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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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| UNITED STATES OF AMERICA, | : | 97-CR-318C |
| Plaintiff, | : | |
| vs. | : | POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING FACTORS |
| RICHARD JAY LAMB, | : | |
| Defendant. | : | |

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The United States, by and through the undersigned Assistant United States Attorney, pursuant to DUCrimR 32-1(b), Rules of Practice, United States District Court for the District of Utah, states that after reviewing the Presentence Report prepared by the U.S. Probation Office, no sentencing factors as described in that report are disputed by the Government.

Defendant has filed a "Memorandum Regarding Sentencing Factors" in which he agrees with the Probation Office that the United States Sentencing Guidelines are inapplicable to his sentencing, relying upon United States v. Corrow, 941 F.Supp. 1553 (D.N.M. 1996). The United States also concurs, and in fact urged the Probation Office to take this position, based on the Corrow case (cited to the Probation Office) and the government's independent determination that

"there is not a sufficiently analogous guidelines" for the instant offense. USSG § 2X5.1.

However, the United States disagrees with two assertions by the defendant concerning his sentencing: (1) "the Court should sentence Mr. Lamb less harshly than the guidelines that would apply had the Antiquities Act been violated;" and (2) "the Court may . . . look to (USSG §§ 2B1.1 and 2B1.3) for some guidance in fashioning an appropriate type of sentence . . ." (Memorandum at 2-3).

First, although the Sentencing Guidelines provide that in the absence of a sufficiently analogous guideline, "any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable" (§ 2X5.1) (emphasis added), the application note to that guideline sets forth the specific "guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline," and neither §§ 2B1.1 and 2B1.3 nor any other Chapter Two guideline is named. This makes sense, of course, since the absence of a "sufficiently analogous offense guideline" in Chapter Two strongly suggests that no such guideline could be "applied meaningfully" to the offense for which the defendant is being sentenced.

Second, very few violations of the Antiquities Act and the Archaeological Resources Protection Act involve the damage and/or desecration of prehistoric Native American human remains. Most archaeological sites are excavated, looted and/or otherwise damaged without ever encountering prehistoric human remains. Consequently, reference to §§ 2B1.1 and 2B1.3 would not inform this Court about relevant sentencing considerations in this case, with one notable exception. Application Note 4 to § 2B1.3 provides in part: "in some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. . .

In such cases, an upward departure may be warranted." The defendant's desecration of prehistoric Native American human remains by selling them like common personal property is the very type of criminal conduct which the Sentencing Commission acknowledged could not be adequately covered by the guidelines use of "monetary value" as a gauge for "harm caused."

Third, the Tenth Circuit has addressed the "loathsome conduct of grave robbers," condemning it in the harshest terms: "Grave robbing, especially grave robbing the sacred objects of Native Americans, is undoubtedly detestable conduct worthy of severe castigation . . ." United States v. Shumway, 112 F.3d 1413, 1423 n.4 (10th Cir. 1997).

The defendant initially told the undercover agent, at the time of the sale, that he had excavated and looted the Native American skull. He later retracted the grave robbing admission after learning of the agent's true identity. The government has no independent evidence that the defendant did in fact commit grave robbing. Nevertheless, the defendant's reprehensible conduct in trafficking in Native American human remains merits stern punitive sanctions. The defendant's criminal conduct is not that far removed from the grave robbing which enabled the defendant to further desecrate these Native American human remains through commercial exploitation.

RESPECTFULLY SUBMITTED this 15th day of January, 1998.

DAVID J. SCHWENDIMAN
United States Attorney

WAYNE T. DANCE
Assistant United States Attorney

**UNITED STATES of America, Plaintiff,**
**v.**
**John C. HUNTER, Defendant.**

**Nos. 2:97-CR-382J, 2:98-CR-198K.**

United States District Court,
D. Utah,
Central Division.

Nov. 4, 1998.

Defendant pled guilty to violating Archaeological Resources Protection Act (ARPA) and to damaging United States property. Upon sentencing, the District Court, Jenkins, Senior District Judge, held that: (1) defendant was not leader or organizer of any criminal activity; (2) prior trespass offense was properly considered in calculating defendant's criminal history score; and (3) court would not include archaeological value of sites harmed by defendant when calculating amount of loss for sentencing purposes.

Ordered accordingly.

**[1] CRIMINAL LAW ⚷ 1251**

110k1251
In determining whether defendant was organizer or leader, sentencing court should consider whether defendant exercised decision making authority, extent of defendant's participation in offense, his role in recruiting accomplices, his role in planning or organizing offense, and degree of control or authority defendant exercised over other coconspirators. U.S.S.G. § 3B1.1(a, c), 18 U.S.C.A.

**[2] CRIMINAL LAW ⚷ 986.2(3)**
110k986.2(3)
Although court may consider hearsay statement at sentencing, it must first find that hearsay statement possesses some minimum indicia of reliability.

**[3] CRIMINAL LAW ⚷ 986.2(1)**
110k986.2(1)
Amount of weight, if any, that sentencing court may attach to hearsay statements is left entirely to sentencing court's sound discretion.

**[4] CRIMINAL LAW ⚷ 1251**
110k1251
Defendant was not leader or organizer of illegal excavations of archaeological sites, for purposes of sentencing defendant for violating Archaeological Resources Protection Act (ARPA) and damaging United States property, despite evidence that defendant was member of group who knew how to find sites; there was no evidence that excavations were organized by defendant or that defendant had greater participatory role in offenses than other members. Archaeological Resources Protection Act of 1979, § 6, 16 U.S.C.A. § 470ee; 18 U.S.C.A. § 1361; U.S.S.G. § 3B1.1(a, c), 18 U.S.C.A.

**[5] CRIMINAL LAW ⚷ 1245(1)**
110k1245(1)
Defendant's prior conviction for trespass on archaeological site was similar to defendant's present conviction for violating Archaeological Resources Protection Act (ARPA) and damaging United States property and, thus, prior trespass conviction could be considered in calculating defendant's criminal history score. U.S.S.G. § 4A1.2(c), 18 U.S.C.A.

**[6] CRIMINAL LAW ⚷ 1208.4(2)**
110k1208.4(2)
In calculating amount of loss caused by defendant's illegal excavation of archaeological sites for purposes of sentencing defendant, court would add additional $2,000 to cost of restoration and repair of sites to reflect permanent aesthetic diminishment at sites. U.S.S.G. §§ 2B1.1(b)(1), 2B1.3, 18 U.S.C.A.

**[7] CRIMINAL LAW ⚷ 1208.4(2)**
110k1208.4(2)
In calculating amount of loss caused by defendant's illegal excavation of archaeological sites for purposes of sentencing, court would not include archaeological value associated with sites; cost of restoring sites, adjusted to reflect aesthetic diminishment of sites, adequately reflected extent of damage caused by defendant and estimates of sites'

archaeological value submitted by prosecution were unreliable. U.S.S.G. §§ 2B1.1(b)(1), 2B1.3, 18 U.S.C.A.

*1284 Wayne Dance, Asst. U.S. Atty., Salt Lake City, for plaintiff.

Richard Mauro, Salt Lake City, for defendant.

MEMORANDUM OPINION

JENKINS, Senior District Judge.

On October 16, 1998, the defendant John C. Hunter appeared before the Court for sentencing. Hunter, who was present, was represented by Richard Mauro; Assistant United States Attorney Wayne Dance appeared on behalf of the United States. After listening to the proffered testimony and examining the exhibits received, and after listening to the arguments of counsel, the Court determined, among other things, that the defendant was not an organizer or leader of the criminal activity and that the amount of loss for sentencing purposes was in excess of $10,000 but less than $20,000. The Court then sentenced the defendant to a ten-month term of imprisonment. For reasons stated on the record, and as supplemented below, the Court reaffirms those findings.

Brief Background

On November 19, 1997, the defendant John Hunter and two co-defendants, Kelby Chadburn and Linden Stucki, were charged in a five-count indictment with violating the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470ee, and with damaging United States property in violation of 18 U.S.C. § 1361. [FN1] Count I charged that in or about late *1285 spring or early summer of 1995, Hunter knowingly excavated and damaged archaeological resources relating to the Fremont culture that were located in the Dixie National Forest at the Santa Clara River Gorge Shelter site. Count IV similarly charged that in or about the summer of 1995, Hunter willfully injured and committed depredation against the property of the United States in the Dixie National Forest by digging, excavating, and otherwise altering and defacing the Santa Clara River Gorge Shelter site. On June 10, 1998, Hunter entered a plea of guilty to these two counts.

FN1. Hunter and his co-defendants were also charged under 18 U.S.C. § 2 with aiding and abetting in these violations.

On April 15, 1998, Hunter and John Robinson were charged in a separate two- count indictment with similar violations for excavating and damaging property of the United States at the Big Round Valley site in the Dixie Resource Management Area, an area managed by the Bureau of Land Management. This indictment was assigned case no. 2:98-CR-198K, and was assigned to Judge Kimball. Count I of this second indictment charged that Hunter, on or about April 24, 1993, violated ARPA by knowingly excavating, damaging, and removing prehistoric archaeological resources from the Big Round Valley site. On June 10, 1998, before Judge Kimball, Hunter entered a plea of guilty to Count I. By Order dated September 3, 1998, the two cases were consolidated for sentencing purposes.

Discussion

Among the issues to be resolved at the sentencing hearing were: (1) was Hunter a "leader" or "organizer" of a criminal activity within the meaning of section 3B1.1 of the Sentencing Guidelines? (2) was the Presentence Report's ("PSR") calculation of Hunter's criminal history score and resulting criminal history category correct? and (3) what was the amount of "loss" for sentencing purposes under the Sentencing Guidelines?

1. Was Hunter an Organizer or Leader for Sentencing Purposes?

Paragraph 64 of the PSR recommends that, pursuant to U.S.S.G. § 3B1.1(c) (1997), Hunter's base offense level should be adjusted by increasing his offense level by two levels to reflect his role as an "organizer/leader" of the unlawful excavations. Hunter specifically objected to this adjustment.

[1] In determining whether a defendant was an organizer or a leader, the sentencing court should consider whether the defendant exercised decision making authority, the extent of the defendant's participation in the offense, his role in recruiting accomplices, his role in planning or organizing the offense, and the degree of control or authority the defendant exercised over other co-conspirators. See § 3B1.1, comment. (n. 4); United States v. Torres, 53 F.3d 1129, 1142 (10th Cir.), cert. denied, 515 U.S. 1152, 115 S.Ct. 2599, 132 L.Ed.2d 845 and 516 U.S. 883, 116 S.Ct. 220, 133 L.Ed.2d 150 (1995). "[T]he gravamen of this enhancement is control, organization, and responsibility for the actions of other individuals, because § 3B1.1(a) is an enhancement for organizers or leaders, not for important or essential figures." Torres, 53 F.3d at 1142 (citations and internal quotation marks omitted).

In support of this adjustment, the United States offered the testimony of David Griffel, special agent for the United States Forest Service, and Rudy Mauldin, special agent for the Bureau of Land Management. The sum of the agents' testimony was that others charged with Mr. Hunter, and an individual named Burt Rondo, asserted that Hunter was the moving force behind the excavations. This testimony, however, is far from persuasive on the issue of Hunter's alleged leadership role.

As an initial matter, these statements have been contradicted. Specifically, when John Robinson, Hunter's co-defendant, was asked about the excavation at Big ***1286** Round Valley, he stated that it was a "spur of the moment" thing. (See PSR ¶ 49.) Moreover, Mr. Rondo, who has himself been charged with archaeological violations at the Big Round Valley site, was found in possession of the excavating equipment that had been used at the Santa Clara River Gorge Shelter site and, indeed, stated that he (Rondo) was the person who originally brought Hunter to the site. Such testimony makes one wonder whether it might have been Mr. Rondo, rather than Hunter, who was the organizer or leader of the excavations.

[2][3] Assessing the value and reliability, if any, of the proffered evidence is made even more difficult by the form in which it was presented. Instead of offering the live testimony of the speakers--Hunter's co-defendants and Rondo--the United States offered the statements of the listeners--the federal agents. Without an opportunity to examine the demeanor of the actual speaker (or for defendant Hunter to cross-examine the speaker), the Court is not in a position to attach any heightened credibility to these statements. [FN2]

FN2. Of course, the Court recognizes that it may consider hearsay statements at sentencing. See United States v. Fennell, 65 F.3d 812, 813 (10th Cir.1995). To be considered, however, the sentencing court must first find that the hearsay statements possess some minimum indicia of reliability. See id.; see also United States v. Watts, 519 U.S. 148, 117 S.Ct. 633, 637, 136 L.Ed.2d 554 (1997) (noting that any information may be considered at sentencing as long as the information bears some sufficient indicia of reliability); U.S.S.G. § 6A1.3(a), p.s., (stating that the court "may consider relevant information without regard to its admissibility under the rules of evidence ..., provided that the information has sufficient indicia of reliability to support its probable accuracy."). What weight, if any, that may attach to these statements, however, is left entirely to the sentencing court's sound discretion. See Hili v. Sciarrotta, 140 F.3d 210, 215 (2d Cir.1998) ( "[H]earsay information may unquestionably be used in the discretion of the sentencing judge and given such weight as appears in his discretion to be merited.") (quoting United States v. Napolitano, 761 F.2d 135, 139 (2d Cir.), cert. denied, 474 U.S. 842, 106 S.Ct. 129, 88 L.Ed.2d 106 (1985)).

[4] Rather than demonstrating that Hunter was a leader or organizer, the proffered evidence merely demonstrates that Hunter may have been an important or essential figure. Although he admittedly knew how to find the archaeological sites, there was no direct evidence that the excavations were organized in any fashion by Hunter. Indeed as one co-defendant purportedly described an excavation, it was a "spur of the moment" thing. Nor was there any direct evidence that

Hunter had a greater participatory role in the offenses. Each of the participants took turns excavating and each came away with the same type of bounty. Hunter's role was neither greater nor lesser than any other willing participant.

At best, the evidence of Hunter's (or any other person's) leadership role in these offenses remains in doubt. The United States has failed to demonstrate, by a preponderance of the evidence, that Hunter was an organizer or leader of the excavations. Therefore, a two-level increase in Hunter's base offense level under section 3B1.1(c) is not warranted.

2. Did the PSR Accurately Calculate Hunter's Criminal History?

Hunter argues that the PSR overstates his criminal history score by one point. In particular, he argues that he should not have been assessed any criminal history points for a 1986 California criminal trespass conviction.

Generally, under the Sentencing Guidelines, no criminal history points will be added for trespass offenses. See U.S.S.G. § 4A1.2(c)(1). If the prior trespass offense is similar to the present offense, however, criminal history points will be added. See U.S.S.G. § 4A1.2(c).

[5] Hunter does not dispute the factual findings in the PSR that the California ***1287** trespass occurred at a site where several Chumash Indian archaeological sites had been illegally excavated. Thus, it is uncontroverted that the California trespass is "similar" to the present offense--that is, both offenses involved unlawful activity at known archaeological sites. In light of this similarity, the Court finds that the PSR was correct in adding one criminal history point for the trespass to Hunter's criminal history score. See U.S.S.G. § 4A1.1(c). [FN3]

FN3. At the October 16, 1998 sentencing hearing, Hunter's attorney did not offer any argument on the trespass question. Rather, he impliedly acknowledged the abstract nature of the Court's inquiry by noting that Hunter's criminal history category would remain unchanged at a level III regardless of the Court's determination on the trespass conviction.

3. What is the Measure of "Loss" for Sentencing Purposes?

In cases concerning the damage or destruction of property, Congress, through its surrogate the United States Sentencing Commission, has determined that the measure of the sentence should be based primarily on the "loss" of the property damaged or destroyed. See U.S.S.G. § 2B1.3(b)(1) and § 2B1.1, comment. (n. 2). When property is taken or destroyed, the "loss" is ordinarily measured by the "fair market value" of the property. U.S.S.G. § 2B1.1, comment (n. 2). When property is damaged, the "loss" is "the cost of repairs, not to exceed the loss had the property been destroyed [i.e., the fair market value]." Id.

A. Cost of Restoration and Repair

In this case, the United States concedes that the amount of restitution Hunter is obligated to repay is $9,661.47. This amount, says the United States, reflects the estimated cost of restoration and repair at the damaged archaeological sites. (The actual out-of-pocket cost to date, however, is far less.) The archaeological artifacts that Hunter allegedly removed from the sites--anywhere between five and fifteen arrowheads, and one partial spear point--were not assigned any market value by the United States. Thus, the ordinary measure of "loss" caused by Hunter's criminal activities totals $9,661.47. See id.

Insofar as "loss" is concerned, the Court further finds that Hunter caused a loss--an aesthetic diminishment at the sites--that is not fully taken into account by the cost of restoration and repair.

B. Aesthetic Diminishment as a "Loss"

Although the United States can backfill the holes dug by Hunter and grade the sites to reflect their pre-excavation topography, because the sites are no longer in pristine condition, they have been diminished. The

diminishment may be subtle, but it is ever-present.

By analogy, what if one of the petroglyphs near the Santa Clara River Gorge Shelter was damaged by a vandal painting over it. Although the archaeological resource itself has not been lost--it would remain under a layer of paint--the resource has been damaged. Certainly the measured "loss" should include the cost of removing the paint and restoring the petroglyph. There is no loss for "archaeological value," however, because the petroglyph remains, as it did before it was vandalized, on the rock face with all its archaeological context intact. Nevertheless, even after cleaning and restoring the petroglyph, the image remains forever tarnished. It is no longer in pristine condition. A small fragment of paint may remain or the hue of the surrounding rock or the image itself may have changed. Importantly, to those who ascribe a spiritual value to these images, that value may be gone forever, wiped away by the vandal's act or by the paint cleaner. Thus, even if restored to its "original" condition, the petroglyph has suffered a diminishment. In such a case, a loss based solely upon the cost of restoration and repair, while adequate,***1288** may not fully capture the harm caused. A "loss" that included a value for the diminishment, as well as the costs to restore, would be more reasonable and appropriate.

[6] For this reason, the Court concludes that an additional $2,000 should be added to the cost of restoration and repair to reflect this diminishment at the sites. Even when "fully restored," they can never be put back to their pre- excavation condition. Thus, the additional $2,000, which was not objected to by the United States or Hunter, represents the Court's estimate of this admittedly subjective aesthetic diminishment. Thus, the total "loss" for sentencing purposes is $11,661.47. Such is a reasonable measure to calculate the actual loss incurred.

C. Shumway and "Archaeological Value"

Nevertheless, the United States argues that Hunter's sentence should be based on a greater amount of "loss." To this end, the United States, relying on United States v. Shumway, 112 F.3d 1413 (10th Cir.1997), asserts that "loss" in this case should include not only the estimated cost of restoration and repair, but also the "archaeological value" associated with archaeological sites.

[7] For several reasons, each of which will be discussed in more detail below, the Court finds that the calculation of "loss" in this case should not include any additional amount reflecting "archaeological value." First, although the court of appeals in Shumway did approve this measure of "loss," it approved this measure as one the court may turn to in calculating loss for sentencing purposes if it finds that the ordinary measures of "loss" are inadequate to account for damage actually incurred. Because the measures of loss relied upon by the Court in this case are sufficient, an additional adjustment for "archaeological value" seems superfluous and need not be included. Moreover, Shumway was concerned with egregious conduct not present in Hunter's case, and the archaeological values at issue here and in Shumway are vastly different.

Furthermore, because the Court finds that the estimates of "archaeological value" offered by the United States are unreliable, they cannot be used to sentence Hunter even if the Court were to factor "archaeological value" into the loss calculation. Notably, each time the United States came before this Court on matters concerning the same Santa Clara River Gorge Shelter site, the United States has proffered different calculations of archaeological value. The disparity between these proffered calculations highlights the unreliability of this information.

As defined in the regulations promulgated by the Secretary of the Interior, "archaeological value" is the "value of the information associated with the archaeological resource." 43 C.F.R. § 7.14(a) (1997). This intangible 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." Id. The costs of retrieval may

include the cost of preparing a research design, conducting field work and laboratory analyses, and preparing reports. Id. (emphasis added.) Simply put, "archaeological value" is an effort to go back in time before the violation occurred and estimate what it would have cost the United States to engage in a full-blown archaeological dig at the site, notwithstanding the fact that the United States had no plans to engage in any such effort. In the present case, the "archaeological value," as proffered by the United States, totals $34,238.18. This figure, if added to the cost of restoration and repair, would bring the alleged "loss" up to $43,895.65. [FN4]

FN4. The breakdown of the "loss," as proffered by the United States is as follows:

| | | |
|---|---|---|
| Cost of Restoration and Repair: | | |
| Santa Clara River Gorge Shelter: | $ 8,430.29 | |
| Big Round Valley: | 1,231.18 | |
| | | $ 9,661.47 |
| Archaeological Value: | | |
| Santa Clzra River Gorge Shelter: | $27,502.18 | |
| Big Round Valley: | 6,736.00 | |
| | | $34.238.18 |
| Total "Loss": | | $43,895.65 |

***1289** As the United States suggests, Shumway, does indeed approve of this type of loss calculation as one way of calculating loss for sentencing purposes. Yet it is not the only way.

In Shumway, the defendant was sentenced in a consolidated sentencing proceeding on three separate ARPA violations and three separate but related counts of damaging United States' property. The sentencing court was called upon to impose a sentence on the defendant pursuant to section 2B1.3 of the Sentencing Guidelines. This required the court to sentence the defendant based upon the "loss" associated with defendant's convictions. See U.S.S.G. §§ 2B1.3(b) and 2B1.1, comment (n. 2). Although the sum of the fair market value of the artifacts taken and the cost of restoration and repair totaled $9,122, the sentencing court added an amount for "archaeological value" to arrive at a "loss" of more than $120,000. This measure of "loss" resulted in a five-level increase in the defendant's offense level. See U.S.S.G. §§ 2B1.1(b)(1)(E) (increasing offense level by four if the loss is greater than $5,000 but less than $10,000) and 2B1.1(b)(1)(J) (increasing offense level by nine if loss is greater than $120,000 but less than $200,000).

In order to justify its measure of "loss," the sentencing court relied on a provision in the Sentencing Guidelines that provided that "[w]here the market value is difficult to ascertain or inadequate to measure the harm

to the victim, the court may measure loss in some other way." U.S.S.G. § 2B1.1, comment (n. 2.) (emphasis added). By calculating the "loss" based not only on the actual "loss"--that is, the fair market value of the property taken or destroyed and the cost of repair--but also by including a sum for "archaeological value," the sentencing court implicitly found that the fair market value of the artifacts taken and the cost of restoration and repair were inadequate to reflect the harm caused by the defendant.

In Shumway, the defendant, who had a previous ARPA conviction, was a grave robber who desecrated a Native American burial ground. During one of the violations, a person digging with the defendant discovered the skeletal remains of an infant wrapped in a burial blanket. The defendant, recognizing the site as a burial site, took over the digging. After fully excavating the infant's remains, the defendant removed the burial blanket and left the infant's remains on the ground. When the site was later inspected, all but the infant's skull was gone. See Shumway, 112 F.3d at 1417-18. At a second site, the defendant found and removed sandals and a sleeping mat.

In affirming the sentencing court's calculation, the court of appeals agreed that the "paltry sum of $9,122, the asserted cost of the artifact's fair market value and cost of restoration and repair, fails to reflect adequately the extent of the damage [the defendant] inflicted." Shumway, 112 F.3d at 1425. Specifically, the court of appeals concluded that the fair market value and the cost of restoration were "grossly insufficient to quantify the devastating and irremediable cultural, scientific and spiritual damage [the defendant] caused to the American people in general and the Native American community in particular." Id. The court of appeals concluded that in such an instance, where it has been determined that the ordinary measure of "loss" is inadequate to measure the extent of the harm caused, it was proper for the sentencing court, based upon the "flexible provision" ***1290** found in application note 2 of § 2B1.1, to use some other reasonable measure to calculate loss. Id. at 1425-26.

In this case, the United States failed to offer any evidence whatsoever as to the fair market value of the arrowheads taken from the two sites. [FN5] Absent such evidence, the Court is not in a position to assess whether the unknown fair market value of the arrowheads, when added to the cost of restoration and repair, would or would not adequately reflect the harm caused by Hunter.

FN5. It appears that arrowheads are treated differently than other artifacts. For example, the removal of arrowheads from the surface of the ground is exempt from ARPA's civil and criminal sanctions. See 16 U.S.C. §§ 470ee(g) (exempt from criminal) & 470ff(a)(3) (exempt from civil); see also 36 C.F.R. § 296.16(a)(3); 43 C.F.R. § 7.16(a)(3). Thus, at least when the archaeological resource violation concerns arrowheads, apparently it is the excavation, rather than the removal of the arrowheads, that is the harmful conduct. In the case of other artifacts, such as a burial blanket, just the mere removal of the artifacts, whether on the surface of the ground or not, is punishable under ARPA. See 16 U.S.C. § 470ee(a) ("No person may ... remove ... or attempt to ... remove ... any archaeological resource....").

Moreover, in Shumway, there was great disparity between the ordinary calculation of loss ($9,122) and the "loss" calculated by using "archaeological value" (approximately $137,200). Indeed, the latter measurement was fifteen times greater. With such a large difference between these "losses," it would be reasonable to infer, as the sentencing court in Shumway apparently did, that the lower loss calculation may have been inadequate to reflect the actual harm caused. In the present case, however, the "loss" as calculated using the Government's last proffered "archaeological value" estimate ($43,895), is only four and one-half times greater than the ordinary loss calculation ($9,661).

Indeed, as a factual matter, this case is very different from Shumway.

In Shumway, the court of appeals noted the

"special import" of the defendant's conduct and appropriately characterized his actions as "undoubtedly detestable ... [and] worthy of severe castigation." 112 F.3d at 1423 n. 4. By contrast, there was no evidence that Hunter's unlawful excavations disturbed any type of sacred ground or burial site. Unlike the defendant in Shumway, Hunter did not disturb any human remains or find and remove any items of great archaeological importance. [FN6]

FN6. All Hunter found and removed were some arrowheads. As noted previously (see footnote 5, supra ), Congress has apparently determined that arrowheads are of lesser archaeological importance that other artifacts.

In Shumway, the court of appeals recognized that, under the Sentencing Guidelines, a sentencing court in its discretion may use a measure other than ordinary measures to calculate loss. This approach was not mandated by the court in every case. Rather, the court simply noted that in proper circumstances--that is, where the sentencing court has made a finding that the ordinary measures of loss are inadequate to reflect the damage caused by the defendant--the sentencing court may rely on some other reasonable measure of loss for sentencing purposes, such as "archaeological value."

For the reasons discussed above, the Court finds that the cost of restoring the two archaeological sites, coupled with an adjustment for the loss of the pristine nature of the site (on aesthetic values more than anything else) adequately reflects the extent of the damage actually caused by Hunter. Thus, there is no need for the Court to rely on the contradictory archaeological value calculations offered by the United States.

D. Reliability of the "Archaeological Value" Calculations

Even if the Court believed that an adjustment for "archaeological value" was warranted, the Court finds that the "archaeological value" estimate offered by the ***1291** United States lacks sufficient reliability to be used for sentencing purposes. To begin with, the United States has offered two archaeological damage assessment reports, each offering substantially different valuations. The first report, prepared in November 1995 by the archaeologist who personally inspected the Santa Clara River Gorge Shelter site, estimated the archaeological value at $15,645. (Def.Ex. A, at 6.) This report also calculated the cost of restoration and repair at $16,595.56. (Id. at Appendix A.) The second report, prepared on September 23, 1998 (and not served on the defendant until the morning of the sentencing hearing) by an archaeologist who did not visit the site, estimated the archaeological value at $27,502.18. (Gov't Ex. 3, at 13.)

In examining these two reports, the Court has had a difficult time reconciling the asserted values. For example, even when comparing known actual costs, such as the hourly rate for the archaeologist who prepared the first report, the rates are different. (Def.Ex. A, at 7 (archaeologist rate of $19.32 per hour); Gov't Ex. 3, at 15 ¶ A (archaeologist rate of $27.45 per hour)). In addition, the mileage charges in the two reports differ. (Def.Ex. A., at 7 (mileage rate $0.37); Gov't Ex. 3, at 15, ¶ A (mileage rates $0.235 and $0.15).) Moreover, although the first report includes a clerical charge, there is no corresponding charge in the second report. (Def.Ex. A, at 7.) Given these differences, the Court is rightly concerned with the reliability of any estimates in damage assessment reports that cannot even agree on known actual costs. This concern is not lessened by the fact that the United States did not deliver the second report to Hunter until the day of his sentencing--a delay that precluded Hunter from effectively challenging the accuracy of the second report.

Moreover, at the October 16, 1998 sentencing hearing, for the first time the United States advised the Court that the first report contained inaccurate calculations for both the archaeological value and the cost of restoration and repair. This acknowledged inaccuracy troubles the Court.

The reliability of the archaeological damage

assessment reports becomes even more suspect when the indictment is examined closely. As mentioned above, Hunter and two co-defendants, Kelby Chadburn and Linden Stucki, were charged in a four-count indictment with ARPA and related violations. Specifically, Count I charged Hunter and Chadburn with knowingly excavating and damaging archaeological resources at the Santa Clara River Gorge Shelter "[i]n or about late spring or early summer of 1995, but not later than July 25, 1995." Count III charged Hunter, Chadburn, and Stucki with knowingly excavating and damaging archaeological resources at the Santa Clara River Gorge Shelter "[i]n or about the summer of 1995, but no later than July 25, 1995." Count IV similarly charged Hunter, Chadburn, and Stucki with willfully injuring property of the United States by digging and excavating the Santa Clara River Gorge Shelter "[i]n or about the summer of 1995, but no later than July 25, 1995." On February 20, 1998, Chadburn entered a guilty plea to Count Three. On June 10, 1998, Hunter entered a plea of guilty to Counts One and Four, and, on August 11, 1998, Stucki entered a guilty plea to Count Three.

On July 17, 1998, Kelby Chadburn appeared for sentencing. At sentencing, the United States, relying on the now-discredited first report, sought a sentence for Chadburn based upon a cost of restoration and repair of $17,495 [FN7] and an archaeological value of $15,645. At that time, the United States asserted that these amounts ***1292** were accurate. The Court relied on these valuations in sentencing Chadburn to an eight-month term of imprisonment and in ordering restitution. [FN8] Of course, the United States now says that these calculations were inaccurate.

FN7. This amount is apparently the sum of the estimated costs of restoration ($16,595.56) and the actual costs incurred by the Forest Service at the Santa Clara River Gorge Shelter site ($899.94).

FN8. Despite the fact that the United States has had knowledge of the inaccuracy of these measures since September 23, 1998, the United States has not yet advised Chadburn's attorney of the error

Tellingly, although defendants Chadburn and Stucki pled guilty to the very same offense, the calculations proffered by the United States in their respective cases for cost of restoration and repair and archaeological value are drastically different. As noted previously, in Chadburn's case the cost of restoration and repair was $17,495 and archaeological value was $15,645. For Stucki, however, the calculations, as contained in the presentence report (and to which the United States did not object), were $6,876 and $2,107, respectively. (Stucki PSR ¶ 11.) Although the United States has now acknowledged that the calculations used at Chadburn's sentencing are inaccurate, the suggested revisions-- $8,430.29 and $27,502.18, respectively-- are much greater than those assigned in Stucki's case. The United States has not offered any explanation for the difference. [FN9] Thus, as to Count III, the United States has offered two widely divergent valuations for the same archaeological damage. This difference highlights what the Court considers the less-than-reliable nature of some of these valuations. [FN10]

FN9. To the extent that the United States may claim that the increased values for Chadburn reflect damages from the unlawful excavations alleged in Count I, that argument is belied by the express language of the indictment. In Count Three, the indictment states that "this offense [Count III] [is] a separate and distinct offense and occurrence from that alleged in Count I." The United States did not suggest at sentencing that the unlawful conduct alleged in Count I should be considered "relevant conduct" for sentencing purposes under U.S.S.G. § 1B1.3. Indeed, there is no mention anywhere in Chadburn's PSR that the conduct alleged in Count I would be used to calculate his sentence. Thus, if the calculations the United States now offers for archaeological value and cost of restoration are to be considered reliable, the calculations should have been the same for both defendants, because both Stucki and Chadburn were both convicted under Count III,

FN10. In the "Statement By Defendant in Advance of Plea of Guilty," drafted by the Assistant United

States Attorney, and signed by him, Stucki, and Stucki's attorney, the United States stipulated that as to Count III, the archaeological value was $5,215 and the cost of restoration and repair $5,832. (See Statement ¶ 10.C(1), (2)). Under the Sentencing Guidelines, factual stipulations must "set forth the relevant facts and circumstances of the actual offense conduct" and may "not contain any misleading facts." U.S.S.G. § 6B1.4(a)(1), (2), p.s. As noted in the commentary, "it is not appropriate for the parties to stipulate to misleading or non- existent facts, even when both parties are willing.... Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines." U.S.S.G. § 6B1.4, p.s, comment. Indeed, the responsibility to be accurate in a factual stipulation in a plea agreement is great: under the guidelines, regardless of the offense of conviction, if the stipulation establishes a more serious offense, the sentencing court is directed to determine the sentence based on the stipulated and more serious offense. See U.S.S.G. § 1B1.2(a); see also Richard Thornburgh, Attorney General, Memorandum to Federal Prosecutors [Thornburgh Bluesheet], "Plea Policy for Federal Prosecutors," March 13, 1989, reprinted in 6 Fed.Sent.R. 347 (1994) ("If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical."). While the Court did not hold the parties to the stipulated amounts, the United States' willingness to agree to yet another calculation of loss is more evidence of the fluid and less-than- reliable nature of these estimates.

Thus, even if the Court were to rely on the archaeological value calculation offered by the United States, the Court finds that the calculations supplied by the United States are unreliable and overstate the archaeological value associated with Hunter's unlawful activities. Admittedly, all Hunter uncovered during his excavations ***1293** were some arrowheads. No other archaeological resource or artifact was removed. The question then becomes, "What has the United States lost?" The United States has not lost the arrowheads: they were surrendered to the United States. (Indeed, it could be said the United States has enjoyed a gain of sorts. As part of his plea agreement, Hunter agreed to surrender not only the ill-gotten arrowheads, but also the totality of his personal archaeological collection--a collection that contains artifacts that were legally acquired.) In the Court's view, what has been lost is the context in which the arrowheads were found. In other words, what the United States has lost is the information concerning the location of the arrowheads to one another, their exact location at the sites when uncovered, and whether they where recovered with or nearby any other items of archaeological import.

Unfortunately, the United States' estimates regarding archaeological value do not put a dollar value on this context. Instead, the offered archaeological value presents a fiction. Starting with the assumption that the site was never excavated, it goes on to estimate what it would have cost the United States to prepare a study of the site, to excavate the site, to remove, analyze, and store any artifacts, and to prepare scientific reports. See 43 C.F.R. § 7.14(a). The problem with this fiction is that it does not reflect reality. The reality is that the site was excavated, albeit unlawfully, and all that was uncovered were some arrowheads.

Armed with the knowledge that a dig at the site would only yield arrowheads, a more accurate calculation of archaeological value would be based on the estimated costs to the United States to recover these artifacts. The United States knew of the existence of both the Santa Clara River Gorge Shelter and the Big Round Valley archaeological sites. Given the fact that the United States had never once planned or engaged in a formal excavation at the sites, one may only speculate whether the United States would have expended any funds at all to uncover these arrowheads. Apparently, even without knowledge of what it might find, the United States was not going to expend any funds to excavate the sites. Based upon the facts of this case, the Court finds that the proffered estimates for archaeological value are both unreliable and unreasonable.

Sentence Calculation

Hunter's base offense level is a four. See U.S.S.G. § 2B1.3(a). An $11,661.47 "loss," coupled with a two-level adjustment for more than minimal planning pursuant to section 2B1.3(b)(3), results in a seven-level increase in Hunter's offense level. See U.S.S.G. § 2B1.3(1) and § 2B1.1(b)(1)(F). Hunter's adjusted offense level is therefore an eleven. After applying a two-level downward adjustment for acceptance of responsibility (see U.S.S.G. § 3E1.1(a)), Hunter's guidelines offense level is a nine. An offense level of nine, when referenced to a criminal history category III, results in a guideline range of eight to fourteen months. The Court's sentence of ten months falls approximately midway within that range.

Conclusion

For reasons discussed at length above and on the record at the October 16, 1998 sentencing hearing, the following factual findings are re-affirmed by the Court: (1) the defendant was not a leader or organizer of any criminal activity; (2) the defendant's criminal history score correctly included one point for a prior similar trespass offense; and (3) the amount of "loss" for sentencing purposes was $11,661.47.

As a final note, the Court recognizes that in cases like this, where a defendant has been convicted of damaging and looting an archaeological or cultural resource, sentencing a defendant based on the estimated dollar value of the loss, however calculated, is absurd. These speculative estimates are simply inadequate to measure the true cultural, scientific, and spiritual harm such an act causes. How can one ***1294** ever quantify the harm to a Native people whose ancestral burial grounds may have been desecrated? If Congress is indeed serious about punishing such offenders, the sentencing decision should be left to the sentencing judge who may then measure the harm in terms of his or her experience and common sense, rather than asking the judge to rely on speculative assessments and fictional scholarship in an attempt to quantify the harm in a way that bears little or no relationship to the true damage.

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U.S. Department of Justice
Wayne T. Dance Assistant United States Attorney Fax: (801)524-6924
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REPLY TO:

December 11, 1998

Overnight Delivery

Sean Connelly
Trial Attorney
U.S. Department of Justice
U.S. Attorney's Office
1961 Stout Street, Suite 1300
Denver, Colorado 80294

Re: United States v. John C. Hunter, Nos. 2:97-CR-382J & 2:98-CR-198K (D.Utah) (cases consolidated for sentencing)

Dear Sean:

This office requests approval of the Solicitor General to appeal the consolidated sentencing of John C. Hunter in the subject cases. Statutory appeal authority is provided in 18 U.S.C. § 3742(b)(2) in that the sentence "was imposed as a result of an incorrect application of the Sentencing Guidelines." I regret the delayed submission of this request.

IMPORTANCE OF APPEAL

The Archaeological Resources Protection Act of 1979 (ARPA) is a statute of great importance to this country because, as Congress stated, its "purpose . . . is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands . . ." 16 U.S.C. 470aa(b). Congress also found that "archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage . . . " 16 U.S.C. 470aa(a)(emphasis added).

These cultural treasures of our Nation's heritage not only have been destroyed for generations by looters searching for artifacts, but the "culture thieves" have continued their depredations since the passage of ARPA. In order to strengthen the enforcement of the Act, Congress amended ARPA in 1988 by drastically reducing the felony threshold for a violation from $5,000 to $500 of values/costs associated with the offense (i.e., harm to the affected archaeological resources). It is noteworthy that in 1996 Congress made a tenfold increase ($100

to $1,000) in the felony threshold for numerous federal property crimes (e.g. 18 U.S.C. §§ 641 and 1361) but did not raise the ARPA threshold.

ARPA is also very important to the District of Utah. Within the past several years we have prosecuted an infamous looter of archaeological resources, Earl Shumway, who received the longest ARPA prison sentence yet imposed (5 1/4 years), as well as the nation's largest ARPA case ("Polar Mesa Cave;" 9 defendants convicted of one or more ARPA felonies; 18 felony convictions overall). It is believed that in the past eight years there have been more defendants (27) convicted of felony ARPA offenses in the District of Utah than all other districts combined.

In order to adequately achieve the deterrent effect underlying ARPA, and thus meet its stated purpose of "the protection of archaeological resources and sites which are on public lands and Indian lands," proper sentencing of ARPA offenders is essential. In the appeal following the Earl Shumway trial and sentencing, one key issue dealt with the method of determining a proper ARPA sentence under the Guidelines. United States v. Shumway, 112 F.3d 1413, 1424-26 (10th Cir. 1997) (discussed below). The Tenth Circuit's ruling, favorable to these ARPA deterrence and protection interests, will be seriously undermined by the rulings made by the district court at the Hunter sentencing and expanded upon in the Memorandum Opinion filed with the Judgment. The Hunter sentencing rulings will not only have deleterious impact in future ARPA cases in this district, but if the Memorandum Opinion is published (as anticipated), the damage to archaeological resource prosecutions nationwide will be substantial.

This office understands that appeal authorization is not ordinarily granted on sentencing issues unless the purported error results in a substantially reduced sentence. However, it also believed that certain sentencing issues carry such importance beyond the case in question that appeal may be warranted even if correcting the error would have only a minor impact at resentencing. This appeal authorization request is based on the latter principle. Although there is only a two level difference between the government's position and the Court's ruling on the issue of archaeological damage assessment, appeal is important for the reasons stated above.

## TIME

A Protective Notice of Appeal was filed in both cases on December 4, 1998.

## ISSUES

Issue 1: Where Congress mandates that "archaeological value" be included in the total monetary value used in determining whether a violation of the Archaeological Resources Protection Act (ARPA) is a felony, and the Guidelines define loss as "the value of the property taken, damaged, or destroyed" (USSG § 2B1.1, n.2), is it necessary to include "archaeological value" of the harmed archaeological resources in the loss assessment for a felony ARPA offense in order to "fully capture the harmfulness of the conduct" (§ 2B1.1, n.15). (Standard of Review: de novo.)

Issue 2: Whether the district court erred in determining that the methodology of

calculating "archaeological value" set forth in ARPA's uniform implementing regulations is " unreasonable" (thus impliedly invalidating the regulation), and if so, whether the court's refusal to accord deference to the regulation was improper. (Standard of Review: de novo.)

Issue 3: Whether the district court erred in creating and utilizing the concept of "aesthetic diminishment," and arbitrarily assigning it a value of $2,000, as part of the ARPA loss assessment, that is, as an appropriate method of valuing the unique and irreplaceable nature of the harmed archaeological resources. (Standard of Review: de novo on this mixed question of fact and law.)

Issue 4: Whether the district court erred in finding that the government's evidence concerning archaeological value was "unreliable." (Standard of Review: clear error.)

## STATEMENT

Case No. 2:97-CR-382J

On November 19, 1997, John C. Hunter (37 years old and a Utah resident) and two acquaintances, Kelby Chadburn and Linden Stucki, were indicted for violating the Archaeological Resources Protection Act (ARPA) (two counts; Hunter and Chadburn named in both counts and Stucki in one), and damaging property of the United States (18 U.S.C. § 1361) (two counts; Hunter and Chadburn named in both and Stucki in one). The four counts related to two separate looting incidents at the same location in 1995, the Santa Clara River Gorge Rockshelter located on the Dixie National Forest in Washington County, Utah. On June 10 1998, Hunter pled guilty to Counts I and IV of the indictment. Count I charged an ARPA violation at the Santa Clara River Rockshelter "in or about late spring or early summer, 1995, but not later than July 25, 1995" (the first charged looting incident at the site). Count IV charged a violation of 18 U.S.C. § 1361 at the site "in or about the summer of 1995, but not later than July 25, 1995" (the second looting which occurred several weeks after the first).

The circumstances surrounding Hunter's offenses at the Santa Clara River Rockshelter were described in Hunter's Presentence Report as follows:

> The Offense Conduct:
>
> Investigation into the instant offense began July 24, 1995, when a citizen reported to the Dixie National Forest that they observed what appeared to be an illegal excavation of an archaeological site. The site was located along the Santa Clara River, west of Pine Valley, Utah. On Tuesday, July 25, 1995, Forest Service law enforcement officer Dave Ricks inspected the archaeological site. He discovered two sifting screens and two short-handled shovels located in a crevice in the rock wall immediately adjacent to the entrance of the rockshelter. These items were concealed by branches from native vegetation and appeared to have been used recently.
>
> Officer Ricks also observed mouth and nose dust masks constructed of a fabric-type material and several partially burned candles lying near the entrance of the

rock- shelter. In viewing the rockshelter, it appeared it had been recently excavated and severe damage was done to the interior. Photographs were taken of the damage and surveillance equipment was set up at the site.

Between July 27, 1995, and August 19, 1995, law enforcement officers watched the site closely. On August 19, 1995, they discovered that the short handled shovels and sifting screens had been removed. Investigation of a campsite upstream from the site revealed one of the short-handled shovels, and a camper told them the sifting screens had been removed by an individual named Burt Rondo. Mr. Rondo was located in Central, Utah, and law enforcement officers noted the two screens and the other short-handled shovel located in the back of his vehicle. Mr. Rondo was questioned and indicated he had removed the items from the site after he discovered the damage. He reported he had taken a friend by the name of John Hunter to the site in early spring of 1995 with the intent of showing him the Native American history. He later learned Mr. Hunter and two individuals by the name of Kelby Chadburn and Linden Stucki had damaged the site and had been removing archaeological artifacts. He also learned they had been selling the artifacts in California.

According to Mr. Rondo, Mr. Hunter had told him he had not only excavated the site in question, but had also visited several other archaeological sites in the area. Mr. Rondo had reportedly observed several artifacts collected from various places dug by Mr. Hunter, Mr. Chadburn and Mr. Stucki. Many of these items were located in Mr. Hunter's residence in St. George, Utah.

In late 1996, the Washington County Sheriff's Department reported to the Forest Service law enforcement officers that John Hunter had been charged with the offense of Manufacturing and Distributing a Controlled Substance. During the search of his residence numerous items appearing to be Native American Indian artifacts had been located. These items were seized by the Washington County Sheriff's Department and turned over the Forest Service law enforcement investigators as part of the investigation into the archaeological resource violation.

. . . .

On March 5, 1997, Forest Service law enforcement officers interviewed Kelby Chadburn, who reported that he, John Hunter and Linden Stucki had visited several archaeological sites during the early summer of 1995, along the Santa Clara River, just outside Pine Valley. He reported that during the time in question they excavated the sites and removed numerous Indian artifacts. According to Mr. Chadburn, Mr. Hunter stated he had completed numerous illegal archaeological excavations in the District of California prior to moving to Utah. Mr. Hunter reportedly took the majority of the items into his possession, and to Mr. Chadburn's knowledge, he was selling the artifacts in the District of California.

Presentence Report at 8-10.

The description of the Santa Clara River Rockshelter archaeological site, the archaeological resources contained within the site, and the nature and extent of the damage and destruction of the archaeological resources are fully explained in the Archaeological Damage Assessment Report prepared by Forest Service Archaeologist Stan McDonald and submitted to the court as Government Sentencing Exhibit 3. Mr. McDonald also testified (along with two other archaeologists) at an evidentiary hearing (9/28/98) on the issue of archaeological resource damage assessment. This evidentiary hearing (discussed below) preceded the sentencing hearing itself (10/16/98). Mr. McDonald's qualifications to assess archaeological resource damage are considerable: he was one of two archeologists who prepared damage assessment reports in the Shumway case and testified at that trial; he also prepared an exhaustive damage assessment report in the Polar Mesa Cave series of cases (cited above) which has been widely acclaimed by his professional colleagues.

Because the essence of this appeal, if authorized, is the unique and irreplaceable nature of archaeological resources and their "value" for sentencing purposes, it is necessary to provide extended excerpts from Mr. McDonald's comprehensive Damage Assessment Report:

INTRODUCTION

Between early spring, 1995 and July 26, 1995 archaeological site looters excavated approximately 11.72 cubic yards of archaeological deposits from the Santa Clara River Rockshelter archaeological site (State Smithsonian Site No. 42WS3086), a Formative Virgin Anasazi/Fremont and Late Prehistoric Paiute Period rockshelter site located in Washington County, Utah.

Archaeological site looters dug two large holes into soil layers containing evidence of human occupation, use and activity by Native American groups during the Formative (from approximately AD 500 to AD 1300) and Protohistoric Southern Paiute (AD 1300-late 1800s) Periods. Examination of the damage shows that valuable archaeological materials and significant archaeological data were irretrievably lost and irreparably damaged. In the following report, the site and damages are described, its importance discussed, and cost determinations of the dollar value of damages presented.

. . . .

ARCHAEOLOGICAL INTEREST AND SIGNIFICANCE OF SITE

Site 42WS3086 is of *archaeological interest,* since it is, as defined in 36 CFR 296.3(a)(2), "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through scientific or scholarly techniques such as controlled measurement, controlled collection, analysis, interpretation, and explanation." The archaeological interest and importance of the site is discussed in more detail below.

. . . .

By looting Site 42WS3086, vandals irreparably damaged fragile archaeological deposits containing a 1,500 to 2,000 year record of human history. Unauthorized excavation by site looters resulted in the irreplaceable loss of unique and significant archaeological information. Looters' theft of artifacts foreclosed our abilities to study and understand how these human groups lived and adapted to their prehistoric environments. Most importantly, opportunities for future generations to learn about, enjoy and fully appreciate the human history which the Santa Clara River Gorge Rockshelter once had to offer, have been forever lost.

. . . .

## ARCHAEOLOGICAL RESOURCE DAMAGE

In accordance with 36 CFR Part 296, which implements the provisions of the Archaeological Resources Protection Act (ARPA) of 1979 (16 U.S. C. 470aa-mm), damages to the archaeological resource known as Santa Clara River Gorge Rockshelter (Utah State Site No. 42WS3086) were appraised in terms of the archaeological value of the damaged areas. The costs of restoration and repair of the damaged archaeological resource (which includes the costs of stabilizing areas exposed by unauthorized excavation and protecting damaged areas from further damages) as well as the costs of assessing damages to the site were included in the appraisal.

. . . .

Unauthorized excavations were documented in two areas of the site. These have been delineated as Holes 1 and 2. These holes and associated damages at each are described and discussed in more detail below.

***Description and Discussion of Damages-Hole 1.*** This is the larger of the two holes dug at the site and is located underneath a small overhang or sheltered area of the site (e.g. the rockshelter). Hole 1 an irregular shaped hole, roughly rectangular shaped approximately 20 feet long and varying from 10 feet to over 13 feet wide. Jacklyn (first USFS archaeologist to visit the site in July, 1995) observed unauthorized excavation throughout the entirety of the sheltered area where the unauthorized excavation had proceeded to the cave walls. In some places, the digging exceeded 2 feet (24") in depth.

. . . .

In total, unauthorized excavation resulted in the removal and damage of 11.02 cubic yards of material remains at Hole 1.

***Description and Discussion of Damages-Hole 2.*** This hole is an irregular-shaped hole, roughly rectangular in shape with rounded corners. The hole is deepest on the West End being approximately 21" to 24" deep. The depth of the hole tapers downward from west to east. The depth of digging at the

extreme East End of the hole is at approximately ground level. Within this area, looters also excavated an area deeper than the surrounding hole. This smaller, roughly oval-shaped hole is approximately 2.5' x 3' and is 0.5 deep." . . . . In total, approximately 0.70 cubic yards of material remains were excavated, removed and damaged at Hole 2.

. . . .

With these measurements, it was determined that looters excavated, removed and damaged approximately 11.02 cubic yards of material remains at Hole 1, and 0.70 cubic yards of material remains at Hole 2. Thus, approximately 11.72 cubic yards of material remains of archaeological deposits containing evidence of human occupation, use and activity were excavated, removed and damaged at the Santa Clara River Gorge Rockshelter Site by site looters between early spring, 1995 and July 26, 1995. It is emphasized that these calculations provide a *conservative measure* of the actual volume of cultural material remains removed by unauthorized excavation; it is my professional opinion that the actual volume of remove, excavated and damaged material remains probably exceeds 11.72 cubic yards.

**Archaeological Value.** Archaeological value is the cost of excavating the same amount of archaeological material as was damaged, if it were done scientifically by professional archaeologists. It includes all of the costs of conducting an excavation, not just the digging. Thus, as prescribed by 36 CFR 296.14(a), *archaeological value* includes "the costs of the retrieval of the scientific information that would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost or preparing a research design, conducting fieldwork, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential."

In the cost estimates presented below, archaeological value costs for Site 42WS3086 includes the costs of preparing a research design in advance, obtaining necessary excavation permits, analyzing the results of the excavation (including special technical analysis such as plant pollen identification, radiocarbon dating, plant and animal bone identification), curation (museum storage, including cleaning, packaging, and cataloguing items), and producing a report of the finds. These costs are based on a recent competitively bid archaeological excavation of a small rockshelter site in Washington County, which was completed by a private archaeological consulting firm (Horn 1991).

Had the Santa Clara River Gorge Rockshelter site been excavated scientifically by professional archaeologists, a research plan would have been designed so that excavation could address the following questions.
(Six multi-faceted archaeological questions identified).

. . . .

Assessing the archaeological value is based on addressing these research questions through the application of specific excavation procedures, specimen collection techniques, laboratory analyses and final reporting. The costs of preparing a research plan, scientifically excavating 11.72 cubic yards of archaeological deposits from Site 42WS3086, analyzing recovered artifacts, plant and animal remains, conducting specialized analyses, preparing a final report of the investigations, and curating the recovered artifacts and scientific specimens is estimated to be $27,502.18 as shown in Table 1.

(Table 1: Line-item cost assessments for Archaeological Value).

(emphasis supplied).

. . . .

**SUMMARY OF ARCHAEOLOGICAL VALUE**

| | |
|---|---|
| Research Design Preparation | 3348.16 |
| Archaeological Fieldwork | 10431.03 |
| Laboratory Analysis | 7582.59 |
| Curation | 1164.40 |
| Report Preparation | 4576.00 |
| Miscellaneous | 400.00 |
| **TOTAL ARCHAEOLOGICAL VALUE** | **$27,502.18** |

**Costs of Restoration and Repair.** As provided in 36 CFR Part 296.14c, "the cost of restoration and repair of archaeological resources damaged as a result of a violation of these prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs necessary to complete restoration and repair, which may include, but need not be limited to:"

1. stabilization of the archaeological resource;
2. ground contour reconstruction;
3. research necessary to carry out reconstruction or stabilization;
4. physical barriers or other protective devises necessitated by the disturbance...to protect it from further disturbance;
5. examination and analysis of the archaeological resource, including recording remaining archaeological information where necessitated by disturbance to salvage remaining values that cannot otherwise be conserved, and preparation of reports relating to any of these activities.

(Discussion of Emergency and Projected Restoration and Repair)

(Table 2: Line-item cost assessments for Restoration and Repair)

. . . .

**SUMMARY OF TOTAL RESTORATION AND REPAIR:**

| | |
|---|---|
| A. Total Emergency Restoration and Repair: | 2273.91 |
| B. Total Projected Restoration and Repair: | 6156.38 |
| **TOTAL RESTORATION AND REPAIR:** | **$8430.29** |

Case No. 2:98-CR-198K

On April 15, 1998, John C. Hunter and Jonathan W. Robinson were indicted for violations of ARPA (Count I) and 18 U.S.C. § 1361 (Count II). The two counts related to one looting episode on April 24, 1993, at Big Round Valley in the Dixie Resource Management Area in Washington County, Utah, public lands administrated by BLM. The Big Round Valley archeological site is a prehistoric village or multiple house habitation site. The circumstances of these two offenses and the investigation were described in the Presentence Report as follows:

> On April 24, 1993, law enforcement officers for the Bureau of Land Management, Dixie Resource Area, St. George, Utah, received information from two citizens, a husband and wife, that they had observed two male subjects vandalizing a Native American Indian ruin in the Big Round Valley area. These witnesses related that they had traveled to this area to view the archaeological ruin. Upon arriving in the Round Valley area, they observed an old white Chevrolet Luv pickup truck bearing Utah license plate number 3622 AW, which was later determined to belong to defendant Hunter's father, hidden in the tamarisk off the road, southwest of the ruin. The couple parked their car in the same area and proceeded to follow footprints up an old road toward the ruin. Upon getting closer to the site they observed two men inside the Indian ruin. With a pair of binoculars they watched the men for approximately 15 to 20 minutes. These two men never left an area of about 12 feet by 12 feet within the ruin.
>
> The witnesses related the men's figures repeatedly went up and down within the ruin in the manner as if they were digging, subsequently causing them to believe these men were probably illegally excavating this Indian ruin site. The couple then went back to their truck and proceeded to drive to another location on the other side of the ruin in an effort to get a better look at the ruin and these two men. Upon exiting their vehicle they walked within 200 yards of the men where they once more, with binoculars, observed the two men digging, or vandalizing, the site. The couple immediately left and reported the incident to

law enforcement authorities.

Three days after reporting the incident, a Bureau of Land Management officer and an archaeologist accompanied the eyewitnesses back to the scene and conducted a preliminary investigation. Upon examination of the reported vandalism it was easily determined that the site had been recently illegally excavated. The soil within the vandal holes was loose, not compacted, and fresh distinct shovel marks could still be observed along the still firm edges of the vandalism holes. In addition, fresh screen impressions were still observable on some of the vandal hole backdirt piles.

This particular site in Big Round Valley is on BLM managed land within the Dixie Resource Management Area in Washington County, Utah, and an Anasazi Village, or multiple house habitation site, over 120 feet in diameter. The site contained archaeological evidence of occupation during at least the Pueblo I and Pueblo II periods (about 800 A.D. to 1150 A.D.) in the form of plain, corrugated, black-on-white, and black-on-red painted pottery found on the surface. This particular site had been extensively vandalized in the past and looting has left large quantities of rock, both shaped and unshaped, from living rooms and storage units scattered all over the site. Throughout this ruin are scattered fragments of pottery, stone tools, ground stone milling tools, animal and human bone, and charcoal fragments; all evidence of past human occupation by the prehistoric American Indians. Despite past vandalism this ruin still has intact deposits that attract looters to destroy the history which has been buried at this location for over 800 years.

. . . .

On May 5, 1993, BLM officers were contacted and advised by defendant Hunter that "he didn't do it." Mr. Hunter admitted that he and another individual by the name of Jonathan Robertson were at the site on the date and time in question, but stated that they had only gone there to walk his dogs and look for arrowheads. He denied doing any excavating or digging at this site.

Believing there was not enough available information to pursue a criminal case at this time, BLM officers, after giving Mr. Hunter a warning about federal violations of the Archaeological Resources Protection Act and its penalties, discontinued their investigation. This investigation lay dormant for approximately four years, or until December 1997, when agents of the BLM were contacted and advised by a special agent of the United States Forest Service that his office had two photographs they had just seized during a search warrant executed on the home of John Hunter, a suspect in one of their Forest Service investigations. The photographs depicted an Indian ruin which they believed had been vandalized on BLM property. One particular photo included two screens, a shovel, a brick, a jacket or backpack, and a mountain in the background which, judging by the terrain in the picture, was determined to be the same Indian ruin

which had been vandalized in the Round Valley area on April 24, 1993.

Contact made with the Utah State Bureau of Land Management office resulted in investigators obtaining a copy of the ranger report previously filed on this incident. Several interview reports provided to the BLM agents, reflecting interviews conducted by United States Forest Service Agents with known archaeological violators, revealed that Mr. Hunter had admitted on several occasions to digging or excavating the archaeological site in the Round Valley area. Further investigation determined that the person previously noted by Mr. Hunter as being with him on April 23, 1993, was actually Jonathan W. Robinson rather than Robertson. Upon locating Mr. Robinson in Barstow, California, special agents interviewed him at his residence regarding his relationship with Mr. Hunter and the illegal excavation of the Native American Indian ruin at the Big Round Valley site.

Mr. Robinson advised agents that he had been raised with Mr. Hunter in Bonzo Canyon in Malibu, California, and was aware that Mr. Hunter had been a digger of Native American Indian Ruins while he was in California, namely the Clagus Creek site near Malibu. Mr. Robinson related that he had driven out with Mr. Hunter when he relocated from California to St. George in 1993. He stated that he had actively participated in the construction of the Hunter residence in Veyo, Utah, during which time he resided with Mr. Hunter at his residence in Utah. Although Mr. Robinson initially denied any involvement in the digging, or having any knowledge of digging conducted by Mr. Hunter in Utah, he eventually admitted to being with Mr. Hunter at the Big Round Valley site on April 24, 1993. He related that he and Mr. Hunter had driven to the area in Mr. Hunter's beat up Chevy Luv truck to surface collect arrowheads and Mr. Hunter had taken his two dogs along with them. He related Mr. Hunter had hidden two screens and a shovel near the ruin, which he had apparently used in his digging at this ruin on a number of times in the past.

Mr. Robinson stated that he was very impressed with the "incredible Anasazi site" and became caught up in the excitement and began to assist Mr. Hunter in his excavation and effort to find artifacts. He related that he and Mr. Hunter would take turns screening and shoveling when one or the other of them would become exhausted. He states they found bone matter and a broken point or knife, and he did actually remove a black on beige pottery shard from the site, which he provided to the investigators at the conclusion of his interview. Mr. Robinson related that he believed the digging was a "spur of the moment" thing and he believed they had come to the area just for a walk and to look around the site. When Mr. Robinson and Mr. Hunter were through excavating, Mr. Hunter once again hid the shovel and screens near the site.

When asked about the area disturbed by him and Mr. Hunter at the site, Mr. Robinson physically indicated on the wall of his home and the surrounding

sidewalk the approximate amount of footage they had vandalized. He described the area and said that the dig ranged in depths of two to three feet, twelve to fifteen feet in length and four to five feet in width. Mr. Robinson related that Mr. Hunter had apparently been trading a number of the artifacts he found at these excavations with an unknown woman in the State of California.

During subsequent interviews conducted with the investigators since his plea of guilty to these offenses, Mr. Hunter has admitted to illegally excavating the ruin in the Big Round Valley area on a number of occasions, as well as a couple of other sites in southern Utah.

Presentence Report at 10-14.

Other Defendants

Kelby Chadburn (case no. 2:97CR 382J) pled guilty to a felony ARPA offense (Count III) on February 20, 1998. The plea agreement provided that Chadburn would cooperate with the government, including testifying at the trial of his co-defendants Hunter and Stucki. The filing of a § 5K1 motion was left to the sole discretion of the government. Chadburn and the government jointly stipulated to several sentencing matters, including the archaeological value and cost of restoration and repair amounts " as to Count III." The total of the two amounts was $33,140.50, which the parties also stipulated would result in a six level increase for "loss" pursuant to § 2B1.1(b). These amounts came from the damage assessment report prepared by Forest Service Archaeologist Jacklyn. The amounts were accepted by the probation office and included in the presentence report. The PSR computed a total offense level of ten and criminal history score of II, yielding a guideline range of 8-14 months. Sentencing was set for May 4, but continued to July 17, at Chadburn's request because he had entered an outpatient substance abuse program.

On July 16, the day before sentencing, the probation office filed a report with the court indicating that on July 11, Chadburn was charged in state court with the offenses of sexual abuse of a child (2 counts) and child abuse (2 counts), all second degree felonies. Based on this information, the U.S. Attorney's Office decided that Chadburn's potential benefit to the government as a witness in the trial of his co-defendants was substantially weakened. Consequently, no § 5K1.1 motion was filed and the prosecutor submitted the matter of sentencing to the court without recommendation. Judge Jenkins sentenced Chadburn to eight months imprisonment, the low end of the guideline range.

At no time during the Chadburn sentencing proceedings did the court indicate that it had concerns or doubts about utilizing the PSR "loss" figures of $15,645 for archaeological value and $17,495 for cost of restoration and repair, totaling $33,140 and resulting in a six level enhancement for "loss." When Chadburn pled guilty in February, his testimony supporting a factual basis for the plea included his admission that he had excavated and looted the Santa Clara River Rockshelter on the two occasions described

in the four counts of the indictment. Thus, the court was well aware that Chadburn's relevant conduct included the looting incident described in Counts I and II. The plea agreement was poorly drafted in that it stated that the above amounts were "as to Count III" rather than as to both looting incidents.

Linden Stucki (case no. 2:97CR 382J) failed to keep in contact with his court-appointed counsel. Eventually, he failed to appear at two hearings in early June, 1998. He was later arrested and new counsel was appointed. These events delayed the Stucki matter considerably. On August 11, 1998, Stucki pled guilty to a felony ARPA offense (Count III), the same count to which Chadburn had pled guilty. The plea agreement contained stipulations between the government and Stucki similar to those contained in Chadburn's plea agreement. However, the amounts for archaeological value and cost of restoration and repair in the Stucki agreement were considerably less than the amounts in the Chadburn agreement. The reason for this was that there was no relevant conduct of a second looting incident involving Stucki. His stipulated amounts only pertained to one looting incident rather than the two incidents for Chadburn.

A second important reason for the reduced amounts was that in the second looting incident (the only one involving Stucki), the evidence from Chadburn provided during his cooperation was that much less excavation occurred during that incident because the soil in the rockshelter was somewhat wet due to rain flowing into it from the backdirt pile which Hunter and Chadburn had left after the first looting incident. Consequently, screening of the disturbed soil was more difficult on the second occasion, reducing the amount of excavation that occurred.

This information was discussed among AUSA Dance, Stucki's defense counsel, and Probation Officer Terry Bailey who was preparing Stucki's PSR. By this time (early October), the evidentiary hearing on the archaeological loss as to Hunter's sentencing had already occurred on September 28. Consequently, it was the figures from Archeologist Stan McDonald's report (reduced by a factor of four to account for the lesser damage done on the second looting incident) which were used in Stucki's final PSR "loss" calculations: $8,983. The addendum to the Stucki PSR prepared by Probation Officer Bailey advised the court that on October 6, the probation officer, AUSA Dance and defense counsel had discussed the sentencing factors and had all had agreed on the figures in the PSR.

Stucki was sentenced by Judge Jenkins on October 19 (Monday), subsequent to Hunter's sentencing the previous Friday. Stucki's total offense level was 7 and his criminal history category II, resulting in a guideline range of 2-8 months (zone B). Stucki was sentenced to 36 months probation on various terms, including serving 60 days home detention which satisfied the two months guideline minimum. § 5C1.1. The court made no comment about the archaeological value amount of $6,876 in the presentence report. This, of course, was just three days after the court had ruled that there was no archaeological value applicable to Hunter's sentence, and a value of only $2000 was included in the "loss" enhancement for "aesthetics." (Extensively discussed below).

Jonathan Robinson (case no. 2:98CR 198K) pled guilty to a felony ARPA offense (Count I) on August 5, 1998. Sentencing was set for October 14, but Robinson failed to appear. He has recently been arrested on the warrant and will soon be sentenced by District Judge Kimball.

Plea Agreement

Hunter's pleas in both cases were pursuant to a plea agreement which provided, in accordance with the local court rule, that the two cases would be consolidated for sentencing before the judge assigned the first filed case (No. 97-CR-382J; Senior District Judge Bruce S. Jenkins). The agreement contained several sentencing stipulations by the government and Hunter, including stipulations as to the archeological value and cost of restoration and repair associated with each of the three offenses to which Hunter pled guilty. A further stipulation was that the total of these value/cost figures was $41,007.00, and that such amount "should be used by the court to determine the specific offense characteristic of 'loss' under USSG § 2B1.1(b)(1) and § 2B1.3(b)(1), resulting in a seven (7) level increase in the offense level pursuant to § 2B1.1(b)(1)(H)." (Plea Agreement at 5).

Plea Hearing

During the plea hearing on June 10 (Case No. 2:97-CR-382J), Hunter testified that during his looting visits to the Santa Clara River Rockshelter site, he found and removed a number of arrowheads ("I found some some nights and found another, you know, and then sometimes I didn't find anything . . ..") (Tr. 6/10/98 at 13). Hunter also admitted that when he was looting with others at this site, "I did most of the damage." (Id.) Hunter described his motivation: "I was obsessed with finding nice arrowheads and considered myself an amateur archaeologist and that was my rationalization and minimizations of the crime." (Id.) Hunter also understood the paramount concept of archaeological context, even though his terminology was unscientific:

> THE COURT: And why don't you tell us what it is again that you did?
>
> THE DEFENDANT: By me wanting to find some nice arrowheads I damaged U. S. Government property for the use of, if somebody, if an archaeological dig was going to be done there because I damaged it. I moved, when you move the dirt, especially the stratospheric layers that are usually involved, most times more often than not you can get more information that way, and so I damaged the U. S. property for, so that could not take place or would be harder to take place, a lot harder.

Id. at 11.

Presentence Report

All investigative reports in the possession of the government were provided to the probation officer, including the two damage assessment reports prepared by the Forest Service and BLM archaeologists. The Presentence Report adopted the archaeological value and cost of restoration and repair amounts in the two damage assessment reports and stipulated to in the plea agreement, resulting in "loss" enhancement of seven (7) levels under the Guidelines. The damage assessment report pertaining to the Santa Clara River Rockshelter had been prepared in 1995 by Marian Jacklyn, Dixie National Forest Archaeologist. It was this report which was relied upon by the government and Hunter in the value/cost stipulation in the plea agreement pertaining to Santa Clara River Rockshelter. The probation officer also relied on this report. Stan McDonald's Damage Assessment Report for the Santa Clara River Rockshelter (extensively quoted above) was not yet in existence. (This will be explained below in the "Pre-sentencing Developments" and "Evidentiary Hearing" sections.)

The Presentence Report calculated a total offense level thirteen (13), based on a base offense level of four (4), the seven (7) level enhancement for loss, a two (2) level enhancement for offenses involving "more than minimal planning," a two (2) level upward adjustment for Hunter's role in the offenses as organizer/leader, and a two (2) level downward adjustment for acceptance of responsibility. With a criminal history category of III, Hunter's guideline range as computed by the probation office was 18-24 months.

Hunter did not object to the original Presentence Report (which did not include the two-level "role in the offense" adjustment), but later filed a written objection to the amended Presentence Report and Addendum which addressed and agreed with the government's claim that the organizer/leader adjustment should be imposed. Hunter also objected at this time to his criminal history score. At no time did Hunter object to the seven (7) level loss enhancement set forth in the Presentence Report, nor did he attempt to withdraw his stipulation on that issue.

The Presentence Report provided information on Hunter's criminal history. In addition to two drug convictions, the PSR provided this significant information concerning Hunter's conviction for criminal trespass in Ventura County, California in 1986:

> Arrest records indicate that the defendant was cited for this offense along with three other individuals who were caught by local sheriffs officers on private land (the Broome Ranch) where several Chumash Indian archaeological sites had previously been illegally excavated.

Presentence Report at 17.

The Presentence Report also included the following information under the heading "Other Criminal Conduct:"

> The Bureau of Land Management and United States Forest Service agents, throughout the course of their investigation in these instant offenses, regularly received information from various sources alleging that Mr. Hunter, over the past decade, has been involved in a number of illegal excavations of archaeological sites throughout southern Utah and the Ventura, California, area, specifically the Chumash Region of California.
>
> In an attempt to verify this information, investigators, following Mr. Hunter's arrest for the instant offense in November 1997, sent a summary, including photographs of all the artifacts confiscated from Mr. Hunter's residence to the Department of Anthropology Laboratory at the Santa Barbara Museum of Natural History.
>
> An examination of the materials sent to the Museum of Natural History by anthropology experts, namely John R. Johnson, Ph.D., Curator of Anthropology, determined that a number of the artifacts confiscated from Mr. Hunter's residence were definitely from the Chumash Region of California. Mr. Johnson compared the artifacts provided him with various other artifacts seized in criminal matters from defendants previously convicted of illegal diggings at various cemetery excavations in the Chumash Region, particularly the prehistoric cemetery located at the large archaeological site of Simo'mo. This particular site is located on the Broome Ranch at the end of the Santa Monica mountains near Pt. Mugu, Ventura County, California, which is the same area where Mr. Hunter was cited for Criminal Trespass in 1986. Dr. Johnson concluded that a number of the artifacts present in Mr. Hunter's collection were illegally obtained from the Simo'mo archaeological site in Ventura County.

Presentence Report at 19-20.

Pre-sentence Developments

At the plea hearing in June, Hunter's sentencing date was set for August 21, 1998. On August 17, Hunter requested and received a continuance of the sentencing to September 1. On August 26, Hunter filed his objections to the Presentence Report described above. When Judge Jenkins took the bench on September 1, he announced to everyone's surprise that the matter was on calendar not only for sentencing, but an evidentiary hearing on the sentencing issue of loss pertaining to the offenses (i.e. archaeological value and cost of restoration and repair). AUSA Dance advised the court that government witnesses (archaeologists) were not present to testify on that issue, since there had been no notice given that the matter was on calendar for that purpose. Furthermore, not only had there been no objection by Hunter to the Presentence Report calculation of loss, Hunter had stipulated to the seven (7) level enhancement for loss in the plea agreement. Judge Jenkins said that he had concerns about this issue. The matter was continued until September 28 for the evidentiary hearing on both the issue of

loss associated with the offenses, as well as Hunter's objection to the "role in the offense" adjustment.

AUSA Dance and Special Agent David Griffel, the case agent for the Forest Service, returned to the U.S. Attorney's Office and immediately contacted the archaeologists for the Forest Service and the Bureau of Land Management who had prepared the damage assessment reports in the two cases. In addition to advising them that they would be required to appear as witnesses at the evidentiary hearing on September 28, there was also extended discussion with Dixie National Forest Archaeologist Marian Jacklyn about various aspects of her report. This discussion brought to light two errors in her report which substantially affected her calculation of both archaeological value and cost of restoration and repair. Although almost every aspect of her investigation and analysis of the Santa Clara River Rockshelter was professionally sound, these two major errors discredited her report and needed correction.

The AUSA and the case agent decided that instead of asking Ms. Jacklyn to prepare an amended report, the court and the parties would be better served by having a more qualified archaeologist conduct an entirely new damage assessment investigation and prepare a new report with fully accurate calculations. Because of Stan McDonald's considerable qualifications, as described above, he was requested to take on this major task under very tight time restrictions. He agreed to do so, and worked extensively on the matter during the next four weeks. The product of his labors is Government Sentencing Exhibit 3.

Ms. Jacklyn's errors had resulted in a substantial inflation of the cost of restoration and repair, and a corresponding deflation of the archaeological value. Although these were serious flaws in her report, the correct amounts as determined by Stan McDonald did not alter the ultimate guidelines loss enhancement of seven (7) levels:

A. Jacklyn's calculations:
   1. Archaeological value: $15,645.00.
   2. Cost of restoration and repair: $17,495.00
   3. Total: $33,140.00.

B. McDonald's calculations:
   1. Archaeological value: $27,502.18.
   2. Cost of restoration and repair: $8,430.29.
   3. Total: $35,932.47.

When the archaeological value and cost of restoration and repair amounts from the other case (198K), totaling $7,967, are combined with the 382J case, the total exceeds $40,000, whether you use Ms. Jacklyn's incorrect figures or Stan McDonald's calculations. Consequently, the seven (7) level loss enhancement under § 2B1.1(b)(1)(H), as stipulated to by Hunter and endorsed by the probation office in the

Presentence Report, remains a valid guideline determination for loss assessment in these cases (unless McDonald's calculations were shown to be unreliable).

Evidentiary Hearing (9/28/98)

Stan McDonald's new Damage Assessment Report is dated September 23, 1998, but was not in the possession of AUSA Dance until the afternoon of Sunday, September 27, when the prosecutor met with Mr. McDonald and the other two archaeologists who would testify the following morning. On Monday, September 28, at the time the evidentiary hearing and sentencing hearing were scheduled to commence, defendant Hunter was not present. His attorney eventually contacted him at his home in southern Utah. Hunter indicated that he was ill and he was unable to travel to Salt Lake City for the hearing. The court decided to allow Mr. Hunter to appear by way of the conference call with his attorney and others in the courtroom.

Although the sentencing hearing itself would not take place under these circumstances, the government requested and the court allowed the three archaeologists (who had traveled some distance to appear as witnesses) to testify in the evidentiary hearing on the loss issue. These archaeologists were Stan McDonald, John Herron (BLM archaeologist who prepared the damage assessment report in the 198K case) and Martin McAllister (the nationally recognized expert on archaeological resource protection and damage assessment).

Archaeologists Stan McDonald (USFS) and John Herron (BLM) testified about their damage assessment investigations, the nature of and damage to the archaeological resources at the respective sites, their procedures for determining archaeological value and cost of restoration and repair as required by the ARPA regulations, and their calculations as to each of those amounts relative to Hunter's offenses.

In describing the damages at the Santa Clara Rock Shelter, Stan McDonald advised the Court that the dimensions of the larger of the two looter holes (later referred to as a "trench" by the court) were a length of 20 feet, a width of 10 to 13 feet, and an average depth of 16 inches, with depth to 27 inches in some areas. At the conclusion of Mr. McDonald's testimony, in response to a question from the court about the "trench" dimensions, he repeated the figures. (Tr. 9/28/98, McDonald/Herron, at 19 and 34.)

Immediately prior to Mr. McDonald's testimony, AUSA Dance explained to the Court the reason why he was appearing as a witness rather than Miss Jacklyn who prepared the first archaeological damage assessment report on the Santa Clara River Rockshelter:

MR DANCE: United States calls Stan McDonald.

Before Mr. McDonald takes the oath, if I may have the benefit of a brief statement to the Court as a matter of explanation concerning the testimony of Mr. McDonald?
THE COURT: Fine.

MR DANCE: In regard to the site on U.S. Forest Service land which has been referred to in the reports as the Santa Clara River Gorge Rockshelter, there was a preparation of a damage assessment report done by a Ms. Marian Jacklyn of the United States Forest Service, and that report was provided in discovery to counsel. That report was the basis for the stipulation of the figures contained in the plea agreement. And it was not until Your Honor indicated several weeks ago that you desired evidence presented in this area that, upon closer examination of that report, it was determined that there were certain calculation errors in it. And in order to present to the Court today the most accurate and the most complete information on the damage assessment of that site, we have requested the Forest Service to bring in a more experienced archaeologist in the field of damage assessment who was asked to do a new report based on his own calculations and his own determinations. And that is the reason that Mr. McDonald is being called today to testify about his report that he has very recently prepared for this hearing and based in large part upon information obtained in consultation with Ms. Jacklyn, but I did want the Court to be aware of the reason why Mr. McDonald is being called.

Tr. 9/28/98, McDonald/Herron, at 4-5.

AUSA Dance and Special Agent Griffel decided to present a witness of the caliber of Mr. McAllister in order to give Judge Jenkins eminent expert testimony on archaeological resource damage and how federal regulations require federal agencies to assess such damage. One of the many indicators of Mr. McAllister's expertise is that he was contracted to perform the archaeological damage assessment for the Exxon Valdez oil spill (see qualifications, Tr. 9/28/98, McAllister, at 4-8). As an aside, it must be noted that the Memorandum Opinion fails to even mention the September 28 evidentiary hearing or the testimony of Mr. McAllister. The following are important excerpts from Mr. McAllister's testimony:

Q. Upon the enactment of the Archaeological Resources Protection Act in 1979, what occurred thereafter regarding the development of federal regulations to implement the statute?

A. There was a five-year process that was led by the Department of Interior to develop implementing regulations for the Act. The Department developed various drafts of the regulations. Those regulations were circulated to the professional archaeological community for review and comment. And then numerous public hearings were held in which public input was sought on these regulations. And finally in 1985 a -- or, excuse me, 1984, a final version of those regulations was issued by the Department of Interior.

Q. And are they referred to as the uniform ARPA regulations?

A. Yes, sir, they are.

Q. And by the way, people in the field commonly use the acronym ARPA for the abbreviated term for the Archaeological Resource Protection Act?

A. That's correct.

Q. Where are the uniform ARPA regulations found in the Code of Federal Regulations?

A. For the Department of Agriculture, U.S. Forest Service, they are found at 36 CFR part 296. For the Department of Interior, which would include the Park Service, the Bureau of Land Management and other Interior agencies, they are found at 43 CFR part 7.

. . . .

Q. Mr. McAllister, does the Archaeological Resources Protection Act statute as well as the ARPA regulations define what is an archaeological resource?

A. Yes, it does.

Q. What is that definition?

A. The definition is material remains of past human life or activities which are of archaeological interest and at least 100 years of age.

Q. And do the ARPA regulations also deal specifically with the concepts of archaeological value and cost of restoration and repair?

A. Yes. There's a separate section of the regulations, Section 14, which deals specifically with procedures that are required to be used in determining archaeological value and cost of restoration and repair.

. . . .

Q. Mr. McAllister, before discussing the specific concept -- concepts of archaeological value and cost of restoration and repair, it would be helpful for you to briefly explain the field of archaeology . . .

A. Archaeology is the reconstruction of past cultures from scientific information dealing with the material remains of human activities. This information that we use to reconstruct past cultures is obtained by recovering and analyzing the material remains and data about them.

Q. What is the scientific importance of archaeology?

A. The primary scientific importance of archaeology is that most of human existence on the planet Earth occurred before the development of written

records. We only have written records for a very brief period of time of the total span of human existence on the planet Earth. And so the only tool that we have to find out about past cultures, past human activities during that period is through archaeology. So it's very important scientifically from that standpoint for the prehistoric period, the period before written history and then even for the period for which we have written history, which begins around 3000 B.C., it's still very important because written records tend to be incomplete and in many cases inaccurate. So to gain a complete picture of what occurred during the historic period, we also look at the archaeological record.

Q. Are there additional benefits provided by archaeology in addition to scientific information?

A. Yes, in my opinion there are very strong benefits. I could give you some examples. One benefit is providing information about the cultural heritage of Native Americans and other ethnic groups. Archaeology also provides information about what you might refer to as our national cultural heritage. It provides information quite frequently on modern problems, for example, land use planning issues, and so on. And it also provides important information about the management of archaeological resources for recreation and tourism purposes which allow communities to derive economic benefits from archaeological resources.

Q. What is the definition of archaeological value in the ARPA regulations?

A. I read again from the second exhibit I've prepared, Exhibit 1-B, the ARPA regulations require that this value shall be appraised in terms of the cost of the retrieval of the scientific information which would have been obtainable prior to the violation. And that definition is found at 36 CFR part 296, Section 14(a). And in the Interior regulations it's found at 43 CFR 7.14, sub (a).

Q. This definition refers to the retrieval of scientific information which would have been obtainable prior to the violation. What does this mean?

. . . .

A. When we determine archaeological value, the regulations tell us to look at that archaeological resource in the condition it would have been prior to the violation. So, in other words, we're looking at recovering archaeological information as if the archaeological resource were in an undamaged condition.

Q. Is there a uniqueness about archaeological resources different than any other types of resources?

A. I think the most unique thing about archaeological resources is that each object in an archaeological resource has a unique relationship to all of the other

objects. We, as archaeologists, we refer to that relationship as context. And that's the -- really the aspect of the archaeological resource that allows us to reconstruct past human activity. So when we're dealing with archaeological resources in an undamaged condition, we have access to those contextual relationships.

Q. And these archaeological resources, once damaged or the context once damaged, are irreplaceable; is that correct?

A. That's correct.

Q. What effect does dealing with these archaeological resources as if they were undamaged have on the scientific retrieval information costs -- the scientific information retrieval costs upon which archaeological value is based?

A. We're dealing in archaeological value with the standard scientific archaeological recovery techniques. And dealing with the site as if it were (in) an undamaged condition naturally results in those costs being higher than if we were simply examining and analyzing the actual damage itself.

Q. Do the ARPA regulations establish that the cost of certain specific types of scientific operations be included in calculating archaeological value?

A. Yes, they do.

Tr. 9/28/98, McAllister, at 8-15.

. . . .

Q. What impact does it have on archaeological resources and in particular this important contextual framework of the archaeological data when looting of a particular resource occurs rather than the scientific excavation and examination you've been describing?

A. Unfortunately the site looters are only interested in the objects. They are not interested in the contextual relationship. When they go to a site, they take those objects without concern for this contextual information and consequently the contextual information is lost and our ability to reconstruct the past human activity that occurred there is seriously damaged or in some cases totally -- we totally lose the ability to do that.

Q. And would there still be context, at least some context of archaeological data and therefore archaeological value at an archaeological site where there may have been previous looting?

A. Yes. Unless a site has been completely -- an archaeological resource site

had been completely destroyed by looters, there's always some contextual information remaining. There's still some objects that are in their original relationship to other objects and therefore there (is) scientific information to be obtained from that remaining, those remaining contextual relationships and therefore the site still retains archaeological interest.

Id. at 17-18.

. . . .

Q. Can damaged archaeological resources ever be completely returned to an undamaged condition?

A. No. Unfortunately that damage is irreparable because these contextual relations that I spoke about earlier have been essentially irrevocably damaged by those activities. What we're basically talking about is a physical repair of the resource to try to put it back into a condition that it was in prior to the violation in a physical sense, but certainly not in a contextual sense as it was before.

Id. at 22.

. . . .

Q. Mr. McAllister, showing you Plaintiff's Exhibit No. 3 for identification. It's entitled Archaeological Resource Damage Assessment Report. And that indicates it has been prepared by Mr. Stan McDonald of the United States Forest Service; is that correct?

A.. That's correct.

Q. Have you reviewed the contents of that report?

A. Yes, I have.

Q. Showing you Plaintiff's Exhibit No. 4 for identification, Archaeological Damage Assessment Report prepared by Mr. John Herron of the Bureau of Land Management, have you reviewed the contents of that report?

A. Yes, I have.

Q. Mr. McAllister, based on your expertise in the area of archaeological damage assessment and having reviewed these two damage assessment reports, do you have an opinion on whether these two archaeologists, Mr. McDonald and Mr. Herron, properly followed and applied the damage assessment procedures required by the ARPA regulations which you have just described to us?

A. It's my opinion that both of these archaeologists have very carefully followed the procedures that are established for determining archaeological value and cost of restoration and repair by ARPA Regulations.

Id. at 29-30 (emphasis supplied)

Sentencing Hearing (10/16/98)

On October 16, 1998, Hunter appeared in court with counsel for the scheduled sentencing hearing. The case was also on calendar for further evidentiary hearing on a contested sentencing issue, the "role in the offense" adjustment. To support the PSR recommendation on this issue, the government presented the testimony of Special Agents Griffel (USFS) and Mauldin (BLM), as well as Probation Officer Terry Bailey who prepared Hunter's PSR. Because the court rejected this adjustment later in the hearing, this testimony is not relevant to the appeal except as will be noted below. Although this office believes that the "role in the offense" adjustment was fully warranted by the evidence of Hunter's conduct, vis-a-vis the other participants in the offenses, appeal authorization is not being sought on this issue in order to focus exclusively on the paramount issue of loss assessment.

Following the testimony of the agents and the probation officer, the hearing involved the court and counsel discussing the sentencing issues, the court's rulings on those issues, and the imposition of sentence. The court and AUSA Dance engaged in an extended colloquy concerning archaeological resource loss assessment. Although the transcript record of that discussion (Tr. 10/16/98, afternoon session, at 20-30) is too lengthy to include here, reference to it is essential to a full understanding of the court's ultimate ruling on the loss issue. Consequently, that portion of the record is provided as Attachment A to this letter.

The court ruled as follows on the loss assessment issue:

THE COURT: Okay. Well, as I view this, quite frankly, just looking at it, let me walk through the computations. I could take time to pay my respects to Sentencing Guidelines but I won't. We all end up purportedly quantifying things often that are unable for quantification at all. But in the combined cases that you've asked me to deal with here, one, Santa Clara and two, Round Valley, we end up with a base offense level to begin with of four. Now, the specific offense characteristics that we're dealing with combine things. The actual dollar figures that we're talking about are the $9,000 figure that you referred to. It appears to me that you're correct in suggesting that one may take into consideration some of the other values that are available. This is a far less heinous case than the Shumway case, with far less of the kinds of records that my colleague took into consideration in dealing with Shumway.

But it seems to me that what we ought to do here is to indicate we're

talking artifacts and aesthetics. The artifacts, there's nothing there in the way of value you've indicated in the record. Using the best estimate that your witness suggests, we might be dealing with 15 arrowheads and we might be dealing with one spear point, or partial spear point, with nothing in the record as to their value. Their status in position in the archeological dig may have had some aesthetic value to someone. And I'm content to take your $9,000 plus figure and add to that the sum of $2,000, placing it in the 11,000 plus figure enabling us to deal with the figure of more than 10 but less than 20. That produces a figure at five.

Spur of the moment or not, these fellows, both of them, were around, knew a little bit about what they were doing. It seems to me there's more than minimal planning. You have an additional two points there. You have the question as to whether somebody was running an organized crime organization, basically. Long time ago I had an interesting case brought by the United States Department of Justice involving activities down in Price, Utah. Purportedly organized crime. As it turned out it was disorganized crime. It seems to me that what we've seen here is an example of disorganized crime without anyone playing a major leadership role. And thus, it appears to me that we ought to not upwardly adjust for the so-called major role played by Mr. Hunter.

We have 11 (with) adjustment for acceptance of responsibility produces nine. We have an adjusted level of nine. Criminal history three. Guidelines eight to 14 months.

Mr. Hunter, if you and your counsel want to stand by the lectern. With those findings let's go ahead. All of us have spent a lot of time on this particular matter. It was only today that I finally had somebody tell me, through the witnesses for the United States, about 15 arrowheads and one spear point. And that was helpful to me in trying to ascertain to what extent we should use the calculations that on occasion people use under the federal regs. To that extent I think we ought to deal with aesthetics.

Tr. 10/16/98, afternoon session, at 36-39 (emphasis added).

Following the court's ruling, the prosecutor sought clarification whether the $2,000 amount for "aesthetics" was a finding by the court that the "archaeological value" in these cases was $2,000. Although the court's response at the hearing was that " aesthetics" is not distinguishable from "archaeological value," the court later took the opposite position in its Memorandum Opinion (discussed below). This "clarification discussion" was as follows:

MR. DANCE: Your Honor, before discussing sentences I have an inquiry to clarify the Court's ruling.

THE COURT: The record says what it says, so talk to sentencing.

MR. DANCE: Well, it's not clear to me what the $2,000 relates to, Your Honor. Is that the value --

THE COURT: Aesthetics.

MR. DANCE: Aesthetics?

THE COURT: Aesthetics.

MR. DANCE: Is that to be distinguished from archeological value?

THE COURT: No.

MR. DANCE: So, what I'm asking the Court, is the Court (making) a finding as to what, if any, archeological value is involved in these two cases?

THE COURT: I have.

MR. DANCE: And that is what you're calling aesthetics?

THE COURT: The record says what it says, Mr Dance.

Tr. 10/16/98, afternoon session, at 44-45 (emphasis added).

Memorandum Opinion

Although the court did not indicate at the sentencing hearing on October 16 that a written opinion on the sentencing issues would be forthcoming, a 19 page Memorandum Opinion was signed on November 4 and filed with the Judgment on November 6. The first five pages concern the issues of (1) Hunter's "role in the offense" enhancement (rejected by the court), and (2) the criminal history score calculation. The remainder of the Memorandum Opinion deals with the loss assessment issue.

In an introductory paragraph (at 6) the court references the applicable Guideline provisions for loss assessment: § 2B1.3(b)(1) and § 2B1.1(b)(1). The first substantive section of the Opinion on the loss issue concerns "Cost of Restoration and Repair" (at 6-7). Although the court accepts the evidence of $9,661.47 as the total "cost of restoration and repair" relative to Hunter's crimes at the two archaeological sites, the court also characterized this amount as "the ordinary measure of 'loss' caused by Hunter's criminal activities." (Id). (emphasis added).

The court did not fully explain how the "cost of repairs" used for loss assessment " when property is damaged" (§ 2B1.1, comment. (n.2) (emphasis added)) somehow became "the ordinary measure of 'loss' " resulting from Hunter's destruction of property,

i.e. archaeological resources and the knowledge that would have been gleaned from them prior to Hunter's crimes. The court's rationale focuses on artifacts removed rather than archaeological resource destruction, and since the government did not present evidence of "fair market value" for such artifacts, "the ordinary measure of 'loss' " in the court's view is nothing more than the cost of restoration and repair (id. at 6-7) (emphasis added).

The next section of the Memorandum Opinion is "Aesthetic Diminishment as a 'Loss'" (at 7-8). In this section, the court acknowledges that the cost of restoration and repair does not fully account for the loss associated with Hunter's crimes:

> Although the United States can backfill the holes dug by Hunter and grade the sites to reflect their pre-excavation topography, because the sites are no longer in pristine condition, they have been diminished. The diminishment may be subtle, but it is ever-present.

Mem. Op. at 7.

The court describes a hypothetical ARPA violation involving damage to a petroglyph by vandals painting over it, and concludes that "there is no loss for 'archaeological value', however, because the petroglyph remains, as it did before it was vandalized, on the rock face with all its archaeological context intact." (At 7).

However, the court recognizes that "even after cleaning and restoring the petroglyph, the image remains forever tarnished. It is no longer in pristine condition. . . .Thus, even if restored to its 'original' condition, the petroglyph has suffered a diminishment." (Id.) The court concludes that although there has been a diminishment of the archaeological resource, the cost of restoration and repair as a loss measure would be "adequate, (but) may not fully capture the harm caused. 'A loss' that included a value for the diminishment, as well as the cost to restore, would be more reasonable and appropriate." (Id.)

The court assesses this "diminishment" in an amount of $2,000 which "represents the court's estimate of this admittedly subjective aesthetic diminishment." (At 8) (emphasis added). Adding the $2,000 to the cost of restoration and repair, the court concludes that the total of $11,661.47 "is a reasonable measure to calculate the actual loss incurred." (Id.)

The court sites no evidence in the record, nor any law, in support of "aesthetic diminishment" as an appropriate or adequate measure of loss pertaining to archaeological resources. The court does not explain or define what it means by "aesthetics," nor explain how mere "aesthetic diminishment," even if reasonably applicable to the petroglyph hypothetical (which is highly questionable), is valid as to Hunter's excavation and looting which totally destroyed the two sites' archaeological resource context and the cultural and historical knowledge held within.

The next section of the Memorandum Opinion is entitled "Shumway and 'Archaeological Value'." (At 8-13). The court first concludes that although the Tenth Circuit in United States v. Shumway, 112 F.3d 1413 (10th Cir. 1997) endorsed the use of "archaeological value" in assessing loss in an excavation/looting case such as Hunter's, this assessment approach was permissive rather than mandatory. The court reasons that since it had already employed "sufficient" measures of loss (cost of restoration and repair, plus "aesthetic diminishment" of $2,000), "an additional adjustment for 'archaeological value' seems superfluous and need not be included." (At 8). The court further distinguishes the Shumway case by concluding that "Shumway was concerned with egregious conduct not present in Hunter's case, and the archaeological values at issue here and in Shumway are vastly different." (Id.)

The court discusses the ARPA regulation defining "archaeological value" and cites the government evidence of $34,238.18 archaeological value relative to Hunter's offenses at the two sites. A factual and legal summary of the Shumway case is followed by the court distinguishing Shumway from Hunter's case in several respects.

First, the court finds that because "the United States failed to offer any evidence whatsoever as to the fair market value of the arrowheads taken from the two sites, . . . the court is not in a position to assess whether the unknown fair market value of the arrowheads, when added to the cost of restoration and repair, would or would not adequately reflect the harm caused by Hunter." (Id. at 11-12).

Second, the court finds it significant that the spread between the amounts of archaeological value and cost of restoration and repair in Shumway were much greater than in the Hunter cases, and draws the conclusion that a wide disparity justifies fully assessing archaeological value, whereas a narrower spread justifies totally disregarding archaeological value. (At 12).

Third, the court cites the Tenth Circuit's "special import" given to Shumway's conduct and quotes the opinion in this regard, 112 F.3d at 1423 n.4. Although this citation is from the portion of the Shumway opinion dealing with the separate sentencing issue of whether the "vulnerable victim" enhancement is applicable to the defendant's disturbance of a prehistoric burial during the commission of an ARPA excavation/looting, Judge Jenkins utilizes the quotation as if it pertained to the issue of the Shumway loss assessment. The court points out that "Hunter did not disturb any human remains or find and remove any items of great archaeological importance." (At 12). The concluding portion of this statement and the accompanying footnote reveal much about the court's view of archaeology: what really matters is artifacts, not information and knowledge. The footnote reads: "All Hunter found and removed were some arrowheads. . ." (n.6 at 12).

The court concludes this section by reiterating Shumway only holds that it is

discretionary, not mandatory, to "use a measure other than ordinary measures to calculate loss." (At 13) (emphasis added). The court never addresses why " archaeological value," mandated by Congress to be used in determining the felony threshold of an ARPA offense, is not an "ordinary" measure of loss associated with that offense for sentencing purposes.

The next major section of the Memorandum Opinion is entitled "Reliability of the 'Archaeological' Value Calculations." (At 13-18). The court begins with its conclusion: " Even if the court believed that an adjustment for 'archaeological value' was warranted, the Court finds that the 'archaeological value' estimate offered by the United States lacks sufficient reliability to be used for sentencing purposes." (At 13). The court attacks the government evidence in a variety of ways. First, the courts states that "the United States has offered two archaeological damage assessment reports, each offering substantially different valuations." (Id.) The court lists some differences between the two reports, two of which are quite substantial (the amounts for archaeological value and cost of restoration and repair) and several others of a very minor nature. (At 13-14) Later the court acknowledges that "the United States now says that these calculations (in the first report) were inaccurate." (At 15). As described in the "Evidentiary Hearing" section above, the government abandoned the first report once it was found to contain erroneous calculations, and neither relied upon it in the sentencing proceeding nor submitted it as evidence. The "first report," prepared by Ms. Jacklyn, entered the record as Defense Exhibit A.

The court devalues the "second report," the one prepared by Stan McDonald and submitted as Government Sentencing Exhibit 3 at the Evidentiary Hearing, because it was prepared "by an archaeologist who did not visit the site." (At 13) (emphasis added). This is a blatant factual error. The record is replete with statements throughout Mr. McDonald's testimony that he not only visited the Santa Clara River Rockshelter site, but examined, measured, diagramed and photographed the site during his visit. (Tr. 9/28/98, McDonald/Herron, at 8-13, 16-19, 21, 24, 30-34) (Tr. 9/28/98, McAllister, at 33)(Govt. Sentencing Exhibit 3 at 6-8 and in Appendix B photographs depicting Mr. McDonald at the site with signs labeled "9/4/98").

As further indication of the unreliability of the government's evidence on loss assessment, the court compares the archaeological value and cost of restoration and repair amounts submitted in the Presentence Reports for co-defendants Chadburn and Stucki, based on information provided to the Probation Office by the government. The court fails to acknowledge in its Memorandum Opinion the testimonial evidence presented at the 10/16/98 sentencing hearing which explains these differences. The amounts in the Stucki Presentence Report were elicited during the cross-examination of Probation Officer Terry Bailey who prepared both the Hunter and Stucki reports. On re-direct Mr. Bailey explained the reasons for the different amounts in the Chadburn and Stucki reports: (1) Hunter and Chadburn had been convicted of two separate looting incidents at the Santa Clara River Rockshelter site, whereas Stucki had been convicted of

only one incident, and (2) the looting incident in which Stucki had been involved with Chadburn and Hunter resulted in considerably less damage to the site than on the occasion when Chadburn and Hunter were the only participants. (Tr. 10/16/98, afternoon session, at 17-18).

Notwithstanding this evidence in the record, the court stated in its Memorandum Opinion that "the United States has not offered any explanation for the difference (between the Chadburn and Stucki figures)." (At 16). AUSA Dance does acknowledge that in drafting the Chadburn Plea Agreement, he failed to state that the loss amounts were based both on Count III, the count of conviction, and Count I as relevant conduct. Although this oversight should have been easily understood by the court, based on the evidence that the archaeological damage assessment was done only after both looting incidents had occurred, the court viewed this matter as further evidence of the unreliability of the government's loss calculations. (Mem. Op. at 16, n.9).

Once having found the government's evidence of archaeological value to be " unreliable," the court also determines that this value "overstate(s) the archaeological value associated with Hunter's unlawful activities." (At 17). The court acknowledges that "what has been lost is the context," but limits that contextual loss merely to the arrowheads which Hunter admitted looting from the two sites. The court states that " unfortunately, the United States' estimates regarding archaeological value do not put a dollar value on this context." (Id.)

The government's evidence, of course, had extensively explained through the testimony of Mr. McAllister and the other two archaeologists, together with their written reports in evidence, that the archaeological value calculation is, in essence, a valuation of the contextual loss. Pursuant to the ARPA regulations, the value is based on the costs of recovery of the archaeological data from that context prior to its destruction. The court characterizes this procedure as "a fiction . . . (which) does not reflect reality" (id.), citing 43 CFR § 7.14(a), the ARPA regulation establishing the methodology of calculating archaeological value (assessment of the costs associated with scientifically studying the archaeological resource prior to its damage/destruction by the ARPA offense). Thus, the court implicitly invalidates the regulation by ruling that the "archaeological value" methodology is an unreliable "fiction."

First, the court states that the ARPA regulation's methodology of assessing information retrieval costs is "fiction" because "the reality is that the site was excavated, albeit unlawfully, and all that was uncovered were some arrowheads." (At 17)(emphasis added). Thus, the court returns again to its myopic view that this case is only about recovering artifacts rather than destroying knowledge, and engages in this tortured reasoning: "Armed with the knowledge that a dig at the site would only yield arrowheads, a more accurate calculation of archaeological value would be based on the estimated costs to the United States to recover these artifacts." (At 18)(emphasis added).

Second, the court suggests that because the government knew of these two archaeological sites and "never once planned or engaged in a formal excavation at these sites, one may only speculate whether the United States would have expended any funds at all to uncover these arrowheads." (Id.) (emphasis added). The court is falsely assuming that the recovery of artifacts would be the sole purpose of any scientific excavation at the site. Mr. McDonald's report describes six archaeological inquiries which would be the focus of such an excavation. None relates to the recovery of arrowheads. (Govt. Exhibit 3 at 8-9). The court concludes: "Based upon the facts of this case, the court finds that the proffered estimates for archaeological value are both unreliable and unreasonable." (Id).

Not surprisingly, the last section of the Memorandum Opinion is the " Conclusion." What is surprising is the section's content: an attack on Congress and the Sentencing Guidelines. This is nothing new for Judge Jenkins. For years he has been saying negative things about the Guidelines at almost every sentencing hearing. Prior to imposing sentence on Hunter, however, Judge Jenkins only stated, sarcastically: "I could take time to pay my respects to Sentencing Guidelines but I won't." (Tr. 10/16/98, afternoon session, at 36). The court saved its ammunition for the Memorandum Opinion:

> As a final note, the Court recognizes that in cases like this, where a defendant has been convicted of damaging and looting an archaeological or cultural resource, sentencing a defendant based on the estimated dollar value of the loss, however calculated, is absurd. These speculative estimates are simply inadequate to measure the true cultural, scientific, and spiritual harm such an act causes. How can one ever quantify the harm to a Native people whose ancestral burial grounds may have been desecrated? If Congress is indeed serious about punishing such offenders, the sentencing decision should be left to the sentencing judge who may then measure the harm in terms of his or her experience and common sense, rather than asking the judge to rely on speculative assessments and fictional scholarship in an attempt to quantify the harm in a way that bears little or not relationship to the true damage.

Mem. Op. at 19 (emphasis added).

## DISCUSSION

### Standard of Review

When the sentencing issue on appeal is the determination of loss, "while we review the district court's factual findings for clear error, we review de novo questions of what factors the district court may consider in assessing loss under the Guidelines."

United States v. Shumway, 112 F.3d 1413, 1424 (10th Cir. 1997). "Loss assessment is a question of law." United States v. McClelland, 141 F.3d 967, 973 (10th Cir. 1998).

Issue/Argument 1

Where Congress mandates that "archaeological value" be included in the total monetary value used in determining whether a violation of the Archaeological Resources Protection Act (ARPA) is a felony, and the Guidelines define loss as "the value of the property taken, damaged, or destroyed" (USSG § 2B1.1, n.2), it is necessary to include " archaeological value" of the harmed archaeological resources in the loss assessment for a felony ARPA offense in order to "fully capture the harmfulness of the conduct". (§ 2B1.1, n.15).

No Specific ARPA Sentencing Guideline

The first important point to be made is that there is no Sentencing Guideline expressly promulgated for an ARPA offense, necessitating the use of "the most analogous offense guideline." USSG 2X5.1. Appendix A does list the Antiquities Act, 16 U.S.C. § 433 (the ineffective predecessor to ARPA), and cites to USSG § 2B1.1 and § 2B1.3. However, since a violation of § 433 is a class B misdemeanor, the Sentencing Guidelines are inapplicable. § 2X5.1.

One of the three felony convictions for which Hunter was sentenced is a violation of 18 U.S.C. § 1361, damaging ("injure") and destroying ("commit depredation against") government property (Count IV in case no. 2:97-CR-382J). USSG § 2B1.3 is the designated guideline for this offense. Because the three convictions involve " substantially the same harm" (PSR at 15, para. 59), § 3D1.2(d) requires that they be grouped together.

The Hunter case is "Exhibit A" demonstrating the urgent need for a specific ARPA Sentencing Guideline.

Destruction -- Damage: Important Distinction in Loss Assessment

The essence of the archaeological resource crimes involved in this case, the non-scientific, non-permitted excavation (i.e. looting) of archaeological sites by Hunter, is destruction rather than mere damage. This is an important distinction in the loss assessment under the Guidelines because if only damage results from the criminal conduct, "the loss is the cost of repairs . . ." § 2B1.1, n.2.

As described by Mr. McAllister, even scientific, permitted archaeological excavation is a destructive process, but the return is the recovery of valuable archaeological knowledge which can never be destroyed. On the other hand, the looter like Hunter recovers only the artifacts discovered during the digging/screening activity, and the archaeological record (i.e. knowledge) is lost forever.

Judge Jenkins acknowledged this distinction but accorded it short shrift by assessing the damage loss (cost of restoration and repair) in the full amount of $9,661.47, while assessing the destruction loss (what the court termed "aesthetic diminishment') in the token amount of $2,000. Mem. Op. at 7. As will be discussed more fully below, the true value of destroyed archaeological knowledge, lost to present and future generations, cannot be easily ascertained. The ARPA regulations, implemented pursuant to Congressional mandate, and after lengthy scientific, administrative and public dialogue (tr. 9/28/98, McAllister, at 8), measure the value of that lost archaeological knowledge as "the costs of the retrieval of the scientific information which would have been obtainable prior to the violation." Uniform ARPA regulation § 7.14(a); (e.g. 43 CFR § 7.14).

This "destruction loss assessment" is calculated only as to the archaeological resources actually destroyed by the looter's digging (excavation), not the entire archaeological site where such resources are located. Although the integrity and nature of the entire site has been damaged, the ARPA regulations require that "archaeological value" be determined only with reference to the "archaeological resource involved in a violation." Id. This point was emphasized during a colloquy between Judge Jenkins and Forest Service Archaeologist Stan McDonald:

> THE COURT: Just as a matter of curiosity, when you speak of the site in quotation marks, are you talking about the location where the 11.7 cubic yards had been located or are you talking about the 80-200 meters in the way of being descriptive of the site?
>
> THE WITNESS: The entire site is described generally in the report, but the discussion of damages and the discussion we're talking about, the damages to the site, are focused on only those damaged areas.
>
> THE COURT: And you are indicating that your projections relate to those in contrast to the 80-200 meters?
>
> THE WITNESS: Yes, sir, that's correct.
>
> THE COURT: So the projections don't contemplate anything being done in the 80-200 meters?
>
> THE WITNESS: Absolutely not.

Tr. 9/28/98, McDonald/Herron, at 33-34.

The Nature of "Value" in Loss Assessment

While § 2B1.3 (with cross-reference to § 2B1.1 for loss determination) may well be the "most analogous" guidelines for ARPA offenses, they are adequate for a proper sentencing determination only if the loss assessment is based on "the value of the property (archaeological resources) taken, damaged, or destroyed" (§ 2B1.1, comment. (n.2)) and that such loss/value amount "fully capture(s) the harmfulness of the conduct." (§ 2B1.1, comment. (n.15)).

The Application Note 15 suggestion of upward departure "where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct," implicitly requires the sentencing court to first endeavor to "make a reasonable estimate of the loss" (§ 2B1.1, comment. (n.3)) which would "fully capture the harmfulness." "Archaeological value," calculated pursuant to the ARPA regulations,

provides a measure of loss which does exactly that.

"Archaeological resources (which) . . . are an . . . irreplaceable part of the Nation's heritage" (16 U.S.C. 470aa), have such a unique character that their true inherent value would not ordinarily be quantifiable in monetary terms. Cf. United States v. Spiegelman, 4 F. Supp. 2d 275 (S.D.N.Y. 1998) (ITSP conviction; defendant stole rare books from Columbia University; court departed upward based on nature of materials stolen):

> (T)here is no denying the "heartland" of Section 2B1.1 is garden variety theft -- theft of money or fungible property -- which causes only economic harm and impacts only the immediate victim. This case manifestly is exceptional by virtue of the substantial and unquantifiable non-economic harm risked and caused both to Columbia and others. It is outside the heartland almost by definition.

Id. at 291.

The Tenth Circuit has addressed this critical issue of what "loss" under the Guidelines fully encompasses:

> For purposes of determining an appropriate offense level under the Guidelines, " loss" is not simply intended to be a measure of net monetary damage. "Loss" also serves to "gauge the severity of a particular offense."

United States v. Shumway, 112 F.3d 1413, 1425 (10th Cir. 1997) (quoting United States v. Lara, 956 F.2d 994, 999 (10th Cir. 1992)).

As discussed in the "Importance of Appeal" section, and as explained by Mr. McAllister (excerpts in the "Statement" section), great loss occurs when archaeological resources are damaged/destroyed. Among the irretrievable losses is knowledge, and all the benefits knowledge provides to present and future generations. Judge Kaplan, Southern District of New York, wrote eloquently on this subject:

> In callously stealing, mutilating and destroying rare and unique elements of our common intellectual heritage, Spiegelman did not simply aim to divest Columbia of $1.3 million worth of physical property. He risked stunting, and probably stunted, the growth of human knowledge to the detriment of us all. By the very nature of the crime, it is impossible to know exactly what damage he has done. But this much is clear: this crime was quite different from the theft of cash equal to the appraised value of the materials stolen because it deprived not only Columbia, but the world of irreplaceable pieces of the past and the benefits of future scholarship. To treat Spiegelman's offense as being of the same gravity as the theft of $1.3 million in cash would be to deny the unmistakable importance of the undiscovered knowledge likely buried within the items he stole. Thanks to Spiegelman, that knowledge now may remain forever undiscovered.

Spiegelman, 4 F. Supp. at 292.

Congressional Mandate Re "Value" in ARPA Cases

Although the value of harmed archaeological resources, like the stolen rare books in Spiegelman, is largely non-economic in nature, in enacting ARPA Congress elected to assign a monetary measure of value to damaged/destroyed archaeological resources. Congress designated this value measurement as "archaeological value". 16 U.S.C. § 470ee(d). The methodology of determining "archaeological value," like many other procedures and definitions implementing ARPA, was delegated by Congress to several executive departments and agencies which, after appropriate consultation, "shall promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this chapter (The Act)." 16 U.S.C. § 470ii(a).

Congress unequivocally mandated that courts utilize "archaeological value" in determining whether an offense under ARPA is a felony. 16 U.S.C. § 470ee(d). It is incongruous with both good sense and Congressional intent to view the use of " archaeological value" as mandatory in determining if an ARPA offense is a felony, yet totally ignore this statutory measure of the seriousness of the offense when assessing the " loss" for sentencing purposes (i.e. gauging the severity of that ARPA felony).

The Tenth Circuit has spoken directly on this point in United States v. Williams, 50 F.3d 863 (10th Cir. 1995) (ITSP conviction), where the sole issue on appeal was the loss assessment under § 2B1.1, specifically, whether it should be based on the wholesale or retail value of the stolen property. The Tenth Circuit did not jump immediately to an analysis of "fair market value" (as did Judge Jenkins in his ruling) simply because § 2B1.1 (comment. n.2) states that loss "ordinarily . . . is the fair market value of the particular property at issue." (emphasis added). Rather, the Tenth Circuit first looked for and found the answer in the statute proscribing the offense of conviction:

> "Loss" is defined by U.S.S.G. § 2B1.1 as "the value of the property taken, damaged, or destroyed." U.S.S.G. § 2B1.1, comment. (n.2). The statutory test for determining "value" for purposes of an offense charged by 18 U.S.C. § 2314 is furnished by the definition of 18 U.S.C. § 2311. Here, "value" means the face, par, or market value, whichever is the greatest . . ." 18 U.S.C. § 2311. Since neither face nor par value applied, the issue at hand is the "market value" of the stolen jewelry.

Williams, 50 F.3d at 864 (emphasis added).

Williams holds that statutory provisions concerning value take precedence in determining what is the appropriate value to utilize in assessing loss. If the statute governing the offense of conviction provides a "value" for the "property in issue" in the §

2B1.1 loss assessment different from "fair market value," the statute controls. If the property in Williams had a higher "face" or "par" value, it would have been used for loss assessment rather than "market value." Cf. United States v. Smith, 794 F.2d 1333, 1377 (8th Cir. 1986) (where defendant claimed the stolen stock certificates did not have a market value of $5,000 or more as required in 18 U.S.C. § 2315, court held that " regardless of the face value or market value of the certificates, the record shows that the stolen certificates had a par value of $50,000"); United States v. Bell, 742 F.2d 509 (9th Cir. 1984) (face value of stolen property used for jurisdictional amount requirement instead of market value).

Issue - Argument 2

The district court erred in determining that the methodology of calculating "archaeological value" set forth in ARPA's uniform implementing regulations is "unreasonable" (thus impliedly invalidating the regulation), and the Court's refusal to accord deference to the regulation was improper.

Argument Summary

The district court was bound by the ARPA regulation defining "archaeological value" unless the regulation constitutes an impermissible construction of the ARPA statute. Because the regulation's definition is a permissible interpretation of " archaeological value", the district court should have given the regulation the required deference and applied the regulation's definition in assessing loss.

Discussion

The district court determined that "archaeological value" was not a reasonable method for calculating loss, thus impliedly invalidating the ARPA implementing regulation which defines "archaeological value." The Archaeological Resources Protection Act was enacted by Congress "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands. 16 U.S.C. § 470aa(b). These resources constitute " irreplaceable aspects of Native American history and culture." United States v. Shumway, 112 F.3d 1413, 1425 (10th Cir 1997).

Congress specifically found, among other things, that: "(1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage; (2) these resources are increasingly endangered because of their commercial attractiveness; (3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage." 16 U.S.C. § 470aa(a).

Title 16 U.S.C. §470ee(d) sets forth the criminal penalty section in the ARPA statute:

> Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined . . . or imprisoned not more than one year, or both: *Provided, however,* That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500, (emphasis added.) Such person shall be fined . . . or imprisoned not more than two years, or both. (Emphasis added).

In the ARPA statute Congress delegated to the "Secretaries of Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority" (after appropriate consultation with Indian tribes, state representatives and other federal land managers) the authority to "promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this Chapter (The Act)." 16 U.S.C. § 470ii(a)(emphasis added).

Consistent with the purpose of the statute, and after an arduous five-year consultation and public hearing process, regulations were promulgated by the Department of Interior. (Tr. 9/28/98, McAllister, at 8). The relevant regulation, and the one which the district court impliedly invalidated, involves the definition of " archaeological value" as that term is used in §470ee(d) of the ARPA statute. Title 43, Code of Federal Regulations, Section 7.14(a) provides:

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

Inasmuch as the Department of Interior issued regulations, including how to determine archaeological value as that term is used in the ARPA statute, the district court was bound by the statute and implementing regulations when determining archaeological value for purposes of assessing "loss" for ARPA offenses.

"An agency's interpretation of a statute by formal regulation or adjudication is entitled to deference, so long as the agency's interpretation is based upon a permissible

construction of the statute." Fristoe v. Thompson, 144 F.3d 627, 631 (10th Cir. 1998); see also, Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

In Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687 (1995), the Supreme Court upheld the Secretary of Interior's definition of "harm" contained in the regulation as a permissible construction of the definition of "take" as that term is used in the Endangered Species Act. Title 16 U.S.C. § 1532(19) of the Endangered Species Act (ESA) defines "take," as used in the Act (16 U.S.C. §1538(1)(1)), to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Department of Interior regulations implementing the statute further defined the term "harm" in the definition of "take" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR §17.3 (1994).

In upholding the regulatory definition of "harm", the Supreme Court relied on three primary points. For purposes of this memorandum, only the second reason is relevant. In upholding the definition of "harm" as defined in the regulation as reasonable, the Supreme Court relied on the fact that "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." Babbitt, 515 U.S. at 698. "As stated in § 2 of the Act, among its central purposes is 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved..." Id.; see also United States v. Richards, 583 F.2d 491 (10th Cir. 1978) (the inclusion of captive birds within the Secretary's definition of "migratory birds" was reasonably related and consistent with the purpose of the Migratory Bird Treaty Act); United States v. One Bell Jet Ranger II Helicopter, 943 F.2d 1121 (9th Cir. 1991) (in determining whether defendants violated Airborne Hunting Act by "harassing" animals, district court should have used implementing regulations promulgated by the agency).

Just as in these cases, the ARPA regulation's definition of "archaeological value" is a reasonable interpretation of the ARPA statute and is consistent with the purpose of the statute and the broad authority given by Congress to the agencies to promulgate regulations, including the definition of key statutory terms. Thus, the district court was required to follow the regulation defining "archaeological value."

Issue - Argument 3

The district court erred in creating and utilizing the concept of "aesthetic diminishment," and arbitrarily assigning it a value of $2,000, as part of the ARPA loss assessment, that is, as an appropriate method of valuing the unique and irreplaceable nature of the harmed archaeological resources.

The court erred when it chose to assess loss using its own "admittedly subjective" measure ("aesthetic diminishment") rather than "archaeological value" specified in the ARPA regulation. The Tenth Circuit viewed "archaeological value" as "the objective measure of damage"in cases of this nature. Shumway, 112 F.3d at 1425 (emphasis added).

The court first described the "diminishment" aspect of the term "aesthetic diminishment" as the change in the archaeological resource from its "pristine condition" to something less. (Mem. Op. at 7.) What the court describes as "diminishment" is arguably no different than what Congress intended in ARPA when it used the word " damage" and the phrase "otherwise alter or deface." 16 U.S.C. §470ee(a).

The court appropriately determined that there should be some "value for the diminishment." (Mem. Op. at 7). However, the court never defines what it means by " aesthetics." There is no evidence in the record about "aesthetics." There is nothing in ARPA or its implementing regulations about "aesthetics." In the sentencing hearing, the court implies that "aesthetics" relates to archaeological context. (Tr. 10/16/98, afternoon session, at 37). As Mr. McAllister explained, the essence of archaeology is context. Consequently, if the court equates "aesthetics" with archaeological context, the court is essentially using the term to describe the loss of everything that could be learned from that archaeological context. That, of course, is the very definition of "archaeological value," the cost of retrieving the knowledge buried within that archaeological context before it had been "damaged" or "diminished" by the looter.

During the "clarification discussion" at the sentencing hearing, AUSA Dance asked "is (aesthetics) to be distinguished from archaeological value?" The court responded "no." Yet in the Memorandum Opinion, the court clearly is attempting to distinguish between "aesthetic diminishment" and "archaeological value." Which is the court's true position is really irrelevant. It is abundantly clear that regardless of the explanation, the court has ruled that it has the sentencing authority to assign an arbitrary value, in an amount of its own choosing, for the loss associated with the damage/destruction/ "diminishment" of archaeological resources in an ARPA case. That is an erroneous ruling under any standard of review.

Issue - Argument 4

The district court erred in finding that the government's evidence concerning archaeological value was "unreliable."

The Court presented an incomplete and distorted view of the government's evidence of "archaeological value," and made a clearly erroneous finding as to the reliability of that evidence. The true picture of this issue shows the following.

McAllister Testimony

The Nation's leading expert on archaeological damage assessment carefully explained to the court the fundamental and important aspects of archaeological resource damage/destruction, the serious consequences to society of such illegal conduct, the provisions of the ARPA regulations relating to damage assessment, and the methodology for such assessment. Mr. McAllister also testified that, in his expert opinion, archaeologists McDonald and Herron "have very carefully followed the procedures that are established for determining archaeological value and cost of restoration and repair by ARPA regulations." (Tr. 9/28/98, McAllister, at 30).

Based on the absence of any comment by the court, either at the sentencing hearing or in the Memorandum Opinion, on the evidence presented by Mr. McAllister, it can be concluded that the testimony of this prominent expert was essentially ignored by the court.

McDonald Report

Stan McDonald is one of the most experienced government archaeologists in the country on archaeological damage assessment, based on his extensive work in the Shumway case and the Polar Mesa Cave series of cases. His damage assessment report on the Santa Clara River Rockshelter, Governments Sentencing Exhibit 3, is considered by Mr. McAllister to be a model report for other archaeologists to use in future cases, and is included in the training materials for the Archaeological Resources Protection Training Program, at the Federal Law Enforcement Training Center (FLETC).

The court found Mr. McDonald's calculations and conclusions suspect because another report on the same site damage, prepared by an archaeologist with much less experience than Mr. McDonald, was different in several respects. Two major differences were the amounts assigned by the archaeologists to archaeological value and cost of restoration and repair. The court also noted a couple of variations between the two reports of a very minor nature.

The government readily acknowledged to the court that the first damage assessment report (the Jacklyn report) was seriously flawed. That was the very reason the McDonald report was requested and prepared. Nothing in the record demonstrates any error in the McDonald report, other than some differences between it and the Jacklyn report which had been repudiated by the government. The judicial system is not well served if a litigant fears that any admission of error, concerning evidence upon which the party originally but no longer relies, will be used by the court to discredit the reliability of the valid evidence the party does submit and rely upon.

Furthermore, the differences between the reports were not all due to errors in the Jacklyn report. For example, the court noted that "the mileage charges in the two reports differ. . . . The court is rightly concerned with the reliability of any estimates in damage assessment reports that cannot even agree on known actual costs. " (Mem. Op at

14)(emphasis added). The court erroneously assumed that government vehicle mileage rates are the same under all circumstances, causing the court to find fault with the mileage rate variations in the two reports. In reality, Forest Service mileage rates vary depending on the type of vehicle being utilized. Since different type vehicles were used by Ms. Jacklyn in 1995 and Mr. McDonald in 1998, the mileage rates stated in the respective reports were different, yet correct.

> Vehicle Mileage Rates: The mileage rates used in the damage assessment reports are based on the use of different vehicles during assessment of damages in 1995 and again in 1998. Mileage rates are established by the Forest Service and are based upon the costs of operating and maintaining various types of vehicles (4WD, sedan, 2WD pickup, van, etc.) in Forest vehicle fleets. The use of differing rates is analogous to the different rental rates charged by car rental agencies for differing types and sizes of vehicles.

Stan McDonald letter to AUSA Dance dated 12/1/98.

Another variation in "known actual costs" noted by the court pertained to Ms. Jacklyn's hourly salary rate. Due to Ms. Jacklyn's inexperience in preparing damage assessment reports, she erroneously used her net hourly rate in her report, where as Mr. McDonald correctly used the true "cost to government" hourly salary rate for Ms. Jacklyn which included employee benefit contributions by the government such as retirement and health insurance. (McDonald letter of 12/1/98).

If the court or defense counsel had made inquiry of the government as to reasons for the differences in the two reports, these and any other explanations would have been provided. Absent such inquiry, the government did not proffer these explanations simply because it could not be reasonably foreseen that the court would test the reliability of Mr. McDonald's cost figures by relying upon Ms. Jacklyn's repudiated report.

The court apparently gave little or no credence to the evidence in the record that Mr. McDonald relied upon not only his own considerable experience in damage assessment, but used as a guide actual archaeological excavation costs from a scientific endeavor at a southwestern Utah site comparable to the Santa Clara River Rockshelter.

> A. (By Mr. McDonald): I consulted with Ms. Jacklyn and we both consulted with other archaeologists to obtain examples of previous archaeological excavations in southwest Utah. And we located an archaeological site that had been excavated by Alpine Archaeological Consultants in 1991. And Alpine Archaeological Consultants provided us with their actual costs to complete that project. Thus, that formed the basis for making the cost calculations for that Santa Clara River.
>
> Q. (By Mr. Dance): How comparable was that project that was actually

undertaken to the project which you determined could have been taken at this site prior to the damage.

A. The sites appear to be similar in size, similar in the nature and the characteristics of the archaeological material remains that would have been recovered. Both sites, in my opinion, appear to have served the same types of function. Therefore, that allowed us to make the assertion that the types of materials that would have been recovered would have been roughly proximate. And Alpine Archaeology excavation was bid out competitively and thus formed the basis for us to use those costs.

Q. And so that was the basis for the actual costs set forth in your table 1 of archaeological value that you used but applied to the amount of volume of excavation that occurred at Santa Clara River Rock Gorge Shelter; is that correct?

A. Yes, it is.

Tr. 9/28/98, McDonald/Herron, at 15-16.

These costs are based on a recent competitively bid archaeological excavation of a small rockshelter site in Washington County, which was completed by a private archaeological consulting firm (Horn 1991).

McDonald Damage Assessment Report, Government Sentencing Exhibit 3, at 8.

Projecting costs for scientific archaeological excavations is a well-established procedure. The government routinely issues Requests For Proposals ("RFP"), soliciting bids from professional archaeologists to scientifically excavate sites as salvage operations prior to the sites being impacted by major public works projects such as dam construction (with subsequent reservoir formation), interstate highway construction, etc. This "contract archaeology" has been ongoing for the past 40 years or more. (See, e.g., Reservoir Salvage Act of 1960, 16 U.S. C. § 469, et. seq.) The actual costs for various components of such archaeological excavation projects is no mystery. Contrary to what the court termed "speculative assessments and fictional scholarship" (Mem. Op. At 19), this cost assessment process is both firmly established and highly reliable.

Herron Report

The court did not directly attack the reliability of the archaeological damage assessment made by BLM archeologist John Herron as to the Big Round Valley site, but impliedly rejected it for the reasons discussed above. There is no evidence in the record supporting a finding (express or implied) that Mr. Herron's damage assessment was inaccurate. As stated above, Mr. McAllister reviewed Mr. Herron's report and found his assessment procedures to be in full compliance with the ARPA regulations. The "

archaeological value" determination as to the Big Round Valley site was $6,736, more than three times the amount of "aesthetic diminishment" which the court assigned to both this site and the Santa Clara River Rockshelter.

Co-defendants and "Archaeological Value"

As discussed in the "Memorandum Opinion" section above, there are legitimate reasons why there are differing amounts for "archaeological value" in the Chadburn and Stucki plea agreements and presentence reports. Such variations do not support a finding of "unreliability" as to the amount of "archaeological value" attributable to Hunter's multiple ARPA offenses.

Distinguishing the Shumway Case

The court's treatment of Shumway is discussed at length above. Essentially, the court viewed that case as much different than Hunter's due primarily to Shumway's disturbance of a prehistoric burial (the court also noted Shumway's "previous ARPA conviction.")(Mem. Op. at 10). Shumway's abhorrent behavior in desecrating the burial and looting a funerary object (the infant's burial blanket) was considered by both District Judge Winder and the Tenth Circuit as a sentencing issue separate and distinct from the loss assessment issue. As stated above, Judge Jenkins invoked a Shumway quote, which concerned the separate burial issue, to support his "loss" determination.

The Tenth Circuit did analyze "loss" in terms of "the severity of a particular offense" (112 F.3d at 1425), but an objective reading of Shumway supports our position that the "offense" to which the appellate court was referring was the ARPA archaeological resource crimes before the court and the "irreplaceable aspects of Native American history and culture" (id.) damaged and destroyed due to such offenses. In this context of determining "loss" associated with the unique aspects of ARPA offenses, there is no difference between Shumway's and Hunter's offenses.

There are distinct similarities between the two cases. Shumway was sentenced in two consolidated cases for three ARPA offenses (and three corresponding § 1361 offenses) occurring at three archaeological sites. Hunter was sentenced in two consolidated cases for three archaeological resource looting incidents and offenses (two ARPA and a separate § 1361 offense) at two archaeological sites. Substantial archaeological resource damage and destruction occurred in both cases. The fact that Shumway and his accomplice caused more "loss" than Hunter was reflected in Shumway's higher archaeological value amount. The same experienced government archaeologist (Stan McDonald) was involved in the determination of "archaeological value" in both cases.

There was no evidence of "fair market value" for any of the artifacts removed from the sites by Shumway and Hunter. The burial blanket and other items removed by

Shumway were never recovered, and consequently were never appraised. Although the Shumway opinion states that "the district court implicitly found the fair market value of the artifacts inadequately reflected the level of harm Mr. Shumway inflicted" (112 F.3d at 1425), this only reflects the fact that there was no "fair market value" evidence in that case. (The undersigned AUSA, having been the prosecutor in Shumway, is quite familiar with the record in that case.) Likewise, there was not "fair market value" evidence as to artifacts removed by Hunter because it could not be definitively determined what those artifacts were. Merely because a substantial number of artifacts, including arrowheads, were discovered in Hunter's possession long after the offenses in question does not prove which artifacts came from Santa Clara River Rockshelter or Big Round Valley.

The court also engaged in an illogical attempt to distinguish Shumway. The court reasoned that it was appropriate to utilize the full amount of "archaeological value" in Shumway because it was larger than the cost of restoration and repair by a factor of 15, but "archaeological value" should be totally disregarded as an adequate measure of " loss" in this case because its amount is only larger than the cost of restoration and repair by a factor of 4½. (Mem. Op. at 12).

Miscellaneous

The court erroneously stated that it was at the October 16 sentencing hearing that "for the first time, the United States advised the court that the first report contained inaccurate calculations for both the archaeological value and the cost of restoration and repair." (Mem. Op. at 14). Of course, the record shows that this acknowledgment occurred during the evidentiary hearing on September 28. The court's Memorandum Opinion fails to specifically mention the evidentiary hearing and implies that the government's "loss" evidence was presented at the sentencing hearing on October 16.

The court erroneously stated that its "aesthetic diminishment" determination in the amount of $2,000 "was not objected to by the United States." (Mem. Op. at 8). The record could not be more clear that the government was vigorously urging the court to use a combined "archaeological value" of $34,238 in the loss assessment for the two sites. After the "clarification discussion," where the court affirmed that "aesthetics" was indistinguishable from "archaeological value," there was certainly no need for the AUSA to make a post-ruling objection to a finding by the court which was dramatically different that the one urged by the government.

The court placed some importance on the fact that the government had not shown interest in conducting the scientific excavation of either of the two archaeological sites looted by Hunter. (Mem.Opp. at 18). This is an irrelevant consideration. There are several important reasons why the United States does not excavate archaeological sites on public lands, or issue permits to others to do so, including funding restraints, the desire to preserve the sites for posterity and for possible future study utilizing scientific methods not yet discovered, and to honor the sacred values associated with such sites.

The court also gave some weight to the government's possession of Hunter's artifact collection, including what the court assumed were all the artifacts looted by Hunter from the two sites in this case. The court also believed that a portion of this collection was "legally acquired." (Mem. Opp. At 17). As to the first point, our response is twofold: (1) artifacts are of little or no value without the contextual knowledge forever lost when the artifacts are illegally excavated and removed; and (2) the government's recovery of stolen property certainly does not diminish the magnitude of Hunter's crimes or the archaeological loss he has caused. Cf. United States v. Westmoreland, 911 F.2d. 398 (10th Cir. 1990). As to the "legally acquired" artifacts, the court merely accepted as true Hunter's self-serving claim to their legal status. No evidence exists in the record to support this claim.

## CONCLUSION

A careful reading of the Memorandum Opinion, particularly the discussion of contextual loss and the permanent change to the archaeological resource from an ARPA violation, and the court's acknowledgment at the sentencing hearing that "aesthetics" is indistinguishable from "archaeological value," indicates that the court's ruling on "loss" is nothing more than its own belief, independent of the evidence and the law (ARPA and its implementing regulations), of what value should be assigned to the archaeological loss or " diminishment" resulting from Hunter's crimes. In the court's view, the totality of the contextual and cultural loss in this case centers merely on a few arrowheads, and the court arbitrarily values that "loss" at $2000.

In the "Conclusion" of the Memorandum Opinion (at 19), the court describes the entire archaeological resource valuation concept as "absurd," regardless of how that value is determined. This statement confirms that the court is impliedly invalidating the ARPA regulation (§ 7.14(a)), which defines "archaeological value" and establishes the valuation methodology, since any methodology would be "absurd" in the court's view. Likewise, because Congress used the term "archaeological value" in ARPA, it can be said that the court is also impliedly rejecting that portion of the statute.

If the "Conclusion" comments were being made by a judge who was reluctantly applying these statutory and regulatory provisions, they could be read as a judicial suggestion for legislative revision. But coming from a judge who has just rejected the ARPA provisions and created an undefined and "admittedly subjective" valuation method termed "aesthetic diminishment," the court is making a defiant response to ARPA and the Sentencing Guidelines in the context of the "loss" determination.

The court's "Conclusion" suggests that accepting the government's evidence of the contextual loss or "archaeological value" amount would impose undesirable Sentencing Guidelines obligations on the court in sentencing Hunter. The "loss" issue in

this case gave a district court judge who abhors the Sentencing Guidelines the opportunity to both attack Congress and manipulate the guideline computation to the extent that the final sentencing range was where the court wanted it to be.

## ATTACHMENTS

A. Transcript of Sentencing Hearing, 10/16/98, afternoon session (pp. 1-2, 20-30).
B. Memorandum Opinion
C. Judgment
D. Notice of Appeal

ENCLOSURES

1. Indictment (case no. 2:97-CR-382J).
2. Indictment (case no.2:98-CR-198K).
3. Hunter Plea Agreement.
4. Transcript , Hunter Plea Hearing, June 10, 1998, Hunter testimony.
5. Hunter Presentence Report (with Addendum).
6. Transcript, Evidentiary Hearing, September 28, 1998, McAllister testimony.
7. Government Sentencing Exhibits 1A-F, 2A-B.
8. Transcript, Evidentiary Hearing, September 28, 1998, McDonald and Herron testimony.
9. McDonald Damage Assessment Report, Government Sentencing Exhibit 3.
10. Herron Damage Assessment Report, Government Sentencing Exhibit 4.
11. Jacklyn Damage Assessment Report, Defense Exhibit A.
12. Transcript, Sentencing Hearing, October 16, 1998, afternoon session.
13. McDonald letter of December 1, 1998 to AUSA Dance.

Sincerely,

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December 23, 1998

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Re: United States v. John C. Hunter, Nos. 2:97-CR-382J & 2:98-CR-198K (D.Utah)
(cases consolidated for sentencing)

Dear Sean:

After talking to you about our appeal request, and considering the length of my December 11 letter, I believe it would be helpful for me to restate the principal Argument (Issue One) in a refined and concise fashion. There are two prongs to our argument that the Court was required to utilize "archaeological value" in determining loss.

First Prong of Argument One

1. "Loss" is the "value of the property . . . damaged or destroyed." USSG § 2B1.1, comment. n.2. Value of the destroyed property is the paramount issue in this case.

2. Although Hunter's three counts of conviction (two ARPA and one § 1361) caused considerable damage to archaeological resources on public lands, the evidence overwhelmingly demonstrates that these crimes destroyed archaeological resources as well. In fact, it is destruction rather than damage which fully captures the harmfulness of Hunter's unlawful conduct. See Martin McAllister's expert testimony and the two Damage Assessment Reports in evidence.

3. Because the "cost of repairs" (§ 2B1.1, comment. n.2) (i.e. "cost of restoration and repair" in the ARPA context) deals solely with damage and not destruction, the court must determine a value for the destroyed property. Although the Tenth Circuit in Shumway did not explicitly distinguish between damage and destruction, the court's discussion of "the devastating and irremedial cultural, scientific and spiritual damage Mr. Shumway caused" fully conveys the

court's focus on the destructive aspect of ARPA crimes. United States v. Shumway, 112 F.3d 1413, 1425 (10th Cir. 1997) (emphasis added).

4. When property is destroyed, "ordinarily . . . the loss is the fair market value of the particular property at issue." § 2B1.1, comment. n.2 (emphasis added). By using the qualifier "ordinarily," the Sentencing Commission recognized that there is certain unique property for which "fair market value" would not be a true or adequate measure of its value. Archaeological resources constitute such unique property. Congress made this very finding in enacting ARPA: "archaeological resources . . . are an . . . irreplaceable part of the Nation's heritage." 16 U.S.C. § 470aa(a) (emphasis added).

5. What should be the measure of value for the particular property at issue? There is Tenth Circuit authority that the court should apply "the statutory test for determining 'value' " if one can be found in the statute of conviction. United States v. Williams, 50 F.3d 863, 864 (10th Cir. 1995) (emphasis added). Here, we have a statutory test (ARPA's use of "archaeological value" as a measurement of the harmfulness and severity of the crime and as one of the determining factors in whether it is a felony), supplemented by the implementing ARPA regulation's definition of "archaeological value" and the methodology of determining this value. The court is required to give deference to and apply this regulatory definition of "archaeological value" because it is a reasonable interpretation of the ARPA statute and is consistent with the statute's purpose. See Issue/Argument 2 discussion in my 12/11/98 letter.

Second Prong of Argument One

1. In determining "loss," the court is required to make "a reasonable estimate of the loss." § 2B1.1 comment. n.3 (emphasis added).

2. In making a "reasonable estimate of the loss," the court must endeavor to measure loss in a manner which "fully capture(s) the harmfulness of the conduct." § 2B1.1 comment. n.15 (emphasis added). Although Application Note 15 is framed in the context of a discretionary upward departure where the loss "does not fully capture the harmfulness," the Sentencing Commission implicitly requires the court to determine a loss which does achieve this important sentencing standard, if a reasonable measurement of loss is available to do so. "Archaeological value" is the reasonable measurement of value in the ARPA context which does "fully capture the harmfulness" of the unlawful ARPA conduct.

3. As discussed above, the essence of the ARPA offense is the destruction (the "irreplaceable" and "irremedial" loss) of the "cultural, scientific and spiritual" values inherent in the harmed archaeological resource. Shumway, 112 F.3d at 1425. Interpreting Application Note 15 as imposing this implicit requirement of "fully capturing the harmfulness" is supported by Tenth Circuit case law. " 'Loss' also serves to gauge the severity of a particular offense." Id.

4. The ARPA regulation's definition of "archaeological value" fully identifies and "captures" the nature of the harm caused by an ARPA offense (as discussed above): "the

archaeological value of any archaeological resource involved in a (ARPA violation) shall be the value of the information associated with the archaeological resource." 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a) (emphasis added).

5. Since there is a statutory/regulatory measure of loss ("archaeological value") which is both "reasonable" and "fully captures the harmfulness" of the ARPA offense, the court is required to use it in order to adequately assess loss.

I hope this refinement of our dual pronged argument under Issue One will assist your review of the appeal worthiness of the Hunter case.

Sincerely

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Wayne

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KeyCite Citations

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Ian Martin **LYNCH**, Defendant-Appellant.

No. 99-30325.

Argued and Submitted Sept. 14, 2000
Filed Dec. 7, 2000

Defendant was convicted in the United States District Court for the District of Alaska, James M. Fitzgerald, J., of knowingly removing archeological resource from public land, in violation of Archeological Resources Protection Act (ARPA), and he appealed. The Court of Appeals, Goodwin, Circuit Judge, held that felony conviction under ARPA required that defendant have known that skull removed from national forest was "archeological resource."

Vacated and remanded.

West Headnotes

[1] Health and Environment k25.5(8)
199k25.5(8)

Provision of Archeological Resources Protection Act (ARPA) imposing criminal liability for "knowingly" removing archeological resources from government land did not require that defendant knew that his action was against law, but did require that defendant knew, or reasonably should have known, that item removed was "archeological resource." Archaeological Resources Protection Act of 1979, § 6(a), 16 U.S.C.A. § 470ee(a).

[2] Criminal Law k20
110k20

Requirement in criminal statute that violation be "knowing" means that defendant must know facts that make his conduct illegal.

[3] Health and Environment k25.5(8)
199k25.5(8)

Defendant's conduct in removing partly exposed skull on rock surface in national forest without knowledge that it was "archeological resource" was not inherently felonious conduct, and thus was not sufficient to support felony conviction under Archeological Resources Protection Act (ARPA). Archaeological Resources Protection Act of 1979, § 6(a), 16 U.S.C.A. § 470ee(a).

***1139** Mary C. Geddes, Assistant Federal Defender, Anchorage, Alaska, for the defendant-appellant.

Steven E. Skrocki, Kevin Feldis, Assistant U.S. Attorneys, Anchorage, Alaska, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Alaska; James M. Fitzgerald, District Judge, Presiding. D.C. No. CR 98-00001-JMF.

Before: GOODWIN, SCHROEDER and HAWKINS, Circuit Judges.

GOODWIN, Circuit Judge:

Ian Martin Lynch appeals his conviction under 16 U.S.C. § 470ee(a) of the Archeological Resources Protection Act ("ARPA"). He entered a conditional guilty plea after the District Court advised him that the Government would not have to prove that the defendant knew that his act was against the law nor that the skull he removed from government land was an archeological resource.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291. The conditional guilty plea was entered under Federal Criminal Rule 11(a)(2). Pursuant to an agreement with the Government and with the approval of the district court, Lynch preserved for appeal the *mens rea* issue. Therefore, the only question before us is whether the trial court erred in holding that the indictment, which charged a ***1140** knowing violation of § 470ee(a) did not require proof that the defendant knew that a human

skull he picked up and took home was an "archeological resource."

The facts are not disputed. The defendant concedes that he saw a human skull partially exposed and partially covered by soil, that he scraped away the dirt with his hands and lifted the skull from a rocky hillside. There is no evidence that the defendant had reason to know that the location was a burial place, or that the skull was of ancient origin. There is no evidence that the defendant knew that the skull had any monetary value, or that its removal would create government funding for contractors.

Expert witnesses brought into the case after the defendant's conduct was reported to authorities could not fix the age of the skull until after a sample of bone was removed and sent to a laboratory for carbon dating. The skull turned out to be 1400 years old, and the costs associated with the investigation and restoration of the site where the skull was found amounted to something in excess of $7,000, which the Government says the defendant must pay for violating the statute. The Government says these later discovered facts are the risks one assumes when picking up human bones on government land.

We have examined the limited judicial authority we have found on the criminal liability of one who is charged with a knowing violation of a statute denouncing as a crime the removal of an "archeological resource," and are satisfied that the Government must prove that the defendant knew more than that the object he removed was a human skull.

In the summer of 1997, Lynch was a twenty-three year old high school graduate. He and two friends went deer-hunting on Heceta Island, an uninhabited island in southeast Alaska. The island contains an area identified by a report conducted for the Alaska Native Claims Settlement Act as the "Warm Chuck Village and Burial Site," which contains the remains of an Alaska native village. There is no evidence that Lynch knew of the quoted report.

When the others were packing up camp, Lynch went looking for caves. After walking over some boulders, he looked down and saw what looked like the back of a skull. Lynch picked it up, and knew it was a skull. He then picked up some rocks, found other bones, and cleared away some dirt with his hands. He put the rest of the bones back in place and "took the skull back home to do some research on it." The skull was not found in a cemetery or apparent burial ground, but rather was in the side of a hill, under a rock outcropping. The skull was found outside of the area previously identified as archeologically significant by anthropologists and Native historians.

On August 5, 1997, U.S. Forest Service agents interviewed Lynch. Lynch agreed to the interview, gave the agents the skull, and directed the agents to the location of the bones. During the interview, Lynch admitted that he knew the skull was old: "So I mean, it's definitely been there for a while. Oh, man, it's definitely old. There's not a stitch of clothin' or nothin' with it."

The regional Forest Service archeologist stated that in his opinion the skeleton had been deliberately placed or interred at the site, but he could not determine its age. The archeologist called in a physical anthropologist to determine the age of the skull. Osteological examination of the skull and the skeleton failed to provide sufficient evidence of their antiquity for ARPA prosecution. In order to determine whether the skull was at least 100 years old, and therefore an "archeological resource" under 16 U.S.C. § 470bb(1), authorities cut out a section of the skull and had the fragment's age measured by carbon dating. The analysis showed an age of at least 1400 years.

Lynch was indicted for felony violation of ARPA, 16 U.S.C. § 470ee(a). Lynch ***1141** filed motions to dismiss the indictment and to disclose the grand jury transcript. He argued that the indictment had omitted the requisite statutory scienter and that the grand jury had been incorrectly instructed. The district court denied Lynch's motions, and concluded that taking a skull was "*malum in se,*" defined in Black's Law Dictionary 959 (6th ed.1990) as "a wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." The court held that to fulfill the statutory scienter requirement, the accused need know only that he was excavating, removing, damaging and/or otherwise altering a human skull out of a grave. 16 U.S.C. § 470ee(a) provides:

> No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archeological resource located on public lands or Indian lands unless such activity is pursuant to a

permit issued under section 470cc of this title, or the exemption contained in section 470cc(g)1 of this title.

The statute's penalty provision 16 U.S.C. § 470ee(d) provides:

> Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a),(b), or (c) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both: Provided, however, that if the commercial or archaeological value of the archaeological resources involved exceeds the sum of $500, such person shall be fined not more than $20,000 or imprisoned not more than two years, or both ...

Lynch's argument that the Government must prove that he knew he was breaking the law has been rejected in a number of somewhat similar cases. *See United States v. Sherbondy,* 865 F.2d 996 (9th cir.1988) (holding that the statute's use of the phrase "knowingly violates subsection ... (g) of section 922" does not imply that knowledge of the law is required to satisfy the *mens rea* requirement of the statute). In *United States v. Int'l Minerals & Chem. Corp.,* 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971), which also held that "knowingly violates" language did not imply that knowledge of the law was required, the Court explained:

> "We ... see no reason why the word 'regulations' should not be construed as a shorthand designation for specific acts or omissions which violate the Act. The Act, so viewed, does not signal an exception to the rule that ignorance of the law is no excuse ..."

*Id.* at 561, 91 S.Ct. 1697.

We turn next to *Staples v. United States,* 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (holding that the Government must prove that the defendant knew the weapon he possessed was a machine gun, not that he knew his possession was against the law) and *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) (holding that a statute punishing "knowing conversion" required that the defendant have knowledge of the facts, though not necessarily the law that made the taking a conversion). We find these cases instructive, in that the defendant must know that he is in fact performing an act, whether or not he knows that the act has been criminalized by statute.

[1] The Government argues that ARPA's use of "knowingly" rather than "wilfully" reflects legislative intent that the statute not require a knowledge that one's actions are against the law. We agree. *See United States v. Flores,* 753 F.2d 1499, 1505 (9th Cir.1985) (declining to hold that knowledge of the law was necessary absent the word "willful" in the statute and a clear Congressional intent). But this case does not turn on Lynch having known the law, it turns on whether he knew, or should reasonably have been expected to know, that the human remains he found ***1142** were "archeological resources" and that they possessed value other than the satisfaction of his curiosity.

The legislative history of the ARPA appears to reject the requirement of specific intent. Appellant states in his brief: "[t]he legislative history does not fully clarify the intent of its framers with respect to the *mens rea* issue." He offers a number of remarks from the legislative debate. For example, the bill's House sponsor, Congressman Morris Udall, stated:

> I want to take just a moment to explain to the House why this Legislation is needed. In the West, where most of the public lands of the United States are located, and where the archaeological resources are rich, there is a growing tendency on the part of a few industrious entrepreneurs to locate likely sites of ancient ruins to move in a backhoe or similar equipment, and to proceed to mine the area for any artifacts they might unearth ... The bill now before the House attempts to correct this situation. It prohibits the wanton destruction of archeological sites and resources located on the public domain or on Indian lands ... It establishes effective penalties for those who knowingly violate the prohibitions in the act.

125 Cong. Rec. H17391, 17393 (daily ed. July 9, 1979) (statement of Rep. Udall). Congressman Udall addressed the concerns over prosecution of the "casual visitor" who stumbles across an artifact and decides to keep it:

> Certainly, no sponsor of this legislation and probably no reasonable person would want some overzealous bureaucrat to arrest a Boy Scout who finds an arrowhead along a trail or a purple bottle out in the desert. The bill is not drafted for this purpose at all. It is expected that those responsible for the administration and enforcement of this act will use good judgment and exercise moral persuasion where violations unwittingly occur. The thrust of this act is not to harass the casual visitor who happens to find some exposed artifact,

> but to stop the needless, careless, and intentional destruction of archeological sites and organized and intentional theft of the valuable remains of previous civilizations.

*Id.* at 17394. Others in Congress echoed Representative Udall's concerns. Speaking to the Senate Subcommittee on May 15, 1979, Senator Domenici stated:

> [A]s you might suspect there are many innocent people who would be adversely affected; Boy Scouts, ... civic groups, and the like, who because of a lack of information on the subject of ownership might unknowingly enter onto public lands with really no malice or knowledge whatsoever ...
>
> We also have broad civil authority for the lesser kind of technical offenses that I have described. We want the felony jurisdiction to be only for extreme cases where there is both knowledge and a very valuable product, and the remainder would be misdemeanors. And if they are misdemeanors they should require knowledge.

*Archaelogical Resources Protection Act of 1979: Hearing on S. 490 Before the Subcomm. on Parks, Recreation, and Renewable Resources,* 96th Cong. 96-26 (1979) (statement of Sen. Pete V. Domenici). *See also id.* at 41 (statement of Dr. Ernest Connally, Assoc. Dir., Heritage Conservation and Recreation Service, Dept. of the Interior) (describing the intended subjects of criminal prosecution as sophisticated operators, not "mere pilfer[ers]").

The Report to Accompany H.R. 1825, the Archeological Resources Protection Act of 1979, 96th Cong. 1st Sess. (1979), however, clearly rejects the specific intent argument propounded by Lynch. It states:

> This section also provides criminal penalties for those who knowingly commit one of the prohibited acts. This is a general intent crime, and therefore a ***1143** person could be convicted if he acted of his own volition and was aware of the acts he was committing.

H.R.Rep. No. 96-311, at 11 (1979). We hold that knowledge of the law is not necessary. But knowledge of the facts that make a trespass a felony is necessary.

For a felony conviction, the prosecution should have to prove that a person charged under ARPA knew, or at least had reason to know, that the object taken is an "archeological resource." Picking up a skull is not in every case *"malum in se,"* nor does every case "involve public welfare." A prosecution for knowingly violating a statute enacted to criminalize removal of archeological resources must follow at least minimal traditional *mens rea* principles in order to give meaning to "knowingly."

[2] In most cases, a requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal." *Staples,* 511 U.S. at 606, 114 S.Ct. 1793. In *Morissette,* the Supreme Court examined the *mens rea* requirement of a statute that stated: "Whoever ... knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States ... [s]hall be fined ..." 342 U.S. at 248, 72 S.Ct. 240 (citing 18 U.S.C. § 641). The Court held that the term "knowingly" required that the defendant have knowledge of the facts that made his taking of shell casing brass on federal land a conversion, in particular, that the property belonged to the United States before criminal liability could attach. *Id.* at 271, 72 S.Ct. 240. Similarly, in *Staples,* 511 U.S. at 623, 114 S.Ct. 1793, the Court held that the Government must prove beyond a reasonable doubt that the defendant knew the weapon he possessed had characteristics that brought it within the statutory definition of a machine gun in order to be convicted for failing to register a machine gun.

The concerns that led the *Staples* Court to read a knowledge requirement into the statute exist here. As in *Staples,* there exists here the potential for harsh penalties to be applied to those who acted in ignorance of a fact that the statute makes an otherwise noncriminal act a crime: a skull may or may not be an archeological resource, just as it may, or may not be evidence of a recent accident or of a recent crime. A felony conviction carries a possible fine of $10,000 and up to a year in prison, or if the value or cost of restoration of an archeological resource amounts to $500, up to $20,000 and up to 2 years in prison. *See* 16 U.S.C. § 470ee(d). As the legislative history suggests, there may be "casual visitors" to public lands whose souvenir collection, depending on the facts, may be merely thoughtless, but not felonious. Lynch may or may not have been a wholly innocent casual visitor. His interview revealed that he was interested in, or at least curious about, artifacts associated with early inhabitants of the land. He admitted that he was hoping to find something in his cave wanderings, and that he liked to collect things. He even admitted to agents that he

knew he had done something wrong. Nevertheless, the *Staples* concern regarding strict penalties to unwitting violators counsels against convicting an unwitting person of a felony when nobody knew until after a lengthy investigation that the object taken was more than 100 years old, and that the costs associated with restoration of the site would exceed $500. Like the widespread tradition of gun ownership in the United States that animated the *Staples* court's decision, 511 U.S. at 610, 114 S.Ct. 1793, there also exists a widespread tradition of arrowhead and artifact collecting.

The Government, like the district court, casts Lynch's conduct in a different light, and claims that *Staples* is inapposite because there is no acceptable tradition of grave robbing. However, the Government did not charge Lynch with grave robbing, and the record does not demonstrate that ***1144** Lynch knew or should have known that the skull was in a grave.

In yet another case, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994), the Court considered a statute making it criminal to "knowingly transport or ship in interstate or foreign commerce by any means including by computer or mails, any visual depiction if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." 18 U.S.C. § 2252. The Court held that the term "knowingly" applied to the age of the performers and to the sexually explicit nature of the material in a child pornography statute, despite the natural grammatical reading of the Protection of Children Against Sexual Exploitation Act under which the scienter element would apply only to the transport element. *See X-Citement Video,* 513 U.S. at 69-71, 78, 115 S.Ct. 464. The court explained: "*Morissette,* reinforced by *Staples,* instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 72, 115 S.Ct. 464. Because removing objects that are not "archeological resources" from public land is not a violation of ARPA, the knowingly requirement should apply to the term "archeological resources," as well as to the prohibited act of removing.

The Government seeks to characterize the case as a "public welfare" case--or as the district court puts it, a "*malum in se* " case for which an exemption to the traditional *mens rea* requirements exists. The Government argues that it is not prosecuting "otherwise innocent conduct" because "any person on public land cannot believe that removal of an artifact, human or otherwise, can be accomplished legally without some type of regulation." The average citizen may be expected to know that the Administrative Society has become so pervasive that in a national forest everything that is not expressly permitted must necessarily be forbidden. However, the concerns expressed in the legislative history seem to belie this claim. Representative Udall and others' comments acknowledge the possibility that boy scouts and other "casual visitors" might innocently and inadvertently remove an artifact from the public domain.

[3] The examples of public welfare cases relied on by the Government discuss conduct that is, but for the statute prohibiting it, considerably less innocent than taking a skull from public land. In *United States v. LaPorta,* 46 F.3d 152 (2nd Cir.1994) (rev'd on other grounds *Sicurella v. United States,* 157 F.3d 177 (2nd Cir.1998)), the court held that a statute proscribing the destruction of government property by fire or explosives did not require that defendants know they were destroying government property, because arson is not innocent conduct. Similarly, in *United States v. Feola,* 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975), the Supreme Court held that a statute making it an offense to assault federal officers required no more than proof of an intent to assault and that it was not necessary under the substantive statute to prove that the defendants knew the undercover agent they assaulted were federal officers. In *United States v. Sablan,* 92 F.3d 865 (9th Cir.1996), we held that the Government, under a computer fraud statute, need not show an intent to destroy government files, but rather only the intent to access a "federal interest" computer without authorization. We noted that accessing the computer was already a violation. The argument that picking up a partly exposed skull on a rock surface in a national forest without the knowledge that it is an "archeological resource" is inherently felonious conduct like arson, assault, or breaking into a federal interest computer is a stretch this court will not make in order to affirm a dubious felony conviction.

The Government urges that the stretch is justified by our recent decision in *United States v. McKittrick,* 142 F.3d 1170 ***1145** (9th Cir.1998). In *McKittrick,*

we dealt with a provision of the Endangered Species Act ("ESA") that provided penalties for "knowing violations" of any regulations issued under the statute. *Id.* at 1173, n. 1. We held that the defendant did not have to know that he was shooting a wolf, which was listed as an endangered species, to violate regulations relating to experimental population. *See id.* at 1177. The court relied on Congress's 1978 decision to change the wording of the section from "wilfully" to "knowingly" and on the agreement of the Fifth and the Eleventh circuits "in related situations." *Id.* The opinion does not expressly address the issue of whether the case involved a "public welfare" offense or whether shooting an animal that is not a wolf constitutes "otherwise innocent conduct." *Id.* The Government points to similarities in the purposes of the statutes, conservation of resources, their language, "knowingly violates," and even the nature of the element at issue, knowledge of the nature of the object of the defendant's act, in support of its contention that the Government need not prove that Lynch knew the skull was an "archeological resource." The reasoning of *McKittrick* would support a conviction if Lynch, at the time of the charged event, had reason to know that he had picked up and removed a human skull, even though he did not know it was more than a hundred years old.

*McKittrick* is distinguishable for a variety of reasons. First, it dealt with the ESA, where, as a Fifth Circuit case *McKittrick* court cites for support explained, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost.*" *United States v. Ivey,* 949 F.2d 759, 766 (5th Cir.1991) (emphasis added) (citation omitted). With respect to the ARPA, however, the legislative history suggests that Congress was concerned about the risk of penalizing archeologically naive visitors to public lands.

Second, *McKittrick* involved misdemeanor penalties; whereas, this appeal involves felony penalties. *See Morissette,* 342 U.S. at 260, 72 S.Ct. 240. One of the Fifth Circuit cases cited in *McKittrick* emphasized that the violation of the ESA was a misdemeanor to distinguish it from cases requiring *mens rea* in criminal statutes. *See United States v. Nguyen,* 916 F.2d 1016, 1019 (5th Cir.1990).

We note also that the Eleventh Circuit case cited by *McKittrick* to support the argument against a *mens rea* requirement for an ESA violation in fact supports Lynch's stricter specific intent argument. *United States v. Grigsby,* 111 F.3d 806 (11th Cir.1997). In *Grigsby,* the court decided that the "knowingly violates" language of a criminal penalty provision of the African Elephant Conservation Act ("AECA") required specific intent. *Id.* at 819. The court relied not only on the language, but also on legislative history to reach this distinction between misdemeanor and felony statutes.

Lynch claims that here the existence of § 470ff, which provides for civil penalties for violations of ARPA and omits the word "knowingly," reflects Congress's intent to punish criminally "only those who were aware of the very nature of the object they were excavating." Senator Domenici's and Congressman Udall's remarks to Congress bolster this interpretation, as does the Court's holding in *X-Citement Video.* The Court examined 18 U.S.C. § 2252, a statute remarkably similar to the one at issue here, and ultimately concluded that the Government had to prove knowledge of sexually explicit conduct and knowledge that the depiction involved the use of a minor. *See* 342 U.S. at 269, 72 S.Ct. 240 (acknowledging the potential absurdity that would result if people who unknowingly transported items were protected, and people who knowingly transported items that they had no idea contained prohibited material were not).

We hold that under 16 U.S.C. § 470ee(a), the Government must prove ***1146** that a defendant knows or had reason to know that he was removing an "archeological resource." Accordingly, the judgment is vacated to permit Lynch to withdraw his plea, and the case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED

END OF DOCUMENT

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

JAN 22 1999

MARKUS B. ZIMMER, CLERK
BY _____
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

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|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | | 2:99CV 0038S |
| vs. | : | |
| THREE HUNDRED SIXTEEN HISTORIC AND PREHISTORIC NATIVE AMERICAN ARTIFACTS, | : | VERIFIED COMPLAINT FOR FORFEITURE *IN REM* |
| Defendants. | : | |

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Plaintiff alleges upon information and belief as follows:

1. This is a civil action *in rem* brought to enforce the provisions of 16 U.S.C. § 470gg for the forfeiture of archaeological resources removed from public lands in violation of 16 U.S.C.§ 470ee.

2. The court has jurisdiction over this matter by virtue of 28 U.S.C. §§ 1345 and 1355.

3. The defendants in this action are three hundred sixteen historic and prehistoric Native American artifacts (defendant property). A list of the defendant property is attached as exhibit A and made a part hereof.

4. The facts and circumstances set forth herein which support the seizure and forfeiture of the defendant property are based on the investigative report of Special Agent Rudy

G. Mauldin (SA Mauldin). SA Mauldin is a special agent and criminal investigator for the United States Department of Interior, Bureau of Land Management (BLM) and has served for eight years as a law enforcement coordinator for the Archaeological Resource Protection Act within the State of Utah. SA Mauldin has conducted numerous complex investigations with regard to vandalism of Native American ruins and related damage and theft of government property.

5. In November 1995, BLM was notified by the Nevada State Museum in Carson City, Nevada, that the museum had received a gifted collection of three hundred sixteen Native American artifacts presented to them by Christa Bollmann (Bollmann) in the name of Stephan Mueller (Mueller), deceased. Bollmann presented herself as Mueller's mother. In explaining the source of the collection, Bollmann mentioned that Mueller had been digging in a dry cave at night to avoid detection by federal officials. The museum referred the matter to BLM stating that the artifacts may have been illegally acquired. BLM initiated an investigation.

6. SA Mauldin began the investigation by reviewing Box Elder County Sheriff's findings with respect to circumstances surrounding Mueller's death. A sheriff's report indicated that Mueller and his girlfriend Jane Perkins had died from hypothermia while attempting to walk to safety after their pickup truck got stuck in a remote area of Utah. The two bodies were found in the Donner Reed Pass at the north end of Silver Island Mountain. A map indicating the Silver Island Mountain area and the location of the bodies is attached as exhibit B and made a part hereof. The sheriff's report states that the couple appeared to be headed north toward an area known as Little Pigeon at the time they became stuck. The areas of Little Pigeon and Big Pigeon are small outcrops of islands located on public lands at the north end of Silver Island Mountain and are known to contain Native American artifacts.

7. According to BLM archeologist Doug Melton, there is an abundance of lithic remains in the Silver Island Mountain area and vandalism of Indian ruins in that area has been very prevalent.

8. SA Mauldin contacted David Rhode (Rhode), Associate Research Professor at the Desert Research Institute in Reno, Nevada, an expert on artifacts located in the Silver Island Mountain area. Rhode examined the defendant property to determine if the artifacts were of the

same type found in the Silver Island Mountain area. Rhode stated that the tool types, rare skin bags with seeds, grayware potsherds, arrow points, and spear points found among the defendant property are characteristic of the Silver Island Mountain area and likely represent artifacts from multiple sites in that area, some of which were probably protected in a dry cave or rock shelter.

9. The taking of the defendant property from the public lands in question constitutes the removal of historic and prehistoric Native American artifacts from public lands in violation of 16 U.S.C. § 470ee and is subject to forfeiture to the United States pursuant to 16 U.S.C. § 470gg.

10. SA Mauldin interviewed Mueller's friends and acquaintenances who indicated the following:

a. Troy B. Callister described to SA Mauldin a leather bag that was part of the defendant property and said it was dug by Mueller and Steven Corey Haws(Haws) at Three Mile Cave. Three Mile Cave is located on public lands at the south end of the Silver Island Mountain area in Nevada.

b. Haws admitted participating with Mueller in illegal excavations on numerous occasions at multiple sites on Utah state lands and lands managed by BLM in Utah and Nevada. Haws stated that Mueller kept most of the items he found. Haws showed SA Mauldin dig sites where he and Mueller had made illegal excavations. In two of these areas--the Silver Island Mountain area and at Floating Island Mountain--Haws identified indented areas and sift piles associated with the illegal digs. Haws also identified the specific area at Floating Island Mountain where the leather pouches listed as numbers three through nine in exhibit A were collected. Haws said the leather pouches had been taken along with some small leather bundles containing paint pigment. Floating Island Mountain is public land located at the northeast end of the Silver Island Mountain area and is identified on exhibit B. Haws said Mueller also took arrow and spear points from the Silver Island Mountain area.

c. Bob Duncan (Duncan) admitted illegally digging with Mueller and personally took BLM agents to some of the dig sites. These sites included two caves in the Silver Island Mountains and a third site called "Three Mile" in the Leppy Hills. All sites are on public lands. Duncan identified the indented areas and sift piles relating to their illegal digs.

for Native American artifacts. Nine Mile Cave is an archaeological site located in close proximity to the Silver Island Mountain area.

d. Brad Hanson (Hanson) testified that Mueller had dug in a cave at Floating Island Mountain and that he had gone to this cave with Mueller on two occasions. Hanson also stated that Mueller had continued to illegally excavate at this site for approximately two years.

11. During SA Mauldin's visit to the illegal dig sites identified above, he observed within each ruin remnants of sift piles and pieces of rock rubble that had been dumped and scattered from screens during excavation.

12. The defendant property is presently in the custody of the Nevada State Museum in Carson City, Nevada, where it will remain during the pendency of this action. It is the museum's desire to support any litigation that secures proper placement of the defendant property as Native American artifacts.

WHEREFORE, plaintiff prays that the process issue to enforce the forfeiture of defendant property; that notice be given to interested parties to appear and show cause why the forfeiture of defendant property should not be decreed; that the court make a determination that defendant property was involved in a violation of 16 U.S.C. § 470ee; that defendant property be forfeited to plaintiff for disposition according to law; that plaintiff recover the costs and expenses of this action, and for such other and further relief as the court may deem just and proper.

DATED this 25 day of January 1999.

PAUL M. WARNER
United States Attorney

BILL RYAN
Assistant United States Attorney

VERIFICATION

I Rudy G. Mauldin am a special agent and criminal investigator for the United States Department of Interior, Bureau of Land Management (BLM). I have been a sworn federal law enforcement agent since January 1990. I currently serve as the law enforcement coordinator for the Archaeological Resource Protection Act within the State of Utah.

During my tenure with the BLM I have conducted numerous overt and covert complex investigations with regard to vandalism of Native American Indian ruins. For eight years, I have conducted investigations of the Archaeological Resource Protection Act (ARPA), 16 U.S.C. § 470ee and related damage and theft of government property statutes involving 18 U.S.C. §§ 1361 and 641. These investigations have covered numerous states and many areas occupied by prehistoric Native American Indians. Most of these investigations have resulted in convictions, fines, restitutions, forfeitures, and/or prison sentences.

BLM is responsible for managing and protecting public lands and resources as enacted by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701. This responsibility includes the investigation and enforcement of ARPA on public lands.

I have read the contents of the foregoing complaint for forfeiture *in rem* and verify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the statements contained therein are true and correct to the best of my knowledge and belief.

Executed on this 19th day of January 1999.

RUDY G. MAULDIN, Special Agent
Bureau of Land Management

# Stephan Mueller Collec[illegible]n Inventory

001114

EXHIBIT A

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 1 | 1 | wrapped tule bundle | knotted | |
| Mueller | 2 | 1 | wrapped tule bundle | knotted | |
| M[illegible]ller | 3 | 1 | fur-on rawhide bundle | sinew tied, folded | |
| Mueller | 4 | 1 | fur-on rawhide bundle | sinew tied, folded | |
| Mueller | 5 | 1 | fur-on rawhide bundle | sinew tied, folded | |
| Mueller | 6 | 1 | fur-on rawhide bundle | sinew tied, folded | small brown seeds coming out of bundle. not sure if spilled from other bundle or from inside, not sure if other bundles have seeds also |
| Mueller | 7 | 1 | fur-on rawhide bundle | loosely wrapped | |
| Mueller | 8 | 1 | fur-on tanned hide,bundle | filled w/tiny brown seeds | |
| Mueller | 9 | 1 | soft hide grain bundle | grass seeds, 43x20 cm | |
| Mueller | 10 | 1 | flat fur-on hide | | |
| Mueller | 11 | 1 | metate, schist | thin but heavy | |
| Mueller | 12 | 1 | mano, flat | | |
| Mueller | 13 | 1 | mano, long, polished | ochre stain | |
| Mueller | 14 | 1 | basketry frag. coiled | | |
| Mueller | 15 | 1 | basketry frag. coiled | | |
| Mueller | 16 | 1 | basketry frag. coiled | | |
| M[illegible]ller | 17 | 1 | basketry frag. coiled | small frag, part of other | |
| Mueller | 18 | 1 | metate, tuff | broken and repaired, comp | |
| M[illegible]ller | 19 | 1 | mano, tuff?, | blocky, rectangular | |
| Mueller | 20 | 1 | pottery rim sherd | | |
| Mueller | 21 | 1 | pottery sherd | | |
| Mueller | 22 | 1 | pottery sherd | | |
| Mueller | 23 | 1 | pottery sherd | | |
| Mueller | 24 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 25 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 26 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 27 | 1 | pottery sherd | glued to non-matching pcs | |

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 28 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 29 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 30 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 31 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 32 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 33 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 34 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 35 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 36 | 1 | pottery sherd | glued to non-matching pcs | |
| Mueller | 37 | 1 | point, obsidian | | |
| Mueller | 38 | 1 | point, obsidian | | |
| Mueller | 39 | 1 | point, obsidian | | |
| Mueller | 40 | 1 | point, obsidian | | |
| Mueller | 41 | 1 | point, obsidian | | |
| Mueller | 42 | 1 | point, obsidian | | |
| Mueller | 43 | 1 | point, obsidian | | |
| Mueller | 44 | 1 | point, obsidian | | |
| Mueller | 45 | 1 | point, obsidian | | |
| Mueller | 46 | 1 | point, obsidian | | |
| Mueller | 47 | 1 | point, obsidian | | |
| Mueller | 48 | 1 | point, obsidian | | |
| Mueller | 49 | 1 | point, obsidian | | |
| Mueller | 50 | 1 | point, obsidian | | |
| Mueller | 51 | 1 | point, obsidian | | |
| Mueller | 52 | 1 | point, obsidian | | |
| Mueller | 53 | 1 | point, obsidian | | |
| Mueller | 54 | 1 | point, obsidian | | |
| Mueller | 55 | 1 | point, obsidian | | |
| Mueller | 56 | 1 | point, obsidian | | |
| Mueller | 57 | 1 | point, obsidian | | |
| Mueller | 58 | 1 | point, obsidian | | |

001115

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueiler | 59 | 1 | point, obsidian | | |
| Mueller | 60 | 1 | point, obsidian | | |
| Mueller | 61 | 1 | point, obsidian | | |
| Mueller | 62 | 1 | point, obsidian | | |
| M··eller | 63 | 1 | point, obsidian | | |
| Mueller | 64 | 1 | point, obsidian | | |
| Mueller | 65 | 1 | point, obsidian | | |
| Mueller | 66 | 1 | point, obsidian | | |
| : ·ller | 67 | 1 | point, obsidian | | |
| Mueller | 68 | 1 | point, obsidian | | |
| Mueller | 69 | 1 | point, obsidian | | |
| Mueller | 70 | 1 | point, obsidian | | |
| Mueller | 71 | 1 | point, obsidian | | |
| Mueller | 72 | 1 | biface | | |
| Mueller | 73 | 1 | biface | | |
| Mueller | 74 | 1 | biface | | |
| Mueller | 75 | 1 | biface | | |
| Mueller | 76 | 1 | biface/flake tool | | |
| Mueller | 77 | 1 | biface/flake tool | | |
| Mueller | 78 | 1 | biface/flake tool | | |
| , ·ller | 79 | 1 | biface/flake tool | | |
| Mueller | 80 | 1 | biface/flake tool | | |
| M ·ller | 81 | 1 | biface/flake tool | | |
| Mueller | 82 | 1 | biface/flake tool | | |
| Mueller | 83 | 1 | biface/flake tool | | |
| Mueller | 84 | 1 | biface/flake tool | | |
| Mueller | 85 | 1 | biface/flake tool | | |
| Mueller | 86 | 1 | biface/flake tool | | |
| Mueller | 87 | 1 | biface/flake tool | | |
| Mueller | 88 | 1 | biface/flake tool | | |
| Mueller | 89 | 1 | biface/flake tool | | |

0011116

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 90 | 1 | biface/flake tool | | |
| Mueller | 91 | 1 | biface/flake tool | | |
| Mueller | 92 | 1 | biface/flake tool | | |
| Mueller | 93 | 1 | biface/flake tool | | |
| Mueller | 94 | 1 | biface/flake tool | | |
| Mueller | 95 | 1 | convex uniface tool | chert | |
| Mueller | 96 | 1 | convex uniface tool | chert | |
| Mueller | 97 | 1 | convex uniface tool | chert | |
| Mueller | 98 | 1 | convex uniface tool | chert | |
| Mueller | 99 | 1 | convex uniface tool | chert | |
| Mueller | 100 | 1 | convex uniface tool | chert | |
| Mueller | 101 | 1 | convex uniface tool | chert | |
| Mueller | 102 | 1 | convex uniface tool | chert | |
| Mueller | 103 | 1 | convex uniface tool | chert | |
| Mueller | 104 | 1 | convex uniface tool | chert | |
| Mueller | 105 | 1 | biface-tool | chert | |
| Mueller | 106 | 1 | biface-tool | chert | |
| Mueller | 107 | 1 | biface-tool | chert | |
| Mueller | 108 | 1 | biface-tool | chert | |
| Mueller | 109 | 1 | modified flake | chert | |
| Mueller | 110 | 1 | keeled flake tool | chert | |
| Mueller | 111 | 1 | banded chert frag | possibly modified | |
| Mueller | 112 | 1 | green rock frag | | |
| Mueller | 113 | 1 | rock w/azurite | | |
| Mueller | 114 | 1 | drill, chert | | |
| Mueller | 115 | 1 | drill, chert | | |
| Mueller | 116 | 1 | drill, chert | | |
| Mueller | 117 | 1 | drill, chert | | |
| Mueller | 118 | 1 | drill tip, chert | | |
| Mueller | 119 | 1 | point, chert | | |
| Mueller | 120 | 1 | point, chert | | |

001117

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 121 | 1 | point, chert | | |
| Mueller | 122 | 1 | point, chert | | |
| Mueller | 123 | 1 | point, chert | | |
| Mueller | 124 | 1 | point, chert | | |
| Mueller | 125 | 1 | point, chert | | |
| Mueller | 126 | 1 | point, chert | | |
| Mueller | 127 | 1 | point, chert | | |
| Mueller | 128 | 1 | point, chert | | |
| Mueller | 129 | 1 | point, chert | | |
| Mueller | 130 | 1 | point, chert | | |
| Mueller | 131 | 1 | point, chert | | |
| Mueller | 132 | 1 | point, chert | | |
| Mueller | 133 | 1 | point, chert | | |
| Mueller | 134 | 1 | point, chert | | |
| Mueller | 135 | 1 | point, chert | | |
| Mueller | 136 | 1 | point, chert | | |
| Mueller | 137 | 1 | point, chert | | |
| Mueller | 138 | 1 | point, chert | | |
| Mueller | 139 | 1 | point, chert | | |
| Mueller | 140 | 1 | point, chert | | |
| Mueller | 141 | 1 | point, chert | | |
| Mueller | 142 | 1 | point, chert | | |
| Mueller | 143 | 1 | point, chert | | |
| Mueller | 144 | 1 | point tip, quartz | | |
| Mueller | 145 | 1 | biface, chert | | |
| Mueller | 146 | 1 | biface, chert | | |
| Mueller | 147 | 1 | biface, chert | | |
| Mueller | 148 | 1 | biface, chert | | |
| Mueller | 149 | 1 | lg. stemmed point/knife | reworked; weathered obsid | |
| Mueller | 150 | 1 | lg. point, obsidian | probably eared | |
| Mueller | 151 | 1 | Humboldt point, chert | par.oblique, long,thin | |

001116

| essno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 152 | 1 | concave base point | basalt | |
| Mueller | 153 | 1 | corner notch point, obsid | weathered, coated? | |
| Mueller | 154 | 1 | point, obsidian | Rose Spring | |
| Mueller | 155 | 1 | point, basalt | Desert Side-notched | |
| Mueller | 156 | 1 | biface/tool | obsidian | |
| Mueller | 157 | 1 | biface/tool | obsidian | |
| Mueller | 158 | 1 | biface/tool | obsidian | |
| Mueller | 159 | 1 | biface/tool | basalt | |
| Mueller | 160 | 1 | biface/tool | basalt | |
| Mueller | 161 | 1 | biface/tool | basalt | |
| Mueller | 162 | 1 | point, chert | Rose Spring | |
| Mueller | 163 | 1 | point, chert | Rose Spring | |
| Mueller | 164 | 1 | point, chert | Rose Spring | |
| Mueller | 165 | 1 | point, chert | Elko | |
| Mueller | 166 | 1 | point, chert | Elko | |
| Mueller | 167 | 1 | point, chert | Elko | |
| Mueller | 168 | 1 | blade/knife | chert | |
| Mueller | 169 | 1 | point, unfinished? | chert | |
| Mueller | 170 | 1 | incized stone | basalt | |
| Mueller | 171 | 1 | lg. point/knife tip | chert, unfinished | |
| Mueller | 172 | 1 | convex uniface | chert | |
| Mueller | 173 | 1 | serrated point?, incomp. | chert or brown obsid. | |
| Mueller | 174 | 1 | biface/tool | chert | |
| Mueller | 175 | 1 | biface/tool | chert | |
| Mueller | 176 | 1 | biface/tool | chert | |
| Mueller | 177 | 1 | biface/tool | chert | |
| Mueller | 178 | 1 | biface/tool | chert | |
| Mueller | 179 | 1 | horn, bighorn sheep | | |
| Mueller | 180 | 1 | Promontory peg | wood | |
| Mueller | 181 | 1 | Promontory peg | wood | |
| Mueller | 182 | 1 | Promontory peg | wood | |

001119

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 183 | 1 | Promontory peg | wood | |
| Mueller | 184 | 1 | Promontory peg | wood | |
| Mueller | 185 | 1 | Promontory peg | wood | |
| Mueller | 186 | 1 | Promontory peg | wood | |
| Mueller | 187 | 1 | Promontory peg | wood | |
| Mueller | 188 | 1 | Promontory peg | wood | |
| Mueller | 189 | 1 | Promontory peg | wood | |
| Mueller | 190 | 1 | Promontory peg | wood | |
| Mueller | 191 | 1 | Promontory peg | wood | |
| Mueller | 192 | 1 | Promontory peg | wood | |
| Mueller | 193 | 1 | Promontory peg | wood | |
| Mueller | 194 | 1 | Promontory peg | wood | |
| Mueller | 195 | 1 | Promontory peg | wood | |
| Mueller | 196 | 1 | Promontory peg | wood | |
| Mueller | 197 | 1 | Promontory peg | wood | |
| Mueller | 198 | 1 | Promontory peg | wood | |
| Mueller | 199 | 1 | Promontory peg | wood | |
| Mueller | 200 | 1 | Promontory peg | wood | |
| Mueller | 201 | 1 | Promontory peg | wood | |
| Mueller | 202 | 1 | Promontory peg | wood | |
| Mueller | 203 | 1 | Promontory peg | wood | |
| Mueller | 204 | 1 | Promontory peg | wood | |
| Mueller | 205 | 1 | Promontory peg | wood | |
| Mueller | 206 | 1 | Promontory peg | wood | |
| Mueller | 207 | 1 | Promontory peg | wood | |
| Mueller | 208 | 1 | Promontory peg | wood | |
| Mueller | 209 | 1 | Promontory peg | wood | |
| Mueller | 210 | 1 | Promontory peg | wood | |
| Mueller | 211 | 1 | Promontory peg | wood | |
| Mueller | 212 | 1 | Promontory peg | wood | |
| Mueller | 213 | 1 | Promontory peg | wood | |

001120

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 214 | 1 | Promontory peg | wood | |
| Mueller | 215 | 1 | Promontory peg | wood | |
| Mueller | 216 | 1 | Promontory peg | wood | |
| Mueller | 217 | 1 | Promontory peg | wood | |
| Mueller | 218 | 1 | Promontory peg | wood | |
| Mueller | 219 | 1 | Promontory peg | wood | |
| Mueller | 220 | 1 | Promontory peg | wood | |
| Mueller | 221 | 1 | Promontory peg | wood | |
| Mueller | 222 | 1 | Promontory peg | wood | |
| Mueller | 223 | 1 | Promontory peg, tip | wood | |
| Mueller | 224 | 1 | Promontory peg, tip | wood | |
| Mueller | 225 | 1 | Promontory peg, tip | wood | |
| Mueller | 226 | 1 | bone awl | | |
| Mueller | 227 | 1 | bone awl | | |
| Mueller | 228 | 1 | horn frag, bighorn sheep | charred?, broken | |
| Mueller | 229 | 1 | bead, yellow glass | round | |
| Mueller | 230 | 1 | ball, pine pitch | marble size | |
| Mueller | 231 | 1 | corn cob frag. | 8 row? | |
| Mueller | 232 | 1 | corn kernals, 11 | red and yellow, dent | |
| Mueller | 233 | 1 | carnivore? tooth | | |
| Mueller | 234 | 1 | shaped bone/tooth frag. | | |
| Mueller | 235 | 1 | artiodactyl tooth frag | | |
| Mueller | 236 | 1 | human tooth, drilled | lower incisor? | |
| Mueller | 237 | 1 | rabbit skull w/feather | blue thread, glue | |
| Mueller | 238 | 1 | flat stone w/ochre marks | caliche or tufa coated? | |
| Mueller | 239 | 1 | ochre pieces, 5 | w/stone (238) | |
| Mueller | 240 | 1 | unifacial flake tool | photo w/phalanges | |
| Mueller | 241 | 1 | bone, human/bear? | phalange | |
| Mueller | 242 | 1 | bone, human/bear? | phalange | |
| Mueller | 243 | 1 | bone, human/bear? | phalange | |
| Mueller | 244 | 1 | lava rock, red | unmo | |

001121

| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 245 | 1 | hide scrap | | |
| Mueller | 246 | 1 | hide scrap | | |
| Mueller | 247 | 1 | hide scrap | | |
| Mueller | 248 | 1 | hide scrap | | |
| Mueller | 249 | 1 | rodent fur cord frag | | |
| Mueller | 250 | 1 | hide scrap, deer? | | |
| Mueller | 251 | 1 | small bundle of hair? | rust colored | |
| Mueller | 252 | 1 | small fiber quid | | |
| Mueller | 253 | 1 | small fiber quid | | |
| Mueller | 254 | 1 | wrapped sagebrush rope | | |
| Mueller | 255 | 1 | sagebrush rope | | |
| Mueller | 256 | 1 | hide? cordage frag | | |
| Mueller | 257 | 1 | hemp ? cordage | | |
| Mueller | 258 | 1 | hemp ? cordage | | |
| Mueller | 259 | 1 | hemp ? cordage | | |
| Mueller | 260 | 1 | hemp ? cordage | | |
| Mueller | 261 | 1 | hemp ? cordage w/hide | | |
| Mueller | 262 | 1 | hemp ? cordage w/twig | | |
| Mueller | 263 | 1 | juncus ? cordage | | |
| Mueller | 264 | 1 | modern ? rope | | |
| Mueller | 265 | 1 | unifacial tool, chert | 'W.T.1' written on | |
| Mueller | 266 | 1 | smoothing/hammerstone | | |
| Mueller | 267 | 1 | basalt geode-like frag. | | |
| Mueller | 268 | 1 | long rubbing stone, white | | |
| Mueller | 269 | 1 | long rubbing stone, red | | |
| Mueller | 270 | 1 | shaft staightener, pumice | | |
| Mueller | 271 | 1 | shaft staightener, pumice | | |
| Mueller | 272 | 1 | shaft staightener, pumice | | |
| Mueller | 273 | 1 | shaft staightener, pumice | | |
| Mueller | 274 | 1 | lg. side-notched point | chert | |
| Mueller | 275 | 1 | point, chert | Elko | |

001122

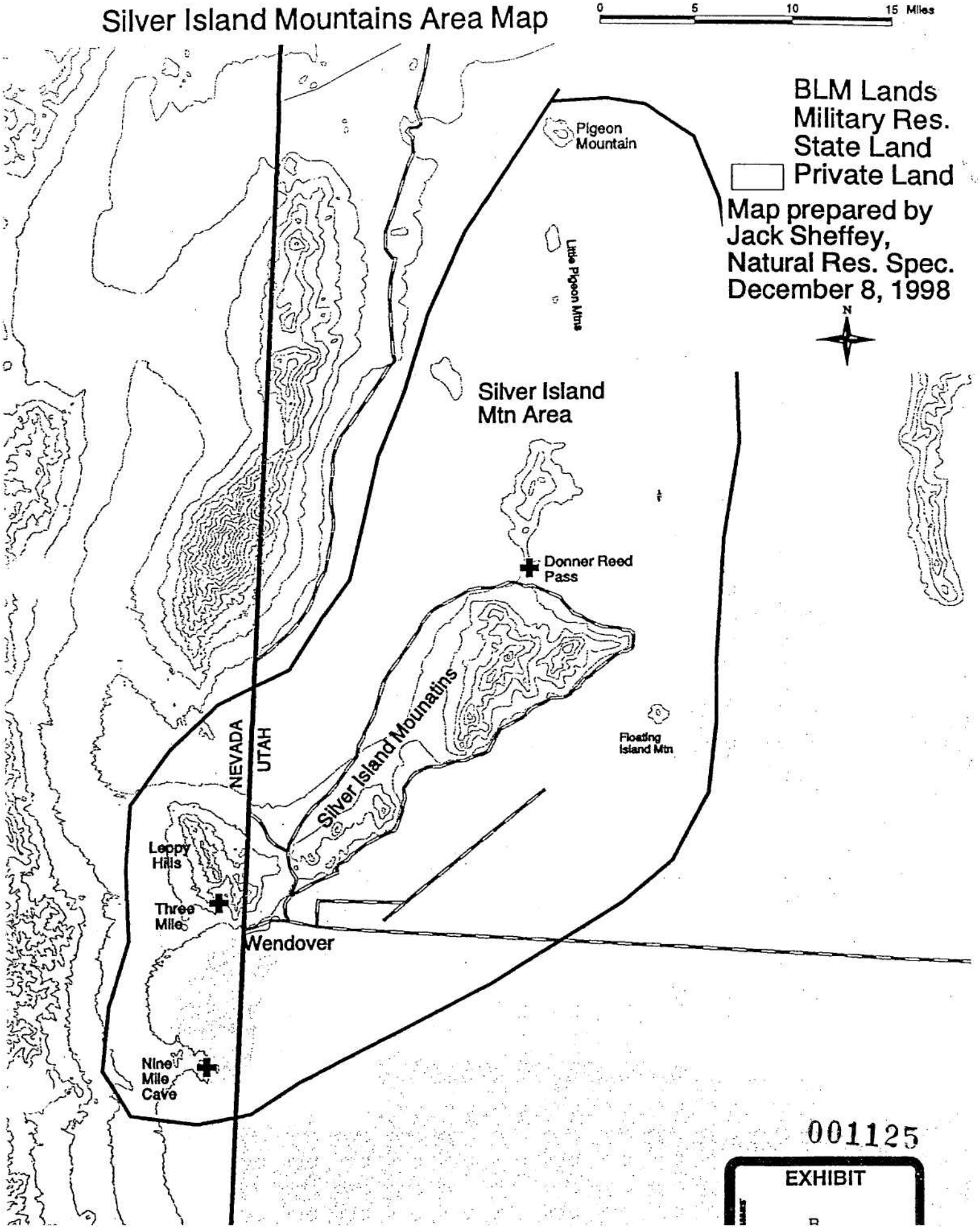
| Accessno | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 276 | 1 | point, chert | Elko | |
| Mueller | 277 | 1 | point, chert | Elko | |
| Mueller | 278 | 1 | point, chert | Elko | |
| Mueller | 279 | 1 | point, chert | Elko | |
| Mueller | 280 | 1 | point, chert | Elko | |
| Mueller | 281 | 1 | point, chert | Humboldt concave | |
| Mueller | 282 | 1 | point, chert | Humboldt concave | |
| Mueller | 283 | 1 | point, chert | Humboldt concave | |
| Mueller | 284 | 1 | point, chert | unidentified | |
| Mueller | 285 | 1 | point, chert | unidentified | |
| Mueller | 286 | 1 | point, chert | unidentified | |
| Mueller | 287 | 1 | point, chert | unidentified | |
| Mueller | 288 | 1 | coprolite, human or bear | full of coarse fiber | |
| Mueller | 289 | 1 | long point/blade tip | brown chert w/white tip | |
| Mueller | 290 | 1 | ungulate femur head | modern elk roast | |
| Mueller | 291 | 1 | antler tine | used as flaker ? | |
| Mueller | 292 | 1 | artio. bone end, cut | hollowed, prehist. | |
| Mueller | 293 | 1 | lg. fauna rib bone | cut, modern | |
| Mueller | 294 | 1 | bird bone tube | cut, polished | |
| Mueller | 295 | 1 | shaped antler/horn | cut, smoothed | |
| Mueller | 296 | 1 | bird bone end, cut | prehistoric | |
| Mueller | 297 | 1 | subrectang. bone piece | shaped, gaming ? | |
| Mueller | 298 | 1 | incized bone piece | shaped, gaming ? | |
| Mueller | 299 | 1 | lg. bone awl | w/joint end | |
| Mueller | 300 | 1 | lg. bone awl | w/joint end | |
| Mueller | 301 | 1 | long thin bone awl | | |
| Mueller | 302 | 1 | smaller bone awl | | |
| Mueller | 303 | 1 | smaller bone awl | rabbit | |
| Mueller | 304 | 1 | thin flat bone awl | | |
| Mueller | 305 | 1 | arrow/dart shaft piece | cut, wood or cane ? | |
| Mueller | 306 | 1 | thin twig w/cord on end | | |

001123

| ;essn; | Catno | Count | Descript | Notes | Detail |
|---|---|---|---|---|---|
| Mueller | 307 | 1 | whittled stick w/cord on | | |
| Mueller | 308 | 1 | flat, shaped wood frag | | |
| Mueller | 309 | 1 | arrow/dart shaft frag | rounded end & hatch marks | |
| Mueller | 310 | 1 | notched stick w/cord on | shaped, snare piece | |
| M eller | 311 | 1 | notched stick w/cord on | shaped, snare piece | |
| Mueller | 312 | 1 | notched stick (no cord) | shaped, snare piece | |
| Mueller | 313 | 1 | notched stick (no cord) | shaped, snare piece | |
| Mueller | 314 | 1 | bone awl frag, charred | | |
| eller | 315 | 1 | sinew wrapped cane piece | | |
| Mueller | 316 | 1 | arrow nock end | sinew wrapped | |
| | | 316 | Total items | | |

001124

# Silver Island Mountains Area Map




001125

EXHIBIT

FILED
CLERK, U.S. DISTRICT COURT
27 JAN 99 AM 10: 43
DISTRICT OF UTAH
BY: DEPUTY CLERK

RECEIVED CLERK
JAN 22 1999
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | |
| vs. | : | |
| THREE HUNDRED SIXTEEN HISTORIC AND PREHISTORIC NATIVE AMERICAN ARTIFACTS, | : | WARRANT OF ARREST *IN REM* |
| Defendants. | : | 2:99CV 0038S |

TO: UNITED STATES MARSHAL FOR THE DISTRICT OF UTAH
AND ANY AUTHORIZED OFFICER OF THE UNITED STATES

WHEREAS, a verified complaint for forfeiture *in rem* (complaint) was filed in the United States District Court for the District of Utah alleging that the above-named defendants are archeological resources removed from public lands in violation of 16 U.S.C. § 470ee and therefore subject to forfeiture to the United States pursuant to 16 U.S.C. § 470gg,

YOU ARE HEREBY COMMANDED to seize the above-captioned defendants, three hundred sixteen historic and prehistoric native american artifacts (defendant property), and detain them in your custody until further order of this court;

AND, FURTHER, TO SERVE copies of the complaint, warrant, and accompanying documents in a manner consistent with the principles of service of process of an action *in rem* under the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules) to all parties who may have an interest in the defendant property, including, but not limited to:

I hereby certify that the annexed document is a true and correct copy of the original on file in this office.
ATTEST: MARKUS B. ZIMMER
Clerk, U.S. District Court
District of Utah
By: Deputy Clerk
11-7-00

Christa Bollmann
3701 Fairview Road
Reno, Nevada 89511

Nevada State Museum
c/o Amy Danzie
600 North Carson Street
Carson City, Nevada 89710

AND TO GIVE DUE NOTICE to all persons and entities claiming an interest in defendant property, or knowing any reasons why the defendant property should not be forfeited in accordance with the complaint, by publishing notice in a newspaper of general circulation within the District of Utah once each week for three consecutive weeks. Said notice shall provide that: 1) within ten days after process has been executed, all persons and entities claiming an interest in the defendant property shall file with the clerk of the above-entitled court verified written claims setting forth the nature and extent of their interest in the defendant property by virtue of which the claimants demand the right to defend this action; 2) such persons and entities shall file written answers to the complaint with the clerk of the court within twenty days after the filing of said claims pursuant to the provisions of Supplemental Rule C(6)(3); and 3) that upon their failure to file such verified claims and answers, default be entered pursuant to Fed. R. Civ. P. 55(a) and seizure and condemnation proceed as prayed in the complaint. Copies of the claims and answers shall be served upon the plaintiff at 185 South State Street, Suite 400, Salt Lake City, Utah 84111.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §§ 1602-1619. All persons and entities who have an interest in the defendants may, in addition to filing claims, or in lieu of the filing of claims, submit petitions for remission or mitigation of the forfeiture for a non-judicial determination of this action pursuant to 28 C.F.R. Part 9.

A RETURN of this warrant shall be made to the court within ten days of execution identifying the individuals upon whom copies have been served, the manner employed and a statement as to the satisfaction of the orders issued herein.

DATED this 26th day of January 1999.

BY THE COURT:

Judge
United States District Court

RECEIVED CLERK

JUN 3 - 1999

JUN - 3 1999

U.S. DISTRICT COURT

FILED

DISTRICT OF UTAH

BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | 2:99CV 0038S |
| vs. | : | |
| THREE HUNDRED SIXTEEN HISTORIC AND PREHISTORIC NATIVE AMERICAN ARTIFACTS, | : | DEFAULT JUDGMENT AND ORDER OF FORFEITURE |
| Defendants. | : | |

Plaintiff has filed a motion for default judgment and order of forfeiture in the above case with an accompanying memorandum. Based on the government's motion and memorandum, it appears that copies of the complaint were served on all known interested parties in this case, notice by publication was made, and no responsive pleadings have been filed with the court.

Having considered the motion and memorandum, and based on the records of the court and the declaration of Assistant United States Attorney Bill Ryan submitted with plaintiff's application for default, the court finds that:

1. Process was duly issued in this case and the defendant property was seized by the United States Marshal's Service pursuant to said process.

Entered on docket
6/9/99 by:
Deputy Clerk

2. Service of the verified complaint for forfeiture *in rem* (complaint) and warrant of arrest *in rem* (warrant) was made on all known interested parties.

3. Notice of seizure appeared by publication in newspapers of general circulation within the districts of Utah and Nevada.

4. No person or entity has filed a claim and answer in response to plaintiff's complaint.

5. Default was entered by the clerk of the court against all persons and entities who might claim an interest in the defendant property.

Based on the above findings, and the court being otherwise fully advised in the matter,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Default judgment be and the same is entered against 316 historic and prehistoric Native American artifacts.

2. Any and all right, title or interest of all persons and entities is forever barred with respect to these artifacts; and

3. The artifacts are forfeited to the United States of America, to be disposed of according to law.

IT IS HEREBY CERTIFIED pursuant to 28 U.S.C. § 2465 that reasonable cause existed in this case for seizure of the defendant property and this case is dismissed.

SO ORDERED this 9th day of June 1999.

BY THE COURT:

David Sam

DAVID SAM, Judge
United States District Court

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The Salt Lake Tribune
Utah



# Artifacts in Collection Were Illegally Obtained

USWEST Dex
Internet Yellow Pages



BY MICHAEL VIGH
THE SALT LAKE TRIBUNE

The collection of American Indian tools, rare skin bags with seeds, potsherds, paint pigment, leather pouches and moccasins, is a treasure.

Curators were surprised and thrilled when a woman appeared at a Nevada museum in Carson City to donate all 316 artifacts after collection owner Stephan Mueller died while on an excursion in a remote area of northern Utah.

But federal investigators said the artifacts, valued at more than $10,000, had been illegally excavated from public lands in Utah and Nevada in violation of the federal Archaeological Resource Protection Act.

The woman who donated the collection vanished, and prosecutors began a lengthy civil court action to seize the artifacts for the government.

Mueller, 31, and his girlfriend, Pensri Perkins, 21, both of Wendover, Nev., had driven to Utah's Silver Island Mountains, located west of the Great Salt Lake Desert near the Nevada border on March 20, 1995.

Investigators say the couple got into trouble when their pickup got stuck in the mud. Five days after they disappeared, their bodies were found several miles from the truck. The two had died of hypothermia on the desolate border of Tooele and Box Elder counties.

Months later, Mueller's mother, Christa Bollman, donated her son's collection to the Nevada State Museum in Carson City. Bollman purportedly told museum officials her son "had been digging in a dry cave at night to avoid detection by federal officials," according to court documents.

Museum workers notified the Bureau of Land Management to determine if the collection had been illegally excavated.

"We wanted to protect the collection, and we have taken great care of it," said Amy Dansie, acting curator of anthropology at the museum.

That call touched off an exhaustive three-year investigation headed by BLM Special Agent Rudy Mauldin. Initially, Mauldin could not locate Mueller's friends, and he never did find his mother.

But after 2 1/2 years of dead ends and frustration, Mauldin finally managed to find several of Mueller's former associates, including a man being held in the Salt Lake County Jail on an unrelated case. Through those witnesses, Mauldin was able to determine who was involved in the illegal digs and where they had occurred.

Finally, two of Mueller's friends admitted they helped dig up the artifacts. One man took BLM agents to several of the spots where the items had been looted, near Wendover, Utah, as well as in Nevada and on the Air Force's testing and bombing range.

After establishing the artifacts were excavated from federal lands, officials filed a petition to seize the collection. Court documents were filed in Salt Lake City's U.S. District Court because most of the artifacts had been unearthed in Utah.

None of Mueller's friends were prosecuted because the five-year statute of limitations had expired. The artifacts had all been dug up in the late 1980s and early '90s, Mauldin said.

Under federal law, the penalty for violation of the Archaeological Resource Protection Act, a grave robber can be imprisoned for up to two years and fined $250,000.

Mueller had no known job when he died, but he was purportedly a member of a music band. "He seemed to do little odd jobs," Mauldin said. "It was very possible that he sold off some of his major finds."

However, an obituary published in The Salt Lake Tribune on March 28, 1995, listed Mueller as a maintenance engineer. He apparently did not have a criminal record of illegal digging.

Mauldin said archaeological crimes are difficult to prosecute because items are stolen in remote, sparsely populated areas, usually meaning no witnesses.

"That makes it important for crime scenes to be processed thoroughly and completely," he said, adding the support he receives from the U.S. Attorney's Office in Salt Lake City makes cracking the often-difficult cases possible.

Mauldin, who has investigated archaeological crimes for the past eight years, said this case is unusual because of the collection's size and value.

"An extremely conservative estimate of the worth of the collection is

**Today's Headlines:**

Surprise Meeting Dismays Some on School Task Force

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Kirby: Moab Fraught With Danger And Foreigners

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West Valley Neighborhoods Plan Block Parties for 'Night Out Against Crime'

Green-Space Lovers Ask Midvale to Reconsider Selling Part of City Park to Boys & Girls Club

Broken Pipeline Subjects Neighbors to Noisy, All-Night Repairs

Lobbyists to Restock Leavitt's Campaign Fund At $10,000-a-Head 'Cowboy Lifestyle' Weekend

Ex-Marine Bennett to Receive a Pauper's Grave

Shelters for Soldiers in Chemical Attacks?

Colorado Cave Is Rich in Bones Left

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"An extremely conservative estimate of the worth of the collection is $10,800," he said.

The collection is eclectic, most likely made up of Shoshone, Ute and Goshute tribal ruins. The most valuable items are rawhide bundles and leather seed bags.

In June, the artifacts were officially turned over to the custody of the government. Mauldin said the collection will remain in Carson City -- where, coincidentally, the museum is also a curator for the BLM.

"To show our appreciation for their willingness to help us out," he said, "the collection will be displayed at the museum for an indeterminate amount of time."

Rich in Bones Left by Beasts of the Ice Age

For the Record

Correction

State of the State

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United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240

AUG 9 1995

In Reply Refer To:
8140 (340)

Dr. James E. Fletcher
Chair, Dept. Recreation & Parks
Management
California State University
Room 130 Aymer J. Hamilton
Chico, CA 95929-0560

Dear Dr. Fletcher:

Enclosed you will find a fact sheet about an important case relating to preservation of archaeological resources and the need to provide clear college policy and programs for their protection. We urge you to share this information with your faculty and administrators and to consider ways in which your institution can take appropriate steps to prevent similar incidents.

Effective stewardship of archaeological resources helps to insure that all our citizens and future generations have opportunities to understand and appreciate our shared cultural heritage. Colleges and universities conduct essential research and educational programs that expand our knowledge about the past and train professionals needed in the future by agencies concerned with public archaeology. The protection of archaeological sites should be a fundamental part of those academic efforts.

Thank you for your assistance in this matter and for helping to improve preservation of the Nation's non-renewable archaeological heritage. If we can be of service in any way, please contact Dr. Marilyn W. Nickels or Dr. John G. Douglas, Cultural Heritage and Recreation Group, at (202) 452-0330.

Sincerely,

original signed by
W. Hord Tipton
Assistant Director
Resource Use + Protection

Enclosure

U.S. Department of the Interior, National Park Service
Departmental Consulting Archeologist/Archeological Assistance Division
Fact Sheet--March 1, 1995

# SUBJECT: Archeological Resources Protection and Educational Programs

Recently the College of Santa Fe in Santa Fe, New Mexico was involved in an unfortunate yet avoidable incident.

## A Federal Case

In April 1992, the College of Santa Fe's Outdoor Recreation Program, under the direction of a staff member, organized a camping and sightseeing trip for a group of students. Their destination was Grand Gulch in southeastern Utah, which is an area administered by the U.S. Bureau of Land Management (BLM). Grand Gulch is widely known for its impressive concentration of prehistoric Native American archeological resources.

Under staff supervision, the students departed the Santa Fe campus in two college vans on April 17, 1992. Upon arrival at the Pine Canyon Wilderness Study Area within the Grand Gulch Complex, they set up camp.

On the morning of April 19, the staff member and a student left the camp to hike. They located two archeological sites in Pine Canyon, each with significant evidence of prehistoric use. While in one of the sites, they disturbed the floor by sifting through the dirt and displacing stones. The student also used a wooden stake to dig into several stone storage compartments. He removed a partial cranium of a prehistoric Native American child while the staff member observed. The student took the prehistoric cranium back to the campsite and displayed it to several members of the group.

On April 20, the group departed for Santa Fe. The student, still in possession of the prehistoric cranium, rode in the van that the staff member was driving. The student showed the cranium to others in the van and displayed it on the dashboard. After arriving on campus, the student placed the cranium in a cabinet in the Outdoor Recreation Office.

Neither the staff member nor the student reported anything about the prehistoric cranium to College of Santa Fe administrators. Within a few days, however, another student complained to the administration about the incident. The College promptly notified Federal officials.

The BLM investigated the case and presented it to the United States Attorney's Office in Utah. In March 1993, the student and the staff member were indicted by a Federal Grand Jury on felony charges. Subsequently, the student pled guilty to a felony violation of the Archaeological Resources Protection Act of 1979 (ARPA). ARPA prohibits excavating, removing, damaging, or altering archeological resources on public lands without a permit. ARPA also prohibits other acts relating to archeological resources. The staff member pled guilty to a misdemeanor violation of ARPA (aiding and abetting in the illegal transportation of an archeological resource). The student's sentence was three years felony probation, performance of 200 hours of community service, payment of $5000 restitution to the BLM, and a $1000 fine. The staff member's sentence was one year probation, performance of 120 hours of community service, and payment of $500 restitution to the BLM.



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As sponsors of the college-sanctioned outing, the College of Santa Fe entered into a civil settlement with the BLM. The College agreed to pay a civil penalty of $5000 under ARPA. As part of the settlement, the College also agreed to organize and host a conference on archeological protection education.

The Conference

The College of Santa Fe Conference on Archeological Protection Education was held June 10 and 11, 1993, at the college campus. The 21 invited participants represented the College of Santa Fe, the University of Connecticut, Cabrillo College in California, the Department of Justice, the Bureau of Land Management, the National Park Service, the U.S. Forest Service, the Hopi Tribe, the Navajo Nation, the Arizona State Historic Preservation Office, and Archeological Resource Investigations (a private consulting firm).

Three primary topics were addressed during the conference:

(1) archeological protection education programs of Federal, State, and Tribal agencies;
(2) strategies for college level archeological protection education; and
(3) strategies for dissemination of information to colleges regarding archeological protection education.

**Why Should Colleges Develop an Institutional Policy?**

The incident involving the College of Santa Fe is by no means unique. Student life programs, outdoor recreation, field schools, and various college-sponsored research trips bring thousands of college students into contact with archeological sites every year.

This fact sheet has been prepared to provide you with accurate information about the College of Santa Fe case and the serious criminal/civil sanctions imposed; to present a draft policy statement, the implementation of which can prevent colleges and universities from becoming involved in such incidents; and to summarize the many positive opportunities to enjoy archeological sites being offered by State and Federal agencies.

Archeology is the systematic study of the material remains of human behavior in the past. Archeological excavation and the investigation of earlier cultures make an enormous contribution to our understanding of the forces and peoples that shape our world. Scientific techniques of investigation and analysis are improving at a rapid rate. The amount of information which can be obtained from the study of a site today is a fraction of what will be possible in the future. Therefore, it is essential that we preserve these invaluable and irreplaceable cultural resources. It is only natural that institutions of higher learning should lead the way in the endeavor.

Because archeological sites cannot regenerate or be replaced, any damage to them, including removing artifacts, robs all citizens of part of their cultural heritage. In addition, the illegal trafficking in Native American human remains and cultural items denigrates and disparages the cultural values and patrimony of living peoples.

Cultural resources awareness and protection encourages understanding and appreciation of the diverse histories of all American peoples. It is not simply concerned with the preservation of cultural artifacts, but with demonstrating the ways in which past cultures are relevant to all living peoples. Sensitivity to cultural resources also encourages us to explore various perspectives held by indigenous peoples and



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ethnic groups of the Americas. In attempting to understand their pasts, we acknowledge their contributions to the making of nations and communities.

## Legal Consequences

The lack of college policy on cultural resources protection may result in acts which harm archeological sites or other kinds of cultural resources. Such acts have serious legal consequences, as the College of Santa Fe case illustrates.

Damaging or altering archeological sites in any manner, or removing any archeological resource, or attempting any such act, may result in civil or criminal penalties under Federal, Tribal, State, and local laws. Federal statutes include the Antiquities Act, ARPA, the National Marine Sanctuaries Act, and the Native American Graves Protection and Repatriation Act. Harming archeological sites also may result in civil or criminal penalties under Federal statutes which prohibit theft or injury of government or Tribal property.

The maximum penalties for violations of these Federal laws range up to ten years imprisonment and a $250,000 fine. Criminal penalties for violation of Tribal, State, or local laws protecting archeological sites vary by locality. In many instances, such violations are punishable as felonies. Violations of ARPA also may result in civil penalties and forfeiture of property. Civil penalties may be assessed for monetary amounts representing the damage caused to archeological sites. All vehicles and equipment used in violations of ARPA are subject to seizure and forfeiture.

Acts which harm archeological sites tend to produce several other negative consequences. Because of high public interest in archeology and archeological protection, there is a strong potential for adverse publicity regarding violators. There also may be negative reactions from Native Americans or other ethnic groups whose cultural properties have been affected. Finally, opportunities to participate in educational programs involving archeological sites may be lost or curtailed when there is a prior history of behavior harmful to sites.

## Involvement in Cultural Resources Protection

Throughout the country, opportunities abound for students, staff, and faculty to participate in archeological research and activities. Participation in these programs will enhance educational experience and student life. In addition, your institution may benefit by establishing new partnerships with State, Federal, or private agencies while providing research, internship, and volunteer opportunities.

Nationwide, there are many ways for education-oriented groups to learn more about archeology and cultural resources. Most National Park Service units have programs for volunteers in the parks. The BLM "Adventures in the Past" program provides educators with training and curriculum development guidance. The U.S. Forest Service sponsors "Passport in Time," which offers volunteer opportunities in cultural resources management and heritage programs in national forests. The Society for American Archaeology (SAA), Committee on Public Education, publishes a quarterly newsletter on archeology and education, offers teachers' workshops and public sessions at their national meeting. Information about these and other efforts is available through the National Park Service Archeological Assistance Program (AAP). Opportunities and educational guidance in public archeology are published in the Listing of Education in Archeology Programs (LEAP), the quarterly report titled Federal Archeology, the AAP Technical Briefs series, and the Archeological Assistance Studies series.

State Historic Preservation Offices (SHPO) serve as clearinghouses or cultural resources activities and information in each State. Many SHPO's sponsor archeology or heritage preservation celebrations, with a wide range of public activities scheduled during a full week or month. They also have information on private research and contract firms and archeological organizations that welcome volunteers.

Draft Policy Statement for Colleges and Universities

The results of the College of Santa Fe case should encourage you to develop a cultural resources policy statement for your institution. To assist, we have drafted the following sample, which is purposely general in its wording. It is presented only as a guideline to assist you in developing your own policy. You may prefer to describe more thoroughly what constitutes unacceptable behavior. You may wish to spell out more clearly the consequences you intend to impose upon your faculty, staff, and students should they exhibit any negative behavior towards cultural resources.

> "_____ (Institution) is located in an area of rich cultural resources, which include archeological sites. Evidence of past human occupation exists within our own city and throughout the region. Archeological sites consist of material remains that have the potential, given appropriate, detailed, scientific investigation and care, to inform all of us about the past. Such sites also may have commemorative or religious importance to some.
>
> This institution is committed to protecting and preserving our cultural heritage. We require all students, faculty, and staff to be knowledgeable about Federal, State, Tribal, and local laws regarding the protection and preservation of cultural resources. In addition, students, faculty, and staff are required to report possible violations of cultural resources laws to the College and to cooperate in any investigations."

**Our Plea to You**

Situations such as the costly and unpleasant court case in which the College of Santa Fe became involved can be avoided, but only if you develop and support a strong policy that makes your faculty, staff, and students fully aware of your institution's stand on protection of cultural resources.

We urge you to consider the points we have made in this fact sheet and to develop and adopt a policy statement of your own. The participants in the College of Santa Fe Conference on Archeological Protection Education will be happy to assist by answering questions and providing further guidance. For information contact **Richard Waldbauer, Archeological Assistance Division, National Park Service, P.O. Box 37127, Washington, DC 20013-7127; telephone (202) 343-4101.**



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OVERNIGHT MAIL - OVERNIGHT EXPRESS

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| UNITED STATES OF AMERICA<br><br>Complainant,<br><br>v.<br><br>THE COLLEGE OF SANTA FE<br><br>Respondent. | : | Civil Penalty Proceeding<br>Archeological Resources<br>Protection Act of 1979,<br>16 U.S.C. § 470ff |

RECEIVED MAR 1 3 '93 PRESIDENT'S OFFICE COLLEGE OF SANTA FE

NOTICE OF VIOLATION

Pursuant to regulations published at 43 C.F.R. § 7.16, the United States of America, by and through the United States Bureau of Land Management, hereby notifies the College of Santa Fe through its President, James Fries, Ph.D., whose last known address is 1600 St. Michael's Drive, Santa Fe, New Mexico, 87501-5634, that the College of Santa Fe has been named Respondent in a civil penalty proceeding based upon actions which are a violation of the Archeological Resources Protection Act (ARPA), ~~43~~ 16 U.S.C. § 470ff. Respondent should read the attached copy of the statute and regulations which govern this proceeding and explain Respondent's rights. The United States Bureau of Land Management proposes in the civil penalty proceeding against Respondent assessment of a monetary civil penalty in the total sum of $5,00 for the acts and violations described as follows:

Violation: Complainant alleges that agents of Respondent who are subject to the jurisdiction of the United States committed the following violations of the Archeological Resources Protection Act.

COUNT I.

On or about April 19, 1992, during a College of Santa Fe Outdoor Recreation Program field trip to the Grand Gulch area, located in Utah on public lands managed by the United States Bureau of Land Management, a College of Santa Fe student/member of the group, aided and abetted by a College of Santa Fe staff member supervising the group, did excavate and remove human remains from an archeological site in Grand Gulch.

COUNT II.

On or about April 20, 1992, the same two individuals from the College of Santa Fe referred to in Count I did transport the excavated human remains in a College of Santa Fe vehicle from Grand Gulch to the College of Santa Fe in New Mexico.

RESPONSE BY RESPONDENT

Respondent may respond to this Notice of Violation by taking any of the following actions:

1. Pay the proposed civil penalty in the total sum of $5,000;

2. Enter into a Settlement Agreement with the United States;

3. Avail itself of available administrative appeal or judicial review as provided in the attached statute and regulations.

Regardless of the response which Respondent chooses to make, Respondent should read the attached statute and regulations since they govern this proceeding and explain Respondent's rights. If Respondent chooses to take affirmative action in response to this Notice under options, 1, 2, or 3 above, such action must be taken within 45 days of the date of this Notice. All responses should be directed to the undersigned's address, Office of the Regional Solicitor, U.S. Department of the Interior, 6201 Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801) 524-5677. Payment of civil penalties must be made by certified check or money order which is made payable to the "United States Bureau of Land Mangement," unless otherwise provided for in a Settlement Agreement. Failure to respond to this Notice within 45 days will be cause for the issuance of a final assessment decision.

Dated this 12th day of March, 1993.

U.S. BUREAU OF LAND MANAGEMENT

By

DAVID K. GRAYSON
Assistant Regional Solicitor
Office of the Solicitor
Intermountain Region
U.S. Department of the Interior
6201 Federal Building
125 South State Street
Salt Lake City, Utah 84138

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | Civil Penalty Proceeding |
| Complainant, | : | Archeological Resources Protection Act of 1979, 16 U.S.C. § 470ff |
| v. | : | |
| THE COLLEGE OF SANTA FE | : | |
| Respondent. | : | |

SETTLEMENT AGREEMENT
FOR COMPROMISE OF CIVIL PENALTY

The College of Santa Fe acknowledges through its representative James Fries, Ph.D., President, that it is the Respondent in a civil penalty proceeding initiated by a Notice of Violation issued against it dated March 12, 1993, under provisions of the Archeological Resources Protection Act, 16 U.S.C. § 470ff, in which the United States Bureau of Land Management is Complainant. It is charged that on or about April 19, 1992, representatives of the College of Santa Fe excavated certain human remains from Grand Gulch which is on public lands administered by the Bureau of Land Management in violation of the Archeological Resources Protection Act (ARPA). It is also charged that on or about April 20, 1992, such excavated human remains from Grand Gulch were transported to the College of Santa Fe in New Mexico in a College of Santa Fe vehicle in violation of ARPA.

Respondent agrees as follows:

1. That the College of Santa Fe accepts the ARPA civil penalty of $5,000 and waives any right to administrative appeal or judicial review of the penalty under 16 U.S.C. § 470ff;

2. That pursuant to ARPA at 16 U.S.C. § 470ff(a)(1) it is agreed between the parties that the penalty may be mitigated as follows. The College of Santa Fe will be given credit toward such civil penalty for all extraordinary expenses incurred by the College which are directly attributable to the organization, promotion, and hosting of an ARPA training conference for the higher education community during the summer of 1993. It is the understanding of the parties that credited expenses will include the costs of the speakers and participants which the College incurs, plus other actual promotion and hosting costs;

3. That following the conference, the College of Santa Fe will present the BLM with an accounting of what costs indicated in paragraph 2 were. Insofar as those costs exceed $5,000

the civil penalty will be considered settled. If such costs are less than $5,000, the College of Santa Fe will submit the difference with the accounting.

It is understood and agreed that upon execution of this agreement it shall be returned to the Office of the Regional Solicitor, Intermountain Region, 6201 Federal Building, Salt Lake City, Utah 84138.

U.S. BUREAU OF LAND MANAGEMENT, COMPLAINANT

By _____ April 12, 1993
DAVID K. GRAYSON — Date
Assistant Regional Solicitor
Office of the Solicitor
Intermountain Region
U.S. Department of the Interior
6201 Federal Building
125 South State Street
Salt Lake City, Utah 84138

THE COLLEGE OF SANTA FE, RESPONDENT

By _____ March 16, 1993
JAMES FRIES, PH.D. — Date
President, College of Santa Fe
1600 St. Michael's Drive
Santa Fe, New Mexico 87501-5634

THE COLLEGE OF SANTA FE

*Office of the President*

August 5, 1993

Mr. David K. Grayson
Assistant Regional Solicitor
Office of the Solicitor
Intermountain Region
US Department of the Interior
6201 Federal Building
125 South State Street
Salt Lake City, Utah 84138

Dear Mr. Grayson:

Enclosed please find a final accounting of expenses incurred by The College of Santa Fe in organizing, promoting. and hosting a conference focusing on the Archaeological Resources Protection Act which occurred at CSF on June 10-11, 1993. As you will note, the final expense total of $9,966.91 exceeds the civil penalty of $5,000 as referenced in the Settlement Agreement. I would appreciate written notification that the College's obligations have been met in regard to the Settlement Agreement.

Thank you for your assistance.

Sincerely,

James Fries, Ph.D.
President

cc: Mr. Wayne T. Dance
Mr. Stanley K. Kotovsky, Jr.

JF/wh

1600 St. Michael's Drive Santa Fe, New Mexico 87501-5634 (505) 473-6234 FAX: (505) 473-650

United States Department of the Interior

OFFICE OF THE SOLICITOR
SUITE 6201, FEDERAL BUILDING
125 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84138

SEP 3 12 55 PM '93

August 31, 1993

James Fries, Ph.D.
President
The College of Santa Fe
1600 St. Michael's Drive
Santa Fe, New Mexico 87501-5634

Dear Dr. Fries:

Thank you for your letter of August 5, 1993, documenting the expenditures which The College of Santa Fe made in organizing, promoting, and hosting a conference focusing on the Archeological Resources Protection Act which occurred at your college on June 10-11, 1993. This office is satisfied that the college has met its obligations in regard to the Settlement Agreement and we are closing our files on this matter.

Sincerely,

DAVID K. GRAYSON
Assistant Regional Solicitor

cc: Wayne T. Dance, Esq.
Assistant United States Attorney
350 South Main Street, Room 476
Salt Lake City, Utah 84101

James M. Parker
Utah State Director
Bureau of Land Management
324 South State Street, Suite 301
Salt Lake City, Utah 84111

DKG:dlb:08/31/93:Grayson:LtrtoJfries