. It obtained damage and cost evaluations from professional archeological consultants, concluded upon that basis that damage had occurred under 43 C.F.R. Section 7.4, made a request for the issuance of a NOV through supervisory channels which request may have been accompanied by a prepared document that went to the Navajo Area Director for approval and issuance. The Area Office staff had the responsibility to consult, and did, with HPD personnel to determine whether to make a recommendation to the Navajo Area Director that he sign the violation/assessment notices. (Tr. at p. 323.)

Did the process work perfectly? Hardly. There is no question but that the situation was confused. That is evident in the record given the 638 contract, the newness of ARPA's regulations, general lack of familiarity with those procedures at all levels by laymen with no sophisticated knowledge of a legal procedural type. Even parties told specific facts didn't understand their significance or pursue clarification.

The record nonetheless shows compliance with the procedures outlined in the ARPA regulations in a situation where program duties, including the duty to make recommendations, prepare base studies and paperwork, have been tribally-contracted but the final decisional issuance function remains vested in a government official.

**DID THE REED AND KLESERT CALCULATIONS COMPLY  
WITH ARPA AND ITS IMPLEMENTING REGULATIONS? (NO. 2)**

ASSC argues that the damage assessment report upon which the proposed penalty is based includes double counting of certain costs, citing Eel River, supra, that it incorrectly bases its figures upon complete curation of all artifacts instead of sampling and that its commercial value estimate is extremely overstated.

Other side arguments are thrown in to the effect that the report preparers intentionally used figures or procedures that purposely would produce higher than required costs and that the Tribe and/or BIA is operating upon base pecuniary motive in seeking a monetary penalty from ASSC. This motive is said to be evident from the fact that there is no research plan in place nor has there been in the past since site damage was discovered.

These contentions are dismissed out of hand. The record, specifically the testimony of Judith Reed and Anthony Klesert, shows that the commercial value component of 43 C.F.R. Section 7.14 was selected over archeological value plus cost and restoration because it was the lower figure. Both testified that they believed their cost estimates were in all likelihood low.

As to the second contention, under ARPA, I see nothing in ARPA or the regulations which factors in as a consideration landowner or land-manager motive as an element of the ARPA violation/damage evaluation/assessment process. Inquiry into mental processes of decision-makers is to be avoided unless bad faith is shown. Citizens to Preserve Overton Park v. Volpe, supra at p.p. 824-26.

The fact is that under ARPA when an archeological resource is damaged or alleged to be damaged, damages associated with the alleged violation must be ascertained under 43 C.F.R. Section 7.14. 43 C.F.R. Section 7.16(a) equates the amount so established to the penalty assessed in circumstances where the alleged violator has not been previously cited for ARPA violations. The

damage calculation has specific components that are required to be addressed. As previously noted, these are: Archeological value or commercial value plus cost of restoration and repair.

Under 43 C.F.R. Section 7.15(a), the Federal Land Manager may assess a civil penalty against any person who has violated a prohibition contained in 43 C.F.R. Section 7.4. The latter provision states:

No person may excavate, remove, damage, or otherwise deface any archeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under Section 7.8 or exempted by Section 7.5(b).

Among the particular points advanced by ASSC is the fact that there was no intentional damage to the site, that no artifacts were removed and that the situation is not one of commercial profiteering. As to the lack of removal or profiteering, ASSC specifically contends that use of the commercial value component of 43 C.F.R. Section 7.14 is not authorized under the circumstances of this case.

ASSC's reasoning was developed in the testimony of Stephen Glass. Mr. Glass in conversations with an attorney said to be an ARPA drafter was given the impression that such a distinction was made; however, he was unable to cite specific provisions of ARPA or other authorities to support the particular application of the two values which he professed to exist.

Informal comments of legislative drafters, apart from being hearsay, may not be considered in construing statutes assuming statutory construction were required in this case. Cf. Sutherland Stat. Const. Sections 48.04, 48.12 and p.p. 382-83 (5th Ed). I found nothing in the statute nor in the legislative history reviewed in U.S. Code Cong. & Admin. News, *supra*, which addresses when archeological versus commercial value under 43 C.F.R. Section 7.14(a) is specifically to be used. While it appears that experts have their own personal views about when use of one over the other is appropriate, and it further appears that circumstances may be a strong determinative factor, there is no one flat rule which directs or restricts use of one or the other values in particular contexts.

Much has been made in this case about intent or lack of it to damage the site with all parties referencing Judge Hutt's technical brief. The latter clearly states as does Eel River, *supra*, that intent is not an issue relative to violation and that the alleged violation may be technical or inadvertent. ARPA is a law that can be viewed as a strict liability statute.

In the preceding section, I found procedural compliance under ARPA as to the participants, their interaction with each other and final decision-issuance process. The facts and their analysis need not be repeated.

In this section, I conclude that Ms. Reed and Mr. Klesert fully examined

and measured the subject site and applied reasoned professional judgment in the evaluation of conditions as they existed at the time the damage assessment occurred, including comparing their observations with those from prior studies (PMDR), each, respectively, developed cost data on particular categories described in 43 C.F.R. Section 7.14. Judith Reed then adjusted or compiled the data into a formal report dated June 16, 1994. I therefore conclude that respondent has established a prima facie case regarding compliance with the damage assessment requirements set forth in ARPA and its implementing regulations in the preparation of a damage assessment.

The burden shifts to ASSC to overcome respondent's prima facie case.

ASSC argues that Judith Reed's commercial value figures are extremely overstated. It offers the opinion of Donald Weaver, a witness deposed by ASSC, in support of its position. Mr. Weaver's opinion in the deposition was made the subject of interrogation of respondent's witnesses at the hearing. At most, the deposition contradicts, which is not ASSC's burden, Ms. Reed's commercial value figures. I cannot conclude that ASSC has overcome respondent's evidence. It has simply presented another view in a subject matter area which the experts at hearing testified would produce as many differing expert opinions as experts consulted.

With respect to ASSC's argument that complete curation as contemplated by respondent rather than sampling is inappropriate, it was evident during cross-examination of Judith Reed and Anthony Klesert that ASSC counsel and witnesses were operating upon different planes of perspective and of subject matter.

ASSC contends that sampling, not complete curation of all artifacts in an archeological site, is the norm. Ms. Reed and Mr. Klesert agree regarding undisturbed archeological sites. ARPA sites by definition are not undisturbed. To comply with ARPA, which they testified contains a special or unique mandate, full curation is viewed as required as part of the complete overall damage assessment process.

The position derives in part from 43 C.F.R. Section 7.14(a)'s language: "For purposes of this part, the archeological value of any archeological resource involved in a violation of the prohibitions contained in Section 7.4 ... shall be the value of the information associated with the archeological resource."

ASSC and respondent are therefore speaking to two different processes: One, a general initial evaluation of an untouched resource; the other, an evaluation of or assessment of full damage to a resource. I therefore am not prepared to and do not conclude, based upon the instant record, that sampling is the appropriate methodology for evaluating damage to archeological resources under ARPA.

Both Ms. Reed and Mr. Klesert have testified that the archeological value component of 43 C.F.R. Section 7.14(a) is a wholly different issue and

process than that undertaken in establishing cost of restoration and repair of a disturbed site although certain cost information, as for example, salaries, may be adaptable for use in establishing base costs under either component, without being deemed a double cost. An analogy would be if a contractor were going to dig a hole for a foundation he would have labor costs at "X" dollars an hour. If one were to fill in the hole and smooth it over, there might be labor costs at the same rate but the work would be entirely different. This is a simplistic representation but in my mind expresses the basic point.

With respect to ASSC's arguments about double counting, having heard the explanations provided by Ms. Reed and Mr. Klesert regarding damage assessment components and methodology, I specifically decline to attribute to El River, supra at p. 9, a holding, if ASSC were correct, which would inherently have determined the basic statutory (16 U.S.C. § 470ff) and regulatory procedures (43 C.F.R. Section 7.14) established by Congress for assessing damage to archeological resources to be invalid or defective. Administrative Law Judges are not vested with the power to directly or indirectly invalidate or re-write federal statutes and regulations.

I conclude that the questions of double counting and the matters raised on p.p. 6-7 of ASSC's Post-Hearing Brief, are actually non-issues in this case since commercial value plus the cost of restoration and repair was utilized as the basis for penalty assessment.

Based on the preceding, I conclude that the specific damage assessment calculations prepared and utilized in this case comply with ARPA requirements and its implementing regulations.

#### EXERCISE OF 43 C.F.R. SECTION 7.15(g)(3) AUTHORITY

I am requested by ASSC to exercise authority under 43 C.F.R. Section 7.15(g)(3) to rescind or reduce the penalty assessment imposed. I decline to do so. I will neither substitute one side's expert opinion for another unless there is a valid basis for doing so nor will I substitute my ad hoc opinion for that of a professional archeologist who established a commercial value for the artifacts by reference to a specific standard.

While I, personally, share ASSC's concern that using as a sole reference standard a gallery in a tourist area may not produce in all cases a standard price picture—or it could since that is a chief venue in which relevant transactions occur, a point I need not decide—I am required to apply only my legal judgment to the subject. The latter required that I ascertain only whether a prima facie case was made out by the respondent based upon applicable standards.

I do not find selecting a single artifact price from a single source rather than establishing a price or price range from an array of sources to be an optimum procedure under the statute not only because it could lead

possibly to unusually high figures or subjective selectivity in a process that is already recognized by experts as subjective but also because lack of such data or information effectively nullifies the hearing judge's ability to exercise fully those powers conferred to reduce, augment or otherwise adjust assessed penalties as contemplated under 43 C.F.R. Section 7.15(g)(3).

By the above I specifically do not say that certain objects or specific artifacts may not have established or establishable finite value. However, in sites such as that described in this case and artifacts in the condition described, it would not be inappropriate to infuse the damage assessment process with more breadth.

Were I inclined to exercise adjustment authority, I would be hard pressed under the state of this record to do so, given the evidence before me. It renders the task of determining the validity of the penalty assessment an all or nothing proposition which is not what I believe Section 7.15(g)(3) contemplates.

#### CONTINUATION OF MITIGATION

ASSC insists that mitigation was not considered at all by respondent or the Tribe. I specifically found the assertion not to be correct.

Certain factors amounting to mitigation circumstances as expressed in 43 C.F.R. Section 7.16(b) and raised by ASSC, were addressed in the reissued NOA. The revised NOA's treatment of mitigation elements does not contain particularized or detailed analysis of facts in relation to the issues. I find the process engaged in or applied not to constitute reasoned decision-making which in law means that the conclusions reached must be supported by the facts as found.

I therefore conclude, while reaffirming that there is no mandatory duty to mitigate as contended by ASSC, that having undertaken mitigation, at least facially, the Federal Land Manager was under an obligation to perform the process adequately and with full consideration of the points raised by ASSC.

It is specifically pointed out here, as before, that lack of consideration of financial hardship was not a failing on the part of the Federal Land Manager. Data was not submitted to the latter to analyze when the issue was first raised and addressed, or appears not to have been, based upon the record before me.

I therefore direct ASSC to submit to the Federal Land Manager for consideration, by certified mail, a specification of matters which it has previously argued should be considered under 43 C.F.R. Section 7.16(b) no later than sixty days from the date of receipt of this decision.

The Federal Land Manager has sixty days from the date of receipt of ASSC's specification to consider and file with the Administrative Law Judge, Salt Lake City Office of Hearings and Appeals, a reasoned decision concerning

each of the matters presented specifically stating whether he accepts or rejects mitigation as to each such matter and why. As to any matter for which mitigation is deemed appropriate, the Federal Land Manager is to specify each matter mitigated and the amount of reduction determined to be appropriate for each.

It is specifically recommended that the Federal Land Manager secure the services of an independent business or tax accountant familiar with the industry to aid in the evaluation of documentation and data provided by ASSC to demonstrate financial hardship.

#### SPECIFIC CONCLUSIONS

1. That ASSC has committed two to three documented or stipulated acts in contravention of 43 C.F.R. Section 7.4;
2. That ASSC may be held liable for such acts under the doctrine of *respondet superior*.
3. That violation determination processing requirements and damage assessment procedures under ARPA and its implementing regulations were complied with by the Federal Land Manager or his contractual delegate;
4. That mitigation factors raised by ASSC were not fully considered by the Federal Land Manager through a reasoned decision-making process and that such action is directed to be completed by him consistent with the procedures identified in this decision.
5. That upon provision of the Federal Land Manager's mitigation analysis and decision to the Administrative Law Judge, an additional order will be entered, as appropriate, confirming or modifying the previously assessed penalty amount or entering an order determining penalty under 43 C.F.R. Section 7.15(g)(3).

This decision is issued October 21, 1996 at Arlington, Virginia.

  
S. N. Willett  
Administrative Law Judge

#### APPEAL INFORMATION

No interim appeal rights are applicable in light of the disposition made. Final appeal from the Administrative Law Judges' decision(s), if any, shall be to the Board of Indian Appeals, accordance with 43 C.F.R. Section 4.310 at 4015 Wilson Boulevard, Arlington, VA 22203.

3-17-97

UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS

ARIZONA SILICA SAND COMPANY,  
Complainant,

No. IBIA 94-186-A  
Archaeological Resources  
Protection Act of 1979

v.

(16 U.S.C. §§470aa-II)

ACTING NAVAJO AREA DIRECTOR,  
BUREAU OF INDIAN AFFAIRS,

Respondent,

and,

the NAVAJO NATION DEPARTMENT OF  
JUSTICE

Intervenor.

RESPONDENTS' REPLY TO  
ARIZONA SILICA SAND COMPANY'S POST-HEARING  
REQUEST FOR MITIGATION OF ARPA PENALTY

Pursuant to Judge S.N. Willett's October 21, 1996 decision<sup>1</sup>, the Bureau of Indian Affairs (BIA) and the Navajo Nation have considered Arizona Silica Sand Company's (ASSC's) request for mitigation, submitted December 31, 1996. ASSC requested mitigation of the penalty amount assessed against it for violation of the

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<sup>1</sup>Although the BIA herein complies with Judge Willett's decision and order to respond to ASSC's post-hearing request for mitigation, it does not waive it's right to appeal this unusual decision which allows complainants an additional opportunity to provide evidence to support mitigation of a penalty amount post-hearing that is totally without authority in the Archaeological Resource Protection Act of 1979, 16 U.S.C. §470aa-11.

Archaeological Resources Protection Act of 1979, 16 U.S.C. §§470aa-II (hereinafter ARPA). The BIA, in consultation with the Navajo Nation, has determined that mitigation of the penalty is not appropriate and the \$70,672.00 penalty amount assessed should stand.

Judge Willett ruled on this case in her October 21, 1996 decision and found for the BIA and the Navajo Nation on all substantive issues except mitigation. She discussed the issue of mitigation in some detail on page 19:

ASSC insists that mitigation was not considered at all by respondent or the Tribe. I specifically found the assertion not to be correct.

Certain factors amounting to mitigation circumstances as expressed in 43 C.F.R. section 7.16(b) and raised by ASSC, were addressed in the reissued NOA. The revised NOA's treatment of mitigation elements does not contain particularized or detailed analysis of facts in relation to the issues. I find the process engaged in or applied not to constitute reasoned decision-making which in law means that the **conclusions reached must be supported by the facts as found.**

I therefore conclude, while reaffirming that there is no **mandatory duty to mitigate** as contended by ASSC, that having undertaken mitigation, at least facially, the Federal Land Manager was under an obligation to perform the process adequately and with full consideration of the points raised by ASSC.

It is specifically pointed out here, as before, that **lack of consideration of financial hardship was not a failing on the part of the federal land manager. Data was not submitted to the latter to analyze when the issue was first raised and addressed, or appears not to have been, based upon the record before me. (emphasis added)**

Judge Willett takes the curious position that mitigation of an ARPA penalty is discretionary, but because BIA attempted to consider complainant's request for mitigation (for which no data

was submitted to the decision-maker) the complainant therefore has one more chance, post-hearing, to provide specific financial data that shows financial hardship.

On December 31, 1996, ASSC filed a six-page motion which simply restated its original request for mitigation but provided no financial information which could be used as a basis to determine financial hardship and mitigate the penalty based on the data; this despite the fact that Judge Willett provided complainant with an additional opportunity to provide mitigation data (completely outside the authority of the Act). Mitigation of the penalty amount is a decision which the Judge has affirmed IS DISCRETIONARY.

Judge Willett specifically concluded that:

1) ASSC is in violation of ARPA and has committed two to three **documented or stipulated** acts in contravention of 43 C.F.R. Section 7.4.

2) ASSC may be held liable for such acts under the doctrine of respondeat superior.

3) Violation determination processing requirements and damage assessment procedures under ARPA and its implementing regulations were **complied with** by the BIA or its contractual delegate, the Navajo Nation.

4) Mitigation factors raised by ASSC were not fully considered by the Federal Land Manager through a reasoned decision-making process [a failing not on the part of the BIA, as specifically pointed out by Judge Willett, but a failing because data was not submitted] and such action is directed to be completed by him

consistent with the procedures identified in this decision.

5) Upon provision of the BIA/Navajo Nation mitigation analysis and decision to the Administrative Law Judge assigned this case (upon Judge Willett's departure) an additional order will be entered confirming or modifying the penalty amount.

**MITIGATION**

In its introduction, ASSC mischaracterizes Judge Willett's conclusions. It states that Judge Willett concluded that the BIA's second NOA did not contain a "particularized or detailed analysis of facts in relation to the issues" and that the process used by the BIA in considering mitigation of the penalty did not constitute "reasoned decision-making". See ASSC's December 31, 1996 request for mitigation at 2 (citing the October 22, 1996 Decision of Judge S.N. Willett at 19.)

ASSC omits, however, the continuation of the Judge's conclusions on the same page:

It is specifically pointed out here, as before, that lack of consideration of financial hardship was not a failing on the part of the Federal Land Manager. Data was not submitted to the latter to analyze when the issue was first raised and addressed, or appears not to have been, based upon the record before me.

Id. at 19.

Judge Willett then ordered the ASSC to provide "specification of matters which it has previously argued should be considered . . . [for mitigation]." ASSC apparently considered the word "specification" to mean reiteration of the general arguments in a six-page motion. ASSC simply did not provide any more financial data or "specification" in its December 31, 1996 motion, when given

the additional opportunity by Judge Willett.

It is clear that Judge Willett intended to give the ASSC one more chance to provide data to allow for mitigation when she stated on page 20:

**It is specifically recommended that the Federal Land Manager secure the services of an independent business or tax accountant familiar with the industry to aid in the evaluation of documentation and data provided by ASSC to demonstrate financial hardship.**

Id. at 20

ASSC states in a footnote on page 5 of its December 31, 1996 motion that it produced financial materials during discovery and as exhibits at the hearing. (This is apparently the basis for its assumption that, despite Judge Willett's decision to the contrary, it need not produce any further financial information in its December 31 motion). It then states that it will provide other financial records (at some unspecified time in the future) should they be needed by an accountant evaluating ASSC's financial hardship status. This broad promise of action in the future is not in compliance with Judge Willett's time-frame of sixty days.

As quoted above, Judge Willett stated clearly that: "Data was not submitted to [BIA] to analyze . . . or appears not to have been, based upon the record before me." Id. at 19. The record before Judge Willett contained all the financial information that was ever submitted to the BIA. This financial information was determined to be insufficient by Judge Willett, Id. As ASSC points out in its footnote on page 5, this information was not provided until the discovery stage of the hearing, and was not made

available at the time of the decision-making on the penalty amount.

Judge Willett determined that ASSC should have one further opportunity to prove financial hardship. ASSC did not avail itself of this opportunity because it did not provide any further financial information. The BIA therefore, has no obligation, even given Judge Willett's legally unsupported decision, to allow the ASSC another opportunity to provide different or more information. ASSC was offered an additional opportunity (without basis in ARPA) to convince the BIA to consider financial hardship for mitigation of the penalty amount. It should not be allowed any further opportunities beyond the scope of ARPA. Judge Willett described "reasoned decision-making as "conclusions reached [that are] supported by the facts as found." Id. at 19. The BIA and the Navajo Nation have not yet been provided any facts that support a reasonable decision to mitigate. ("Data was not submitted to the [BIA] . . . or appears not to have been, based upon the record before me." Id.)

ANALYSIS OF THE FOUR SPECIFIC MITIGATION POINTS RAISED BY ASSC

- A. ASSC did not intentionally or willfully damage the site or [intentionally] commit an ARPA violation.

Judge Willett specifically found that:

- 1) ASSC is in violation of ARPA and has committed two to three **documented or stipulated** acts in contravention of 43 C.F.R. Section 7.4.

The Judge determined that although intent is irrelevant in determining violation of ARPA, it can be taken into account in determining whether to mitigate the penalty amount. It has already been considered. Because ASSC has committed more than one violation of ARPA, and stipulated to that fact, the BIA could, in compliance with the regulations, **double the amount** assessed as a penalty: "Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person." 16 U.S.C. §470ff(B). The BIA, in consultation with the Navajo Nation, used its discretion in analyzing these subsequent violations of ARPA and decided not to double the amount of penalty assessed. It also determined, however, that because subsequent violations occurred and because ASSC failed to erect a fence to protect the site for countless months (in direct violation of a cease and desist order) that reduction of the original amount was not appropriate.

B. ASSC has always remained willing to assist in preserving and restoring the damaged site.

ASSC claims that it has always been willing to assist in preserving and restoring the site it damaged, however, actions speak louder than words. ASSC has stipulated to the fact that the site was reported disturbed in both 1991 and 1992, See, October 22, 1996 Decision of Judge S.N. Willett at 6. This clearly shows that although the ASSC **knew** of the existence of the archaeological site,

it did nothing to prevent it from being disturbed again and again. ASSC's own contracted archaeological survey found that the site had "been heavily disturbed by quartz sand mining activities, especially bulldozing". Id. at 2. This was before the incident at issue in this case. Finally, after a cease and desist order was issued on December 22, 1993, ordering ASSC to erect a fence around the site, no fence was erected until March 23, 1994. These actions do not appear to be those of a contrite, preservation-minded actor.

C. ASSC never removed any archaeological resources from the site.

ASSC has stipulated to disturbing the site twice. This action alone is a violation of ARPA. ASSC claims that because ARPA allows for mitigation based on "agreement by the person being assessed a civil penalty to return to the Federal land manager archaeological resource removed from public lands or Indian lands," and it never removed resources from the site, mitigation is even more appropriate.

ASSC destroyed the site with a bulldozer. The fact that ASSC did not remove any archaeological resources should be considered but also must be weighed against the other elements of the case in determination of mitigation. The BIA in consultation with the Navajo Nation has stipulated that ASSC did not take resources from the area. However, ASSC displayed egregious negligence in its

repeated damage of the site, lack of compliance with the cease and desist order regarding immediate fencing and disregard for the Navajo Nation's position on archaeological resources. According to Judge Willett in her decision at 3: "I find an element of paternalism in certain arguments made by ASSC and its insistence upon substituting its own preferred procedures based upon misinterpretation of Navajo beliefs and traditions."

The BIA and the Navajo Nation cannot conclude that the fact that resources were not taken from the site (they were merely destroyed by a bulldozer) is outweighed by the other elements discussed above and in the record that weigh in favor of allowing the penalty amount to stand without mitigation.

- D. ASSC has demonstrated that the proposed penalty would impose a financial hardship which ASSC likely could not pay.

ASSC has not demonstrated financial hardship. As argued above, ASSC did not even provide evidence of financial hardship sufficient to allow the BIA to evaluate whether the penalty assessment would impose a financial hardship. Although they were given opportunity upon opportunity to provide this information at the original issuance of the Notice of Assessment, through discovery and at the hearing and again post-hearing according to Judge Willett's decision, they did not provide evidence of financial hardship sufficient to weigh against the other factors enumerated above.

As demonstrated above, the four mitigation factors set forth

by the ASSC have been considered and were insufficient to sway the original decision to assess a penalty in the amount of \$70,682.00. The Navajo Nation was consulted once again on this issue of mitigation in accordance with the regulations and agrees with this determination. Attached in a memorandum written by the Navajo Nation, discussing the four factors for mitigation briefed by the ASSC.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March, 1997.

By Tonianna Baca  
Tonianna Baca  
Attorney-Advisor  
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ORIGINAL of the foregoing  
sent by certified mail, return  
receipt requested this 17<sup>th</sup> day of  
March, 1997, to:

Harvey C. Sweitzer  
Administrative Law Judge  
Office of Hearings and Appeals  
U.S. Department of the Interior  
139 East South Temple, Suite 600  
Salt Lake City, Utah 84111

COPY of the foregoing  
mailed this 17<sup>th</sup> day of  
March, 1997, to:

Snell & Wilmer  
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# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

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Salt Lake City, Utah 84111  
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IN REPLY REFER TO:

00724

April 2, 1997

ARIZONA SILICA SAND COMPANY,	:	IBIA 94-186-A
	:	
Complainant	:	Archeological Resources Protection Act
	:	of 1979
v.	:	
	:	(16 U.S.C. §§ 470aa-470ll)
ACTING NAVAJO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
	:	
Respondent	:	
	:	
-----	:	
THE NAVAJO NATION,	:	
	:	
Intervenor	:	



### SUPPLEMENTAL DECISION

Appearances: Heidi McNeil, Esq. and Robert Kort, Esq., Phoenix, Arizona, for Complainant.

Tonianne Baca, Esq., Albuquerque, New Mexico, for Respondent.

Peter G. Tasso, Esq., Window Rock, Arizona, for Intervenor.

Before: Administrative Law Judge Sweitzer

On October 21, 1996, Administrative Law Judge S.N. Willett entered a Decision in the above-captioned matter upholding the validity of a July 7, 1994, Notice of Violation (NOV) issued to Complainant for damage caused to an archaeological site, Site AZ K:11:40 (ASM), in alleged violation of the Archeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470ll. The Decision also essentially upheld the validity of a Notice of Assessment issued to Complainant in August of 1995 regarding the violations covered by the NOV, with the exception that the Decision expressly did not determine to what extent, if any, the assessed penalty of \$70,672.00 should be mitigated. Instead, Judge

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Willett directed Complainant to submit to Respondent a specification of matters which it has previously argued should be considered as mitigating factors under 43 C.F.R. § 7.17(b), and directed Respondent to file with this office a reasoned decision addressing each of the factors raised by Complainant and specifying the amount of penalty reduction, if any, determined to be appropriate for each factor. These directions were premised upon the finding that Respondent's treatment of the mitigation issue did not constitute reasoned decisionmaking because the conclusions regarding mitigation were not supported by a particularized or detailed analysis of the facts. The Decision also contemplates that an additional order or decision will be entered upon receipt of Respondent's mitigation analysis.

Complainant's submittal and Respondent's mitigation analysis have been received and the matter is now ripe for making the additional determination necessary to bring the matter to a conclusion. Because Judge Willett is no longer employed by the Department of the Interior, the matter has been reassigned to me for handling.

#### Statement of Facts

In the October 21, 1996, Decision, Judge Willett set forth the facts of this case. They are not repeated herein, except as necessary to explain the rulings below.

#### Discussion

43 C.F.R. § 7.16(b) sets forth the factors upon which penalty mitigation may be based. Complainant argues that mitigation of the penalty is appropriate for the following reasons:

1. [Complainant] did not intentionally or willfully damage the Site or commit an ARPA violation.
2. [Complainant] has always remained willing to assist in activity to preserve, restore, or otherwise contribute to the protection and study of Site AZ K:11:40(ASM) ("the Site").
3. [Complainant] never removed any archaeological resources from the Site.
4. [Complainant] has demonstrated that the proposed penalty of \$70,672.00 would impose a financial hardship which [complainant] likely could not pay.

Respondent found that none of these alleged mitigating factors justified reduction of the penalty. Those findings, which are discussed below, appear reasonable and therefore shall not be disturbed.

I.

**Complainant's Argument That It Did Not Intentionally or Willfully  
Damage the Site or Commit an ARPA Violation**

Under 43 C.F.R. § 7.16(b)(v), one factor to consider is a "[d]etermination that the person being assessed a civil penalty did not willfully commit the violation." Respondent considered Complainant's intent and found that no penalty reduction was warranted. He explained that "because [Complainant] has committed more than one violation of ARPA, and stipulated to that fact, the BIA could, in compliance with the regulations, **double the amount** assessed as a penalty." See 16 U.S.C. § 470ff(B). While Respondent decided not to double the amount, he also determined that reduction of the amount was not appropriate because more than one violation occurred and because Complainant failed to erect a fence to protect the Site for many months in violation of a cease and desist order.

Respondent's explanation is reasonable. While the actual violations may not have been the result of willful conduct, Complainant could have done a much better job of protecting the Site from repeated damage, as more fully discussed below. Once the Site was first damaged and discovered, Complainant's conduct was far from unapproachable.

II.

**Complainant's Argument That It Has Always Remained Willing  
to Assist in Activity to Preserve, Restore, or Otherwise Contribute  
to the Protection and Study of Site AZ K:11:40(ASM)**

Another factor to consider is an "[a]greement 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." 43 C.F.R. § 7.16(b)(ii). With regard to Complainant's assertion that it has always remained willing to provide such assistance, Respondent found that "actions speak louder than words" and that Complainant's "actions do not appear to be those of a contrite, preservation-minded actor."

Respondent elaborated that Complainant did nothing to prevent the Site from being repeatedly disturbed, despite its knowledge of the Site's existence. The facts, as set forth by Judge Willett, amply support this finding. She found that Complainant became aware of the Site's existence in June or July of 1991. She further found that there is no evidence of efforts to secure or monitor the area after its discovery. The Site was disturbed at least two times after its discovery in 1991. Not surprisingly, Judge Willett questioned the adequacy of Complainant's efforts to notify its employees of the Site's existence and the need to refrain from disturbing it. Finally, Complainant did not comply with the December 22, 1993, cease and desist order to fence the area until March 23, 1994. In sum,

Respondent acted reasonably in refusing to mitigate the penalty based upon Complainant's alleged willingness to assist in protecting the Site in light of its failures to actually do so.

### III.

#### **Complainant's Argument That It Never Removed Any Archaeological Resources from the Site**

Under 43 C.F.R. § 7.16(b)(i), the Federal land manager may mitigate a penalty based upon an "[a]greement by the person being assessed a civil penalty to return to [the] manager archaeological resources removed from public lands or Indian lands." Complainant argues that mitigation is appropriate under this subsection because of the fact that it never removed any archaeological resources from the Site.

After considering this fact and weighing it against other factors, Respondent concluded that no mitigation was warranted. Respondent found that this fact was outweighed by Complainant "display[ing] egregious negligence in its repeated damage of the site, lack of compliance with the cease and desist order regarding immediate fencing and disregard for the Navajo Nation's position on archaeological resources."

Again, Respondent's finding is reasonable. It makes little difference whether archaeological resources were removed and never returned or simply destroyed by repeated, preventable acts of destruction, as in this case.

### IV.

#### **Complainant's Argument That It Has Demonstrated That the Proposed Penalty of \$70,672.00 Would Impose a Financial Hardship Which It Likely Could Not Pay**

Finally, mitigation may be based upon a "[d]etermination of hardship or inability to pay." 43 C.F.R. § 7.16(b)(iv). Pointing to its failure to make a profit in three of the last five fiscal years, Complainant argues "that a review of its financial records will demonstrate that the proposed penalty represents a severe hardship on [it], thus warranting mitigation under the ARPA regulations."

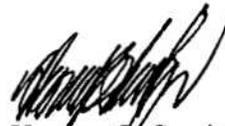
Respondent found, however, that Complainant did not demonstrate financial hardship because it did not provide evidence of financial hardship sufficient to outweigh the other factors considered. Respondent, among other things, argues that Complainant's financial information of record simply does not show hardship.

Respondent is correct because Complainant has provided no analysis of its financial data of record to show hardship or inability to pay. The fact that Complainant did not make a profit in three of the last five fiscal years does not lead to a determination of hardship or inability to pay. It has not shown that it would have to sell essential assets to pay the

penalty or otherwise shown the nature of the alleged hardship. There has been no showing of an inability to pay because funds are not available or obtainable by loan or other methods. Without some analysis of the financial data, there is no reasonable basis for a determination of hardship or inability to pay.

#### Conclusion

Based upon the foregoing, Respondent's determination that no mitigation of the \$70,672.00 penalty is warranted is hereby affirmed. With the issuance of this Supplemental Decision, all relevant issues have been decided and the October 21, 1996, Decision, as supplemented by this Supplemental Decision, is now subject to appeal as set out below.



Harvey C. Sweitzer  
Administrative Law Judge

#### APPEAL INFORMATION

Any party adversely affected by the October 21, 1996, Decision, as supplemented by this Supplemental Decision, has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 C.F.R. § 7.37(f).