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FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH  
MAR 31 1999  
BY MARKUS B. ZIMMER, CLERK  
DEPUTY CLERK

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

UNITED STATES OF AMERICA, : 2:99CR 0147C  
Plaintiff, : MISDEMEANOR  
vs. : INFORMATION  
DAVID R. DOSE, :  
Defendant. : VIO. 16 U.S.C. § 470ee(a);  
: 18 U.S.C. § 2  
: ARCHAEOLOGICAL RESOURCES  
: PROTECTION ACT VIOLATION;  
: AIDING AND ABETTING

The United States Attorney charges:

COUNT I

On or about the 1st day of April, 1994, in the Central  
Division of the District of Utah, on public lands of the United  
States, to wit, Glen Canyon National Recreation Area, defendant

DAVID R. DOSE

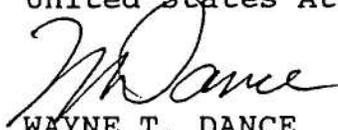
did knowingly aid and abet others who, without a permit issued  
under the Archaeological Resources Protection Act, did knowingly  
excavate, damage, and alter an archaeological resource, namely,  
Crumbling Kiva Ruin, a prehistoric habitation and storage site

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dating to about A.D. 1200-1250; all in violation of Title 16,  
United States Code, Section 470ee(a), and Title 18, United States  
Code, Section 2.

DATED this 31<sup>ST</sup> day of March, 1999.

PAUL M. WARNER  
United States Attorney



WAYNE T. DANCE  
Assistant United States Attorney

**ASSESSMENT OF DAMAGE TO THE ARCHAEOLOGICAL RESOURCES  
AT  
CRUMBLING KIVA (42SA597),  
GLEN CANYON NATIONAL RECREATION AREA, UTAH**

**APRIL 26, 1995**

**Christine E. Goetze  
Archaeologist**

**National Park Service  
Resource Management Division  
Glen Canyon National Recreation Area  
P.O. Box 1507  
Page, Arizona 86040**

**001149**

#### SUMMARY

On April 1, 1994, an episode of illegal excavation of archaeological resources without a permit as required by the Archaeological Resources Protection Act of 1979 as amended (ARPA) occurred in Glen Canyon National Recreation Area (NRA), Utah. The illegal digging was conducted by a group of middle school juveniles who were part of the Kellogg Archaeological Society from Kellogg, Idaho. Crumbling Kiva (42SA597), the site in question, was subjected to digging in at least eight areas by the group. This resulted in the disturbance of an estimated 16.0 cubic feet of soil which cumulatively covered 38 square feet of the ground surface. The following values were determined as a result of this unauthorized activity:

<del>Restoration and Repair</del>	<del>\$1079.80</del>
Commercial Value of Artifacts	\$ 0.00
Archaeological Value	\$7686.72

Monetary damages for ARPA violations is determined by combining (1) the cost of restoration and repair and the commercial value of the resource; or (2) the cost of restoration and repair and the archaeological value of the resource. In example (1) the amount is \$1,079.80 and in example (2) the amount is \$8,766.52.

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## INTRODUCTION

On November 8, 1994, Glen Canyon National Recreation Area (NRA) Criminal Investigator Jim Houseman requested that I provide an archaeological damage assessment for cultural resources disturbed by unauthorized digging. The illegal event occurred on April 1, 1994, at Crumbling Kiva (42SA597), a prehistoric Anasazi site located in Forgotten Canyon, Glen Canyon NRA, San Juan County, Utah. The unauthorized digging was perpetrated by the Kellogg Archaeological Society, a group of middle school juveniles from Kellogg, Idaho, who were on a week-long field trip in Glen Canyon NRA. The digging was condoned and encouraged by the group's leader, David Dose, who was the teacher in charge of the field trip.

Through a confidential source, Investigator Houseman had learned of the violation and obtained a videotape from David Dose, documenting the disturbance. I initially viewed the videotape on November 8, 1994 and specifically identified the site as Crumbling Kiva, a ruin I have professionally visited at least a half dozen times over the past 18 months.

On December 5, 1994, myself and Investigator Houseman visited Crumbling Kiva in an effort to collect any evidence and identify areas of disturbance that could be attributed to the Kellogg school group. This proved impossible as the site is heavily visited during the summer months and too much time and too many people had passed through since the Kellogg group's visit. Therefore, it was decided that the videotape would serve as the primary source of evidence on which to conduct the archaeological damage assessment.

On January 4, 1995, I intensively reviewed the videotape on a second by second basis, documenting each visible instance of disturbance, and identifying the structure and area in which it occurred. Although the videotape shows that Structures 3, 4, 5, 6, 7, and 8 were all entered by the group during their visit, actual fill disturbance that could be documented on the videotape occurred in Structures 4, 5, 6, and 7 only. My review uncovered eight specific instances of surface and subsurface disturbance in these structures. In addition, four separate vegetal remains in the form of prehistoric corncobs were displayed for the camera. No other unequivocally prehistoric artifacts were seen in the video.

On April 4, 1995, Park Archaeologist Tim Burchett and Investigator Houseman had an opportunity to meet with David Dose at Crumbling Kiva. Dose was back in the Recreation Area with a new group of juveniles, and agreed to provide further information concerning the specific areas of site disturbance that had occurred in April 1994.

Based on my review of the videotaped evidence, along with the information provided by David Dose, an estimate of the area and volume of each instance of disturbance was made. A detailed discussion of this damage, along with a monetary assessment of the loss and damage caused by the illegal digging carried out by the Kellogg Archaeological Society at the site, is the subject of the remainder of this report.

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## AREAS OF DAMAGE

### ARCHAEOLOGICAL SIGNIFICANCE

Crumbling Kiva (42SA597), the site where unauthorized digging of archaeological materials took place, is located in the south fork of Forgotten Canyon in the Uplake District of Glen Canyon National Recreation Area (NRA) (Figure 1). It is situated on a sheltered ledge in a south-facing overhang, approximately 2.5 miles from the mouth of the canyon. Prior to the rise in the waters of Lake Powell, the ledge was approximately 100 feet above the streambed. Depending on the water level, it is currently only 10 to 20 feet above the Lake, providing easy access for boaters.

The site was originally recorded in 1958 during the Upper Colorado-River Basin Archaeological Salvage Project by the University of Utah (Fowler et al. 1959), and more extensively documented and excavated the following year (Lipe et al. 1960) (Appendix A). At the time of excavation, nine structures were noted. Most of these structures are situated on a narrow, sheltered ledge, which is approximately 480 feet long and 20 feet at its widest point (Figure 2). A single structure is located in a small alcove just east of the main ledge.

The 1959 excavations suggest that Crumbling Kiva was a habitation and storage site that was occupied for only a short period of time between A.D. 1200 and 1250 (Lipe et al. 1960). The initial occupation date is based on the pottery found at the site, which dates to no earlier than A.D. 1200. Despite the presence of multiple structures and use-areas, a short-lived occupation is inferred because of the small numbers of artifacts and thin trash deposits found at the site, as well as the site's poor agricultural location. There was no evidence to suggest that all of the structures had been built at the same time, however, the architecture of Structures 8 and 9 are unlike the other structures at the site, implying that they at least were constructed at a different time.

An initial stabilization assessment was conducted at the site in 1978 (Schroedl 1981), and all nine structures noted in 1959 were accounted for. When a second stabilization assessment was made in 1987 by Nickens and Associates (Gaunt et al. 1987), the site was re-recorded and Structures 1 and 2 were no longer present. The following site description is taken from the 1987 Intermountain Antiquities Computer System form used to document the site (see also Appendix A):

The site consists of standing structural remains that define four single-unit rooms, Structures 4 and 7-9, and three open use areas, Structures 3, 5, and 6. Structure 1, a masonry walled cist, and Structure 2, a short dry-laid wall, have been destroyed. Structures 3-7 form the main roomblock in the center of the alcove. The largest room, Structure 4, is a kiva that maintains a portion of its roof. Structures 3, 5, and 6 have been defined as open use areas. Structure 7 is the only apparent habitation room at [the] east end of the room block. Structure 8, an unroofed granary, is isolated 19 m east of Structure 7. A completely intact granary, Structure 9, is within a small alcove removed 130 m southeast of the main roomblock. Numerous ground and

pecked surfaces are present on exfoliated boulders at the west end of the site.

Crumbling Kiva is currently part of the Glen Canyon Archaeological Monitoring Program, established in 1986. It is monitored on an annual schedule, whereby photos taken from previous years are compared at the site in an effort to determine changes in the site's condition from one year to the next. Prior to the Kellogg Archaeological Society visit, the site had been monitored on June 2, 1993. It was monitored again the following year on August 4, 1994. At that time, some structural changes were noted, and a single pothole in Structure 4 was documented and backfilled (Appendix B).

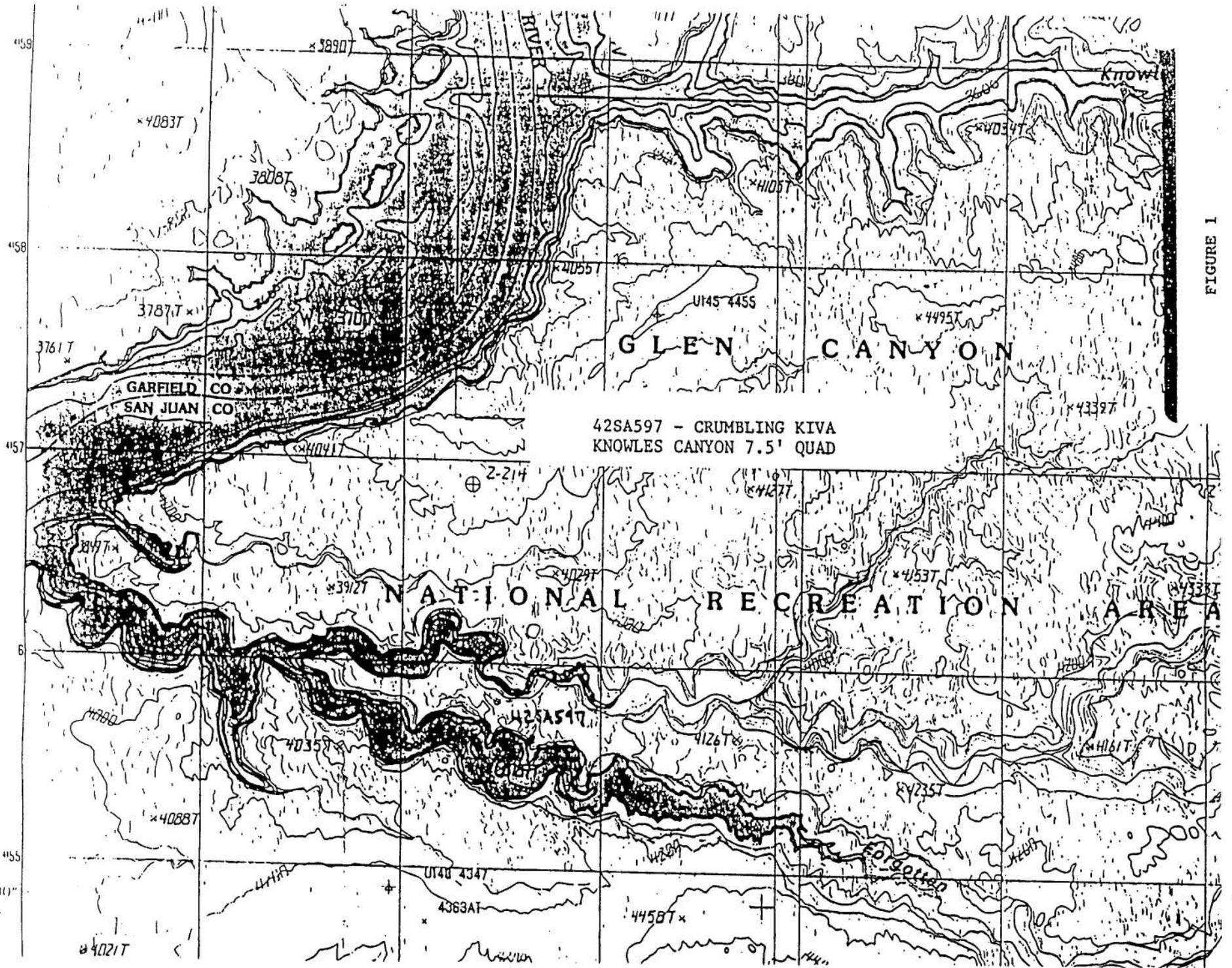


FIGURE 1

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CRUMBLING KIVA

42SA597

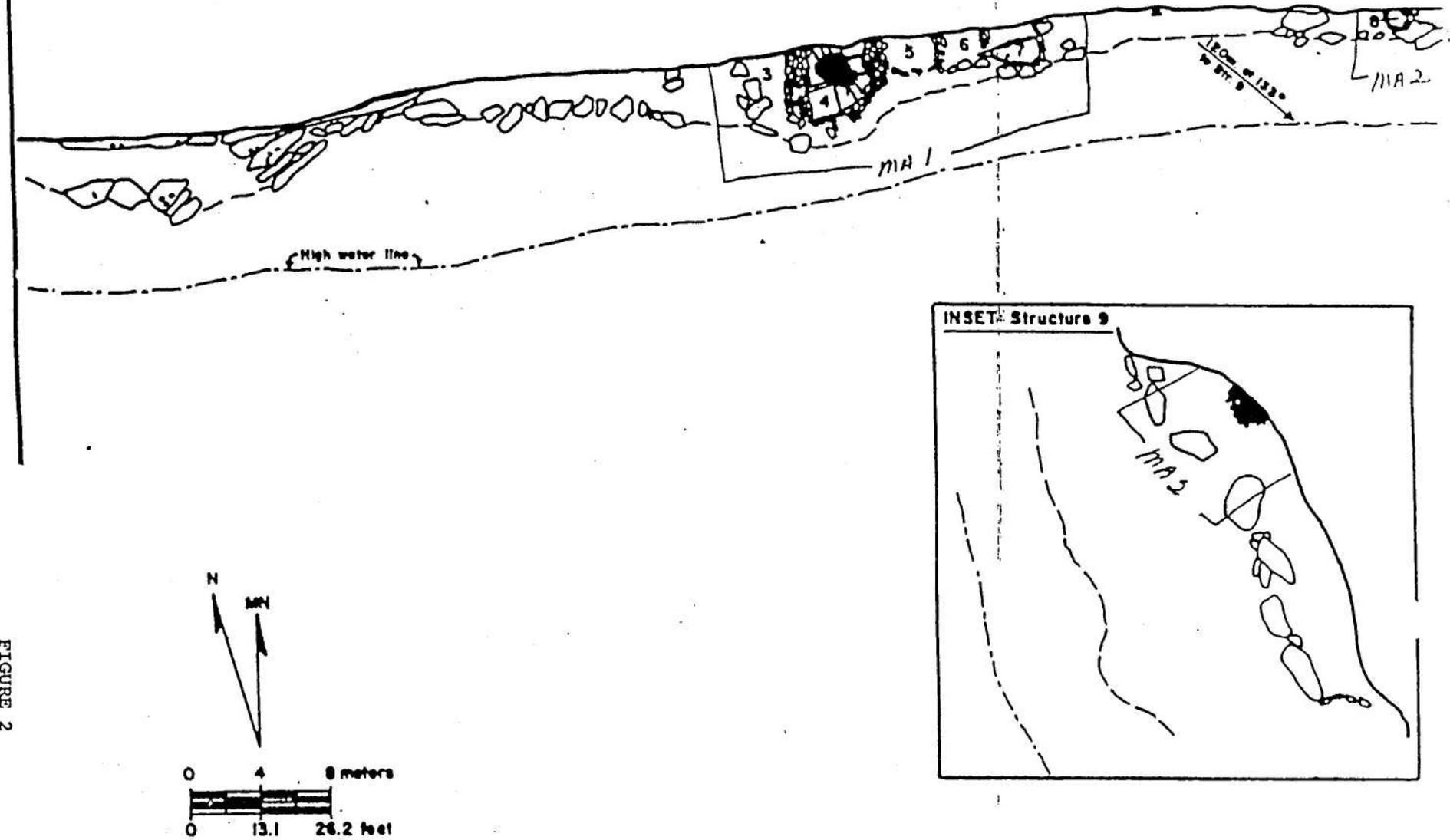


FIGURE 2

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## METHOD OF ASSESSMENT

The process of archaeological assessment was two-fold. It initially consisted of reviewing the video made on-site by the Kellogg Archaeological Society, and identifying which specific structures and portions of structures were involved in the unauthorized digging. Structural identifications were made by comparing the architectural features shown in the video with monitoring photographs taken at the site within the past 2 years. Table 1 summarizes the structures involved, and the kinds and numbers of disturbances that occurred during the unauthorized digging. Each identifiable episode is cross-referenced to the specific time printed on the video frame, and to the Glen Canyon NRA photo number that identifies the structure involved in the digging.

Evidence from the videotape indicates that during the unauthorized digging by the Kellogg Archaeological Society, eight specific instances of disturbance occurred, that Structures 4, 5, 6, and 7 were impacted by the illegal digging, and that at least 4 vegetal remains in the form of prehistoric corncobs were unearthed during these events.

The areas of disturbance documented on the video were confirmed by David Dose during an in-field consultation at Crumbling Kiva on April 4, 1995. In several cases, Dose provided estimates as to how much fill had actually been disturbed in each of the eight areas. Table 2 summarizes this information.

Dimensions of each of the disturbed areas, including length, width, and depth, were estimated from both the video images, and the in-field consultation with David Dose. Areas and volumes of illegal digging and other disturbance were calculated from this information. Figure 3 illustrates the specific site areas in which the disturbance occurred, and Table 3 summarizes that disturbance.

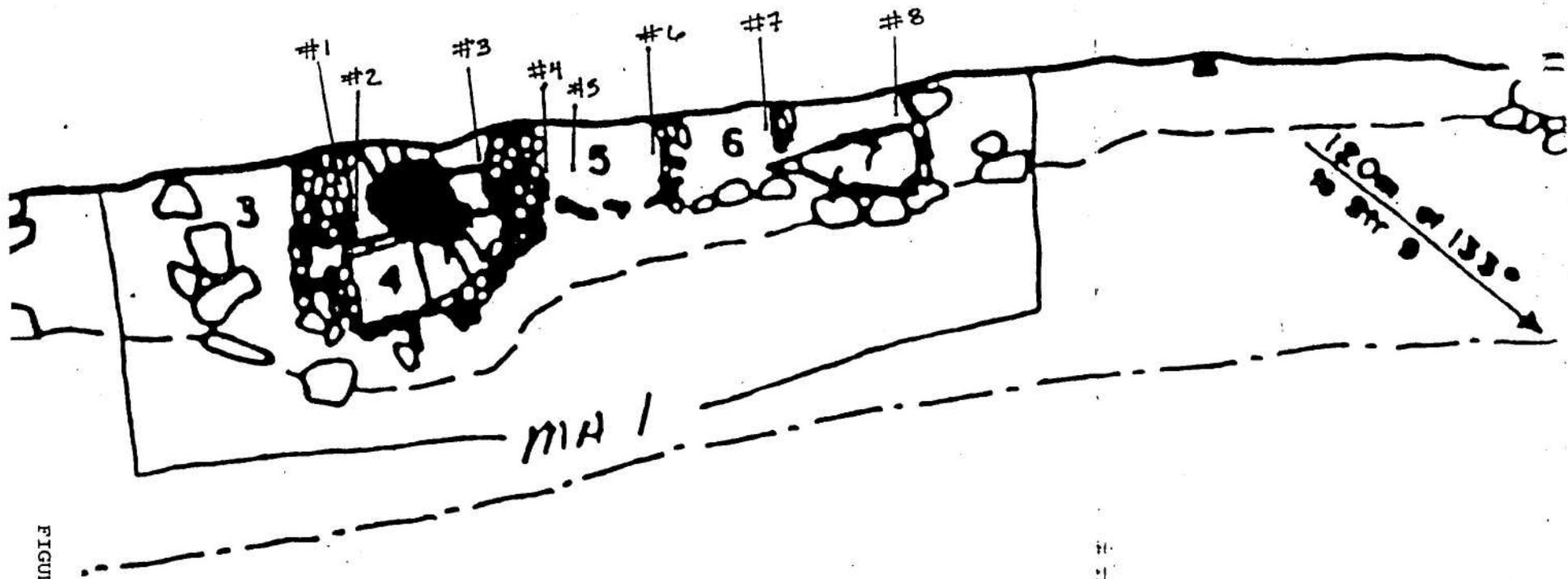


FIGURE 3

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INSET: Structure 9

Table 1. Summary of disturbance observed on video tape.

VIDEO TIME	STRUCTURE INVOLVED	GLCA PHOTO NUMBER	COMMENTS ON ACTIVITIES OBSERVED	DISTURBANCE NUMBER
1:06:34	Structure 4	94-47:28	Juveniles inside structure	
1:06:41	Structure 4	94-47:28	Observe digging at base of east wall	3
1:06:50-53	Structure 5	94-47:25	One juvenile digging at base of east wall	6
1:06:59	Structure 7	94-47:22	Juveniles inside structure	
1:07:14	Structure 5	94-47:25	Juvenile with handful of something dug from the base of east wall	6
1:07:23	Structure 5	93-23:12A	Three juveniles inside structure next to west wall looking at material. Narrator voiceover says "Mr. White, I'm pretty sure you found a piece of their food, I think you're in a storage room".	4
1:07:29	Structure 4	93-23:4A and 5A	Juveniles digging near west wall - Camera focuses on pothole adjacent to wall.	2
1:07:40	Structure 4? Unable to positively identify room from photos - need to compare on-site.		3 corncobs are displayed for camera. Narrator voiceover says "800 year old corncobs".	
1:07:45	Structure 5	94-47:25 and 93-45:5	Juvenile kneeling at base of east wall holds something up in hand and appears to place it on top of wall.	6
1:07:56 through 1:08:04	Structure 5	94-47:25	Juvenile obviously digging in fill in west center interior of structure. Three other juveniles bent down next to west wall.	4 and 5
1:08:08	Structure 6	94-47:21	Juvenile bent over poking at ground where east wall of structure adjoins alcove wall.	7

VIDEO TIME	STRUCTURE INVOLVED	GLCA PHOTO NUMBER	COMMENTS ON ACTIVITIES OBSERVED	DISTURBANCE NUMBER
1:08:08	Structure 7	94-47:21	Two juveniles inside structure. Something in hand of juvenile with white shirt.	
1:08:14	Structure 7	94:47:21	Closeup of juveniles inside structure.	
1:08:29-35	Unable to identify area - need to field check for positive ID		Juvenile digging and sifting dirt with shovel	
1:09:00	Structure 7	94-47:20-21	Juveniles digging at base of east wall	8
1:09:05	Structure 7	94-47:20-21	Juvenile examines object in hand.	8
1:09:12	Structure 7	94-47:20-21	Juvenile pulls herself off ground by pulling on east wall.	
1:09:53	No structure		Juvenile shows bone and corn cob to camera. Narrator confirms identification.	
1:09:58	Structure 4		One juvenile hands a piece of organic material (corn cob or stalk?) to another	3
1:10:02	Structure 4	93-45:4 and 93-23:19A	Juvenile sitting on top of west wall digging in the rubble between Structure 4 and the east wall of Structure 3.	1
1:10:14	Structure 8	93-25:3	Juvenile climbing out of structure. Narrator voiceover says "Josh, wave at me".	

Table 2. Verbal descriptions provided by David Dose on April 4, 1995 concerning areas and volumes of illegal digging

DISTURBANCE NUMBER	STRUCTURE NUMBER	SPECIFIC AREA OF DISTURBANCE	COMMENTS BY DAVID DOSE
1	4	Top of west wall	Juveniles were sifting sand through their fingers. They were instructed not to move any big rocks. About 20% of the area was sifted through their fingers to a depth of about 3".
2	4	Base of west wall	The video shows a number of juveniles were working in the corner along the wall in a depression estimated to be ca. 2 x 3 x 1 foot deep. Dose says a shovel was used but the juveniles did not dig any deeper than 3 to 4".
3	4	Base of east wall	Corn was recovered from this area, found ca. 2" below the surface against the east wall, within 12" of the wall. The group measured the depth. A 4 x 4 x .4 foot area was dug along the wall.
4	5	Base of west wall	The video shows an area near the alcove wall being dug. Dose does not recall the size of this area, but the video clearly shows an area ca. 2 x 2 x 0.6 being disturbed.
5	5	Interior center	Dose did not recall the amount of this disturbance either, but the video clearly shows an area ca. 1 x 1 x .6 being disturbed by a juvenile using a rock as a digging tool.
6	5	Base of east wall	The video clearly shows at least one juvenile digging along the base of the east wall in an area ca. 1 x 1 x .6. Dose stated that 80% of the kids dug in this structure though he stressed they were digging only 1" deep and staying away from the walls.
7	6	Base of east wall	Four to five juveniles worked in this room. According to Dose they stayed away from the walls, but the video clearly shows at least one juvenile digging along the base of the east wall in an area ca. 1 x 1. Depth estimates range from 1 to 3".

8	7	Base of east wall	Dose could not provide information as to the amount of disturbance in this structure. The video clearly shows digging but it is impossible to estimate from the images how much disturbance occurred in this structure.
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Table 3. Areas and volumes of illegal digging

DISTURBANCE NUMBER	STRUCTURE NUMBER	SPECIFIC AREA OF DISTURBANCE	DIMENSIONS (FT)	DEPTH (FT)	AREA (SQ FT)	VOLUME (CU FT)
1	4	Top of west wall	3 X 3	0.3	9.0	2.7
2	4	Base of west wall	2 X 3	0.4	6.0	2.4
3	4	Base of east wall	4 X 4	0.4	16.0	6.4
4	5	Base of west wall	2 X 2	0.6	4.0	2.4
5	5	Interior center	1 X 1	0.6	1.0	0.6
6	5	Base of east wall	1 X 2	0.6	2.0	1.2
7	6	Base of east wall	1 X 1	0.3	1.0	0.3
8	7	Base of east wall	?	?	?	?
TOTALS					38.0	16.0

## DAMAGE ASSESSMENT OF ARCHAEOLOGICAL RESOURCES

The assessment of damage to Federally owned or controlled archaeological resources in violation of the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa-470mm) can be obtained by determining three values: archaeological value, commercial value, and the cost of restoration and repair of the resource. Guidelines for conducting such assessments to determine a monetary value is contained in 43 CFR 7.14. The criteria for determining these values and values obtained are as follows:

### COST OF RESTORATION AND REPAIR

...the cost of restoration and repair...shall be the cost which may include, but not be limited to... the cost of the following: (1) reconstruction of the archaeological resource; (2) stabilization of the archaeological resource; (3) ground contour reconstruction and surface stabilization; (4) research necessary to carry out reconstruction or stabilization; (5) physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance; (6) examination and analysis of the archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved; (7) reinterment of human remains..., and (8) preparation of reports relating to any of the above activities (43 CFR 7.14(C)).

The cost of restoration and repair (Table 4) was computed using the specified criteria (6) and (8) and calculated at \$1079.80. This figure includes the costs accrued as a result of the archaeological damage assessment and the cost of preparing this report.

Table 4. Cost of Restoration and Repair

ACTIVITY	RATE/HOUR	HOURS	AMOUNT
Site Visit Archaeologist GS-9	\$18.85	16	\$ 301.60
Travel Expenses Lodging Per Diem @ \$30.00 per day		1 night 2 days	\$ 100.00 60.00
Videotape Review Archaeologist GS-9	\$18.85	8	\$ 150.80
Supplies and Materials Film and Processing	\$15.00 per roll	1 roll	\$ 15.00
Report Preparation Archaeologist GS-9	\$18.85	24	\$ 452.40
<b>TOTAL</b>			<b>\$1079.80</b>

## ARCHAEOLOGICAL VALUE

The value shall be appraised in terms of the cost of retrieval of scientific information which would have been obtained prior to the violation. These costs may include, but need not be limited to the production of a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential (4a CFR 73.145a).

In a site like Crumbling Kiva, an experienced archaeologist screening with 1/8 inch mesh could excavate a 3.37 cubic foot area in eight hours. At this rate, it would take archaeologists approximately 38 hours to excavate the 16 cubic feet disturbed by the Kellogg Archaeological Society.

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However, archaeology is not just excavation. In addition to field work, archaeology involves preparing a research design, obtaining permits prior to excavation, analysis of the results of excavation, writing a report, and curating (storing in a museum) recovered remains. The total cost for the archaeological value at Crumbling Kiva is determined to be \$7,686.72, as shown in Table 5.

Table 5. Archaeological value

ACTIVITY	RATE/HOUR	HOURS	AMOUNT
<b>Research Design Preparation</b>			
<b>LABOR</b>			
Principal Investigator, GS-11	\$ 22.82	8	\$ 182.56
Archaeologist, GS-9	18.85	16	301.60
Clerical/Computer, GS-7	12.80	8	102.40
<b>DIRECT COSTS</b>			
Telephone and Postage			\$ 50.00
Reproduction	300 copies	.10/page	30.00
<b>Subtotal</b>			<b>\$ 666.56</b>
<b>Field Work</b>			
<b>LABOR (38 hrs/2 archaeologists, + travel):</b>			
Principal Investigator GS-11	\$ 22.82	12	\$ 273.84
Archaeologists, (2), GS-9	\$ 18.85	24	452.40
<b>DIRECT COSTS</b>			
Park Plane use, Page to Bullfrog	\$100.00/day	2 days	\$ 200.00
Boat use, Bullfrog to Forgotten Canyon	\$ 50.00/day	8 days	400.00
Per Diem	\$130.00/day	8 days	\$1040.00
Expendable Supplies incl. film	\$ 15.00/roll	6 rolls	90.00
Telephone and postage			50.00
<b>Subtotal</b>			<b>\$2506.24</b>
<b>Data Analysis and Curation</b>			
<b>LABOR</b>			
Principal Investigator, GS-11	\$ 22.82	8	\$ 182.56
Archaeologist, GS-9	\$ 18.85	16	301.60
Clerical/Computer, GS-7	\$ 12.80	8	102.40
<b>DIRECT COSTS</b>			
C-14 Analysis	265.00/sample	4	\$1060.00
Pollen Analysis	95.00/sample	8	760.00
Curation Costs	175.00/box	1	175.00
<b>Subtotal</b>			<b>\$2581.56</b>
<b>Report Preparation</b>			
<b>LABOR</b>			
Principal Investigator, GS-11	\$ 22.82	8	\$ 182.56
Archaeologist, GS-9	\$ 18.85	24	452.40
Clerical/Computer, GS-7	\$ 12.80	8	102.40
Draftsperson	\$ 20.00	16	320.00
<b>DIRECT COSTS</b>			
Telephone and Postage			\$ 50.00
Reproduction	6,000 copies	.10/copy	600.00
Photographs			225.00
<b>Subtotal</b>			<b>\$1932.36</b>
<b>TOTAL</b>			<b>\$7686.72</b>

## COMMERCIAL VALUE

...commercial value of any archaeological resource involved in a violation...shall be its fair market value. Where a violation has resulted in the damage of the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained (43 CFR 7.14 (b)).

The commercial value of the four corn cobs displayed in the video is virtually nil since most collectors are not interested in the mundane but scientifically valuable refuse of prehistoric every day life. For this reason, no commercial value is assigned to the artifacts.

REFERENCES CITED

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## U.S. Department of Justice

Paul M. Warner

United States Attorney  
District of Utah

REPLY TO:  
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March 8, 1999

Gregory Godwin, Superintendent  
Joint School District 391  
a.k.a. Kellogg School District  
800 Bunker Avenue  
Kellogg, Idaho 83837

Re: Archaeological Damage at Crumbling Kiva Ruin,  
Glen Canyon National Recreation Area

Dear Mr. Godwin:

On June 15, 1995 this office sent correspondence to Kellogg School District concerning the National Park Service's subject investigation. The letter explained the investigation in some detail and requested responses to six inquiries. Former Superintendent Larry Curry replied on behalf of the District on July 11, 1995. (Both letters are attached for your reference.) The U.S. Attorney's Office has consulted with various professional archaeological and educational authorities about the Crumbling Kiva Ruin damage incident, and in particular, the answers and curriculum materials submitted to this office by Superintendent Curry.

As a result of this consultation, and after careful consideration of this matter, the U.S. Attorney's Office for the District of Utah has concluded that Kellogg School District was partly responsible for the damage to the Crumbling Kiva Ruin resulting from activities of District students under the supervision and direction of a District teacher, Mr. David Dose. The conduct causing this damage constitutes a violation of the Archaeological Resources Protection Act, as explained in our letter of June 15, 1995.

The principal reason for Kellogg School District responsibility in this matter is the lack of adequate oversight of the "Digging the Past" curriculum in general, and the 1994 Lake Powell archaeological field trip in particular. The District did not ensure that appropriate and necessary professional consultation was conducted in formulating the curriculum and planning the field trip. The District did not require that the "Digging the Past" curriculum be reviewed by knowledgeable professional sources, such as the Idaho Department of Education, the Idaho State Historical Preservation Office, the Idaho State Archaeologist, and the Idaho Archaeological Society.

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Likewise, the Lake Powell archaeological field trip was approved by the District without ensuring that the students, chaperones and the field trip leader, Mr. Dose, were adequately informed about archaeological resource protection on public lands. This could have been easily accomplished by arranging for the group to be personally briefed or otherwise provided information by a National Park Service representative (either prior to or at the commencement of the field trip.)

Had such consultation been sought and obtained, this unfortunate incident would not have occurred. There is a great deal of professional information available about archaeological resource protection and appropriate educational treatment of this subject. The District was negligent in not requiring proper consultation, both as to the curriculum and the field trip. The Archaeologic Resources Protection Act authorizes the assessment of a civil penalty up to the total of (1) costs of restoration and repair of the damaged resources and (2) the archaeological value of the damaged resources. In this case that total is \$7,686.72.

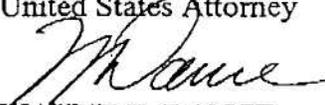
Because of various factors, including the District's cooperation with the investigation, this office is willing to settle this matter with the Kellogg School District on the following terms:

1. The District will pay \$3,000 restitution to the National Park Service, Glen Canyon National Recreation Area, to reimburse the costs of the Crumbling Kiva Ruin investigation.
2. The District will publish an "Open Letter" to the educational community about the Crumbling Kiva Ruin incident, describing in detail the mistakes made and the lessons learned by the Kellogg School District about archaeology education and archaeological resource protection. A draft of the letter will be submitted by this office to a recognized educational authority for review and approval.
3. If Kellogg School District satisfies terms one and two, the District will not be assessed a civil penalty under the Archaeological Resources Protection Act or incur any other legal sanction relating to the Crumbling Kiva Ruin incident.

A written reply to this settlement offer must be received by this office not later than Monday, March 29, 1999. If the settlement offer is accepted, the District must pay the restitution to Glen Canyon National Recreation Area and submit the draft "Open Letter" to this office by April 30, 1999.

Very truly yours,

PAUL M. WARNER  
United States Attorney

  
WAYNE T. DANCE  
Assistant United States Attorney

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U.S. Department of Justice

Paul M. Warner

United States Attorney  
District of Utah

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April 15, 1999

Superintendent Joe Alston  
Glen Canyon National Recreation Area  
P.O. Box 1507  
Page, Arizona 86040

Re: Restitution for ARPA Investigation; Crumbling Kiva Ruin Incident

Dear Superintendent Alston:

I am pleased to forward the enclosed check in the amount of \$1,065.45 from Joint School District No. 391 (a.k.a. Kellogg School District), Kellogg, Idaho. Pursuant to an agreement between Kellogg School District and this office, the District is reimbursing Glen Canyon National Recreation Area for expenses incurred by James Houseman in his investigation of unauthorized archaeological damage done to Crumbling Kiva Ruin by Kellogg Middle School students acting under the direct supervision of a Kellogg District teacher. Also enclosed are two letters from Fred M. Gibler, the District's attorney. As Mr. Gibler indicated, this restitution is not to be considered an admission of wrongdoing by Kellogg School District. It is hoped that these funds will assist the Park Service's archaeological resource protection efforts at Glen Canyon National Recreation Area.

Very truly yours,

PAUL M. WARNER  
United States Attorney

  
WAYNE T. DANCE  
Assistant United States Attorney

cc: Investigator James Houseman  
Glen Canyon NRA

Richard C. Waldbauer  
Archeology and Ethnography Program  
National Park Service

001170

PAUL M. WARNER, United States Attorney (#3389)  
WAYNE T. DANCE, Assistant United States Attorney (#4953)  
Attorneys for the United States of America  
185 South State Street, #400  
Salt Lake City, Utah 84111-1506  
Telephone: (801) 524-5682  
Facsimile: (801) 524-6924

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

MAY 10 1999

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION BY

MARKUS B. ZIMMER, CLERK  
DEPUTY CLERK

UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, : No. 2:99-CR-147C  
 :  
 vs. :  
 : PRETRIAL DIVERSION  
 DAVID R. DOSE, : AGREEMENT  
 :  
 Defendant. :  
 :  
 :

The following is an agreement between the United States and defendant David R. Dose for pretrial diversion in this case.

You, David R. Dose, are charged with the commission of a misdemeanor offense against the United States on or about April 1, 1994, in violation of Title 16, United States Code, Section 470ee(a)(d), in that you did knowingly aid and abet others who, without a permit issued under the Archaeological Resources Protection Act, did knowingly excavate, damage, and alter an archaeological resource, namely, Crumbling Kiva Ruin, a prehistoric habitation and storage site dating to about A.D. 1200-1250.

In essence, the evidence supporting this charge shows the following. As a sixth grade teacher at Kellogg Middle School (KMS), Kellogg, Idaho, you organized and supervised an archaeological field trip for a group of KMS students to Glen Canyon National Recreation Area in early Spring, 1994 (known at KMS as the "Lake Powell Expedition 1994"). The students belonged to the "KMS Archaeological Society" which you also organized and supervised as "Advisor." This student club was organized and conducted in conjunction with the KMS "Digging the Past" interdisciplinary curriculum (history, language arts, math and science) involving the study of ancient civilizations.

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The archaeological field trip to Lake Powell was approved by the KMS principal, the superintendent of Joint School District No. 391, also known as the Kellogg School District (KSD), and the KSD Board of Education. Although the administrators and board members were not on notice that the KMS students under your direction and supervision would engage in unauthorized activities at any archaeological site while visiting Lake Powell, these school officials approved the field trip without either ensuring that you and the students were adequately informed about archaeological resource protection or requiring that the group be briefed by the Park Service at the commencement of the outing.

At no time during either the planning stages of this student group activity or the field trip itself did you or anyone associated with KMS, KSD or its Board of Education seek guidance, assistance, student briefing, or any information concerning archaeological resource protection and/or the federal laws and regulations pertaining to archaeological resources on public lands. This assistance, information, etc., was readily available from such sources as the Idaho State Historic Preservation Office, the Idaho State Archaeologist, the Idaho Archaeological Society, the Idaho Department of Education and the National Park Service (Glen Canyon National Recreation Area).

The itinerary for the "Lake Powell Expedition 1994" included a visit to an archaeological site known as Crumbling Kiva Ruin, located just west of the better known Defiance House archaeological site in Forgotten Canyon, Glen Canyon National Recreation Area. In your well-intentioned but seriously uninformed efforts to instruct the students about archaeology, you actively encouraged and counseled the students to search for, find and remove prehistoric artifacts at Crumbling Kiva Ruin. As a result, the students engaged in unauthorized excavation and removal of various archaeological resources archaeological at this site located on public lands.

Specifically, the KMS students disturbed the surface and subsurface of several structures within the Ruin by digging, some using collapsible shovels. The students also uncovered and removed from the Ruin several prehistoric artifacts such as corncobs. Having organized, directed and counseled this unauthorized student activity involving the excavation and removal of archaeological resources on public lands, you violated the Archaeological Resources Protection Act of 1979.

By your signature on this Agreement, you accept and acknowledge responsibility for your behavior as described above. After an investigation of the offense, your background, and with your acceptance of responsibility in this matter, it appears that the interest of the United States, your own interest and the interest of justice will be best served by the use of the

following pretrial diversion procedure in this case.

On the authority of the Attorney General of the United States, by Paul M. Warner, United States Attorney for the District of Utah, prosecution in this District for this offense shall be deferred for the period of 18 months from the date this completed Agreement is filed with the Court, provided you abide by the following conditions and the requirements of this Agreement set out below (diversion period will be shortened to 12 months, provided all General Conditions have been complied with and all Special Conditions have been fully met).

Should you violate the conditions of this Agreement, the United States Attorney may revoke or modify any conditions of this pretrial diversion program or change the period of supervision, which shall in no case exceed eighteen months. The United States Attorney may release you from supervision at any time. The United States Attorney may at any time within the period of your supervision initiate prosecution for this offense should you violate the conditions of this Agreement. In this case the United States Attorney will furnish you with notice specifying the conditions of the Agreement which you have violated.

After successfully completing your diversion program and fulfilling all the terms and conditions of the Agreement, the charge against you in this case, as described above and in the Misdemeanor Information, will be dismissed.

Neither this Agreement nor any other document filed with the United States Attorney as a result of your participation in the Pretrial Diversion Program will be used against you, except for impeachment purposes, in connection with any prosecution for the above-described offense.

#### GENERAL CONDITIONS OF PRETRIAL DIVERSION

(1) You shall not violate any law (Federal/State/Local). You shall immediately contact your pretrial diversion supervisor if arrested and/or questioned by any law enforcement officer.

(2) You shall attend school or work regularly at a lawful occupation or otherwise comply with the terms of the special program described below. If you lose your job or are unable to attend school, you shall notify your pretrial diversion supervisor at once. You shall consult him/her prior to job or school changes.

(3) You shall report to your supervisor as directed and keep him/her informed of your whereabouts.

(4) You shall follow the program and such special conditions as may be described below.

SPECIAL CONDITIONS

(1) You will pay restitution to Glen Canyon National Recreation Area in the amount of \$1,079.80 for the cost of restoration and repair pertaining to the damage done to Crumbling Kiva Ruin by the KMS students under your direction and supervision.

(2) You will write, edit and submit for publication, as set forth below, a manuscript on the following subject (title may be the same or appropriately similar):

"A Case Study: Students on Field Trip Damage Federal Archaeological Site - Mistakes Made and Lessons Learned by Their Teacher."

This manuscript will meet the publishing requirements of and be submitted for publication to the following:

(a) "Social Education" (journal of the National Council for the Social Studies);

(b) "Schools in the Middle" and "High School Magazine" (publications of the National Association of Secondary School Principals);

(c) "Middle Ground" (publication of the National Middle School Association); and

(d) "Archaeology and Public Education" (publication of the Society for American Archaeology, Public Education Committee).

The manuscript will be submitted for publication only after having been reviewed and approved by the Archeology and Ethnography Program (AEP), National Park Service, Washington, D.C. (in consultation with prominent middle and secondary school educators). The timetable for writing, editing and submitting the manuscript for publication is as follows:

(a) manuscript outline submitted to AEP within two months following the commencement of this Pretrial Diversion Agreement;

(b) manuscript (first draft) submitted to AEP within one month following receipt of AEP comments on manuscript outline;

(c) manuscript (second and any succeeding drafts) submitted to AEP within two weeks following receipt of AEP comments on previous draft manuscript; and

(d) manuscript submitted to the above-named publications/organizations within two weeks of receipt of AEP approval of manuscript.

(3) You will make oral presentations on the subject of your manuscript to the following organizations at their annual conferences:

(a) Rocky Mountain Regional Council, National Council for the Social Studies (Spring 2000 conference in Colorado), or other comparable NCSS conference pre-approved by the U.S. Attorney's Office; and

(b) Idaho Middle Level Association or Utah Middle School Association.

I certify that this document sets forth the complete agreement between the United States and defendant David R. Dose for pretrial diversion in this case.

DATED this 5<sup>TH</sup> day of May, 1999.

PAUL M. WARNER  
United States Attorney



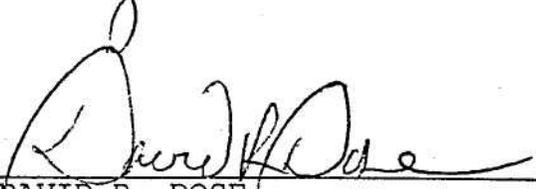
WAYNE T. DANCE  
Assistant United States Attorney

I certify that I am aware the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. I also am aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information, or in bringing a defendant to trial. I hereby request the United States Attorney for the District of Utah to defer this prosecution. I agree and consent that any delay from the date of this Agreement to the date of resumption of prosecution, as

provided for in the terms expressed herein, shall be deemed to be a necessary delay at my request, and I waive any defense to such prosecution on the ground that such delay operated to deny my rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of months equal to the period of this agreement.

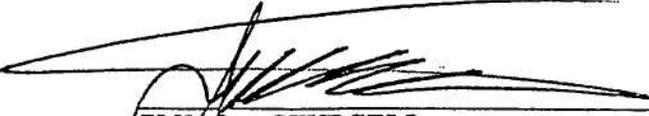
I also certify that I have carefully read and understand all of the above, and have discussed it with my attorney. I fully acknowledge and accept responsibility for my conduct as accurately described above. I knowingly and voluntarily agree to the terms of this Pretrial Diversion Agreement. I will comply with each of the General and Special Conditions set out above.

DATED this 6 day of May, 1999.

  
\_\_\_\_\_  
DAVID R. DOSE  
Defendant

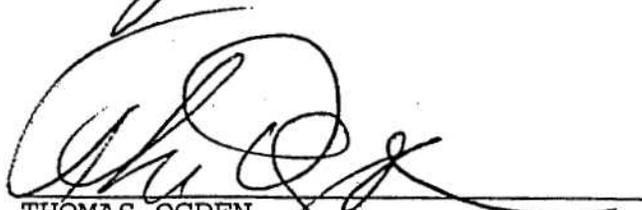
I certify that I have discussed the provisions of this Pretrial Diversion Agreement with David R. Dose and have explained to him his rights, including the Sixth Amendment right to a speedy trial. I believe that he is knowingly and voluntarily entering into this Pretrial Diversion Agreement.

DATED this 6<sup>th</sup> day of May, 1999.

  
\_\_\_\_\_  
JAY Q. STURGELL  
Kellogg, Idaho  
Attorney for Defendant

Defendant David R. Dose is found suitable for participation in the Pretrial Diversion Program.

DATED this 6 day of May, 1999.



THOMAS OGDEN  
Supervising Probation Officer  
Pretrial Diversion Program

FILED  
CLERK OF DISTRICT COURT

15 DEC 00 AM 11:34

RECEIVED CLERK

DEC 17 2000

U.S. DISTRICT COURT

PAUL M. WARNER, United States Attorney, (#3389)  
WAYNE T. DANCE, Assistant United States Attorney (#4953)  
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185 South State Street, #400  
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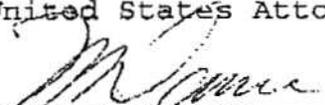
IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	2:99CR-147C
	:	
Plaintiff,	:	DISMISSAL (WITH PREJUDICE)
	:	OF MISDEMEANOR INFORMATION
vs.	:	
	:	
DAVID R. DOSE,	:	
	:	
Defendant.	:	

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of court endorsed hereon, the United States Attorney for the District of Utah hereby dismisses (with prejudice) the Misdemeanor Information against David R. Dose, for the reason that defendant has satisfied all general and special conditions of the Pretrial Diversion Agreement filed on May 10, 1999.

DATED this 8th day of December, 2000.

PAUL M. WARNER  
United States Attorney

  
WAYNE T. DANCE  
Assistant United States Attorney

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AUTHORIZATION FOR FILING OF DISMISSAL (WITH PREJUDICE)

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, and good cause appearing, the filing of the foregoing Dismissal (with prejudice) of Misdemeanor Information against David R. Dose is hereby authorized.

DATED this 15 day of December, 2000.

BY THE COURT:

*Tena Campbell*

TENA CAMPBELL, Judge  
United States District Court

**Getting Young People Hooked on the Past:  
Lessons Learned in Developing Archeological Programs  
for Middle School Students**

by David Dose  
Former Teacher, Kellogg Middle School, Idaho

*During March-April 1994, the Kellogg Middle School Archaeological Society, an Idaho school district-sponsored club, traveled to the Glen Canyon National Recreation Area in Utah to study the archeological remains of the Anasazi culture around Lake Powell. During their stay, the group damaged an archeological site. As a result of National Park Service and professional educator participation in deliberations to resolve the legal case, the parties and consultants agreed to an educational remedy. This article, by the founder of the society, represents part of that legal agreement. Its purpose is to educate teachers on how to develop archeological programs for students that serve to educate them about the past and, at the same time, protect our shared cultural heritage.*

A field trip just isn't a field trip unless you have 40 or 50 kids a thousand miles away from home, doing things they otherwise never would have a chance to do. Teachers and students must know, however, that this notion has inherent boundaries which, when crossed, can result in educational failure. I know. In the spring of 1994, I had the privilege of leading 26 burgeoning young historians-archeologists-explorers on a trip to Glen Canyon National Recreation Area in southeastern Utah. It was the premiere journey for our northern Idaho middle school district-sponsored program, the Kellogg Middle School Archaeological Society, and we were excited. Unfortunately, the trip nearly ended in disaster.

**What I Did Wrong**

The KMS Archaeological Society was formed because so many students had fallen in love with archeology during "Digging the Past," a grant-supported component of our school district's 6th grade social studies curriculum. In "Digging the Past," I taught our sixth graders about archeological field methods and took them to a site near our school planted with simulated ancient Greek cultural remains, so they could practice the excavation, survey, and recording techniques I presented in the classroom. A love of the past, together with a burning motivation to explore the physical remains of the past, always served as a backdrop for these activities.

Following the course, many "Digging the Past" graduates wanted more opportunities to experience archeology, including visits to real archeological sites, not just a seeded, simulated dig. So, thinking that we would have to travel outside our state in order to see archeology, the KMS Archaeological Society began planning an archeology trip to Utah. Actually, had I contacted the Idaho State Historical Society, we would have learned that archeology is all around us here, in Idaho, too.

I thought I thoroughly prepared for our trip to Glen Canyon. By the time our middle-schoolers took on the challenges of spending twelve days away from home, many for the first time, they had learned water safety, boating practices, camping and general survival skills. At the same time, I continued to instruct them on archeological techniques and the history of archeological practice. Our volunteer

chaperons received extensive training, too. Teachers, counselors, and dedicated parents—among who were nurses, emergency medical technicians, and law enforcement personnel—together wanted to give our kids the most amazing scholarly Spring Break they would ever have.

Our enthusiasm for the past notwithstanding, I didn't realize fully how our society values the past for both science and the general public welfare. Of course, I knew intuitively that taking a backhoe, tearing up an ancient site, digging up some pottery, and selling it would be illegal. But, beyond that, I didn't really know what we could or couldn't do at an archeological site. Had I simply called the National Park Service at Glen Canyon National Recreation Area to tell them we planned to visit archeological sites, we would have learned how to behave during our visit there. We also would have learned about the laws that serve to protect and maintain our shared heritage resources for present and future generations. However, I failed to make such a call. Instead, we went to Glen Canyon, and in an area called Forgotten Canyon, I encouraged our students to freely tramp among the remains of buildings situated along a sheltered ledge below an overhang. I also encouraged them to search for artifacts in their effort to determine whether they were at an archeological site. When students found artifacts, they were asked to hold the items in the air while I videotaped them. Following my instructions, the exuberant students, some using collapsible shovels, dug 16 cubic feet of soil covering 38 square feet in eight areas on the site.

This activity took place at a known archeological site called Crumbling Kiva Ruin, a habitation and storage site dating to about 1200-1250 A.D. The student behavior under my direction caused significant damage to Crumbling Kiva Ruin, for which I was responsible. As a consequence, I committed a violation of the Archaeological Resources Protection Act (ARPA). Among other things, ARPA says that no person may knowingly excavate, remove, or damage any archeological resource on public lands or Indian lands without permission, or attempt to do so.

#### **The Outcome of the Case**

I cooperated with the Federal authorities from the moment I was made aware that the Archaeological Resources Protection Act had been violated. I provided to the Park Service the videotape that I had made at Crumbling Kiva Ruin. My cooperation was a significant factor in resolving the case. As the organizer of the field trip and supervisor of the student activities at Crumbling Kiva Ruin, I was criminally charged with a misdemeanor violation of ARPA. However, the Assistant United States Attorney believed that the interest of justice would be best served by a pretrial diversion program, meaning that if I fulfilled the terms of my diversion agreement, the United States would dismiss the charge at the end of the 18-month diversion period.

Through consultation with archeologists at the National Park Service and the Bureau of Land Management as well as education professionals throughout the country, Assistant United States Attorney Wayne Dance crafted a resolution in the case. It allowed us to continue teaching students and insured that we share our lessons learned with other educators, through speaking engagements at education conferences and articles in education journals. In addition, the diversion agreement also required me to provide restitution of \$1,079.80 to Glen Canyon National Recreation Area to cover the cost of restoration and repair to Crumbling Kiva Ruin.

We returned to Glen Canyon in 1995 for remedial training, with a group that was even larger than the one in 1994. By now, the National Park Service investigator assigned to our case had become a valuable resource in helping to reteach our students and recover our program. Also, we volunteered with the National Park Service to form a clean-up detail and thereby added citizenship training to our

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curriculum.

As a result of this unfortunate case, we have transformed our club. Cooperation with archeologists, law enforcement professionals, and attorneys has led to the establishment of the Young Explorers' Society of America, a well-grounded program for boys and girls aged 11 to 18. Today, we sponsor trips all over the United States that focus on history, citizenship, and teamwork as well as a strong appreciation for this country's historical and natural resources. We do it, however, with the assistance and cooperation of the National Park Service, the Forest Service, the Bureau of Land Management, and our state universities. We still preach love for our past, but based on the lessons we learned, now we have an expanded set of objectives for our growing numbers of young members.

The Young Explorers' Society, soon to be a not-for-profit association, is organized to support first-hand exploration of the globe by our nation's youth, as a means to obtain a meaningful understanding of their world. We believe that knowledge makes good citizens, and citizenship and civic responsibility are critical elements to foster in our Young Explorers. Currently, we are working to sponsor chapters throughout the United States and provide better educational adventuring at lower cost to all our student members.

#### **What Educators Need to Know**

From the beginning, the greatest flaw in our archeological program was not knowing about public archeology, that is, how the United States, the states, and Indian tribes manage archeological resources on their lands for the public benefit. The Federal archeology program, for example, addresses archeological interpretation, collections care, scientific investigation, protection and preservation, and public outreach and education. It is conducted by Federal agencies under the authorization of laws such as the Archaeological Resources Protection Act, the National Historic Preservation Act, the Abandoned Shipwreck Act, and the Native American Graves Protection and Repatriation Act.

We have learned that, to develop successful archeological programs, teachers need to seek professional guidance. Fortunately today, thanks to the Internet and electronic mail, governments along with professional associations are providing more communication to teachers and the general public about public archeology than at any time in history.

Before preparing an archeological curriculum, teachers should do two things. First, they should contact the State Historic Preservation Office or the Office of State Archeologist in their state to find out what programs and curricula already exist for students in a particular grade. Every state has a State Historic Preservation Office, with some states having a separate Office of State Archeologist. In Idaho, our State Historical Society (as the State Historic Preservation Office is known) has an archeologist whose responsibilities specifically include education. Often, the SHPO or State Archeologist will be able to provide an existing professionally sound program for the teacher to adopt or modify. Second, educators should look at the array of archeology programs that have been assembled by other professional archeologists via numerous Internet web sites. Regardless of whether the teacher uses any of the archeology curricula available through the SHPO or other professional sources, at minimum, these available programs will provide educators with a solid foundation for the archeology programs they develop for their schools.

After drafting an archeology curriculum with professional guidance, the teacher should request that the State Historic Preservation Office or Office of State Archeologist review their program. Surely,

education professionals want a professional product, and they and their students should know that their archeology curriculum was reviewed by the highest professional authority in their state.

Outside the classroom, every educator and student must know what they can and cannot do when they visit an archeological site (or, for that matter, any public land generally). Teachers need to contact the parks, forest, wildlife refuges, wilderness areas, or reservations they intend to visit to find out the visitor rules. Very likely, an archeologist will be available to provide this information. Besides getting information about how to behave at an archeological site, school groups often also can receive cost-free guided tours, lectures, and other programs from archeologists, historians, and naturalists at the places they visit that, in turn, enrich their field experiences.

Educators should know that a wealth of information about archeology is available through the Internet. [The author provided a 24-page list of archeology web sites that was prepared by Heather Hembry, M.A., during an internship with the Archeology and Ethnography Program of the National Park Service, funded by the National Center for Preservation Education. As the list was too long to include with this article, readers may contact Mr. Richard Waldbauer of the National Park Service (Richard\_Waldbauer@NPS.gov) for a copy of the list.—ed.]

### **Conclusion**

Judge Sherry Hutt, one of our country's preeminent authorities on heritage resources law, has written:

Archeological resources are the nonrenewable and irreplaceable material remains of past human existence. Often they are the only evidence of people who lived in the United States. These heritage resources serve the public welfare both intellectually and emotionally. At the same time, they stimulate the desire to recover as much of the past as possible, and as soon as possible. This temptation to exploit archeological sites, however, must be tempered by the realization that all excavation, even if scientifically sound, is also a form of destruction, and that the amount of information obtainable from a site today is only a fraction of what will be possible in the future. Consequently, one of the purposes of the federal government's archeology program is to fight looting and preserve the archeological record in place...(Federal Enforcement Statutes, in S. Hutt, C. Blanco & O. Varmer, *Heritage Resources Law* 181, 1999).

Today, as I look back on the incident at Crumbling Kiva Ruin, I easily can see why it occurred. Although I was informed about the past we were studying, I didn't know how to study and use archeological resources on the ground. I didn't know anything about public archeology, particularly the strategy of protection in place. Also, I didn't have permission, a plan, or a sound methodology for doing what we did. Consequently, without specifically intending the consequences, as an educator I allowed, even encouraged, my students to injure an archeological site in violation of federal law.

Teachers throughout the country should know they can successfully teach exciting programs in archeology and historic preservation in the middle school environment, with both a classroom and a field component. To be successful, however, they need to understand the principles of public archeology and consult with professional archeologists concerning curricula and practices. Communication with public archeologists is not optional; it is a requirement. The alternative is to risk depriving present and future generations of enjoying our shared cultural heritage.

UNITED STATES of America, Plaintiff-Appellee,  
v.  
Clive HOLLINSHEAD, Defendant-Appellant.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Johnnie Brown FELL, Defendant-Appellant.

Nos. 73-2525, 73-2526.

United States Court of Appeals, Ninth Circuit.

April 11, 1974, Rehearing Denied in No. 73-2525 June 3, 1974, Rehearing Denied

in No. 73-2526 June 17, 1974.

Prosecution for conspiracy to transport stolen property in interstate commerce and for causing the transportation of such property in interstate commerce. Defendants were convicted in the United States District Court for the Central District of California, Malcolm M. Lucas, J., and appealed. The Court of Appeals, Duniway, Circuit Judge, held that it was required to prove that defendants knew that the article transported was stolen, but not their knowledge of where it was stolen, and it was thus not necessary for the Government to prove that defendants knew the law of the place of the theft. Thus where defendants' conduct and admissions were such as almost to compel the conclusion that they knew that it was contrary to Guatemalan law to remove the pre-Columbian artifact from Guatemala and knew that it was stolen, and where defendants did not object to the trial judge's definition of the word 'stolen' as used in the statute, trial court's instruction that there was a presumption that every person knows what the law forbids, even if error, was not prejudicial as charging that there was a presumption as to knowledge of foreign law.

Affirmed.

[1] RECEIVING STOLEN GOODS k7(6)  
324k7(6)

In prosecution for conspiracy to transport stolen property in interstate commerce and of causing transportation of stolen property in interstate commerce, it was required to prove that defendants knew that article transported was stolen, but not their knowledge where it was stolen, and it was thus not necessary for Government to prove that defendants knew law of the place of the theft. 18 U.S.C.A. § 2314.

[2] CRIMINAL LAW k1172.2  
110k1172.2

In prosecution for conspiracy to transport stolen property in interstate commerce and for causing transportation of such property in interstate commerce, where defendants' conduct and admissions were such as almost to compel conclusion that they knew that it was contrary to Guatemalan law to remove pre-Columbian artifact from Guatemala and knew that it was stolen, and defendants did not object to definition of word "stolen" as used in statute, instruction that there was presumption that every person knows what the law forbids, even if error, was not prejudicial as charging that there was presumption as to knowledge of foreign law. 18 U.S.C.A. § 2314.

\*1154 Ramon C. Grolock (argued), Sun Valley, Cal., for defendant-appellant Hollinshead.

Alvin S. Michaelson (argued), Los Angeles, Cal., for defendant-appellant Fell.

Earl E. Boyd, Asst. U.S. Atty. (argued), Los Angeles, Cal., for plaintiff-appellee.

Before DUNIWAY, CARTER and WRIGHT, Circuit Judges.

\*1155 OPINION

DUNIWAY, Circuit Judge:

These are consolidated appeals from judgments of conviction of conspiracy to transport stolen property in interstate commerce and of causing the transportation of stolen property in interstate commerce in violation of 18 U.S.C. § 2314. Between them, Fell and Hollinshead raise nine claims of error. However only one of them is sufficiently colorable to warrant serious consideration.

In barest outline, the salient facts are these. Hollinshead, a dealer in pre-Columbian artifacts, arranged with one Alamilla, a co-conspirator, to procure such artifacts in Central America, and to finance Alamilla in doing so. Although there were other such artifacts handled by the conspirators, the evidence centered primarily on one of them. This is a pre-Columbian stele known as Machaquila Stele 2, a rare and choice item worth many thousands of dollars. It was found in a Mayan ruin in the jungle of Guatemala, cut into pieces, and brought to Fell's fish packing plant in Belize, British Honduras. There the pieces were packed in boxes and marked 'personal effects' and addressed to Hollinshead at Santa Fe Springs, California. This was done in the presence of Hollinshead and Fell as well as other conspirators. Also present were some Guatemalan officers, who departed after receiving bribes. The stele was shipped to Miami, Florida, where Fell and another conspirator, Dwyer, picked it up. They attempted, without success, to sell it to various collectors and museums in this country, traveling with it to Decatur, Georgia, to New York City, to Wisconsin and to Raleigh, North Carolina. Ultimately it wound up in Hollinshead's possession in California, and he, too, attempted to sell it.

Eight of the claims raised by appellants relate to the sufficiency of the evidence or to the admission or exclusion of particular evidence at the trial. We have reviewed each of these claims and find none of them meritorious. There was ample independent evidence of the conspiracy to support the admission of evidence of co-conspirator's declarations and acts against each defendant. There was certainly enough evidence of the existence of a single conspiracy to submit the issue to the jury. The trial judge properly exercised his discretion when he permitted certain cross-examination of Hollinshead to which objection was made and when he disallowed the improper cross-examination of witnesses Feeney and Dwyer; *United States v. Brown*, 9 Cir., 1972, 455 F.2d 1201, 1204; *United States v. Haili*, 9 Cir., 1971, 443 F.2d 1295, 1299. The admission of witnesses Lujan's expert testimony was also proper.

[1][2] Appellants' one arguable contention is that the court erroneously instructed the jury that there is a presumption that every person knows what the law forbids. *Devitt & Blackmar*, § 13.04, pages 274-5. They point to the fact that it is the law of Guatemala that characterizes the stele as stolen property, and that there is no presumption that they knew Guatemalan law. Essentially their claim is that the instruction was overbroad and that it should have been supplemented with or limited by an instruction requested by appellants which made it clear that there is no such presumption as to knowledge of foreign law.

The court had received expert testimony as to the law of Guatemala regarding artifacts such as Machaquila Stele 2. Under that law, all such artifacts are the property of the Republic, and may not be removed without permission of the government. There was also overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the stele, and that the stele was stolen. Both their conduct and admissions that they made to investigators and others almost compel such a conclusion. It would have been astonishing \*1156 if the jury had found that they did not know that the stele was stolen.

Early in his instructions, in defining the offenses charged, the judge defined the word 'stolen' as used in 18 U.S.C. § 2314:

"Stolen' means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership.'

There was no objection to this instruction.

Later in his instructions, the judge gave the instruction to which appellants objected and now object. He did so because the law under which the appellants were charged was the law of the United States, and also, because, while the

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government was required to prove that appellants knew that the stele was stolen, *McAbee v. United States*, 9 Cir., 1970, 434 F.2d 361, 362, it was not required to prove that appellants knew where it was stolen, cf. *Pugliano v. United States*, 1 Cir., 1965, 348 F.2d 902, 903. It follows that it was not necessary for the government to prove that appellants knew the law of the place of the theft. Appellants' knowledge of Guatemalan law is relevant only to the extent that it bears upon the issue of their knowledge that the stele was stolen. The judge specifically instructed the jury that it must find beyond a reasonable doubt that appellants knew that the stele had been stolen. Thus, the judge's failure to clarify the issue of the proof of knowledge of the law of Guatemala, while it may have been error, was not, in our opinion, prejudicial. Viewing the instructions as a whole, we think it most unlikely that the jury thought that the questioned instruction referred to the law of Guatemala. Cf. *Cohen v. United States*, 9 Cir., 1967, 378 F.2d 751, 752.

Affirmed.

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593 F.2d 658 (5th Cir. 1979)

UNITED STATES of America, Plaintiff-Appellee,  
v.  
Patty McClain, Mike Bradshaw, Ada Eveleigh Simpson and William Clark Simpson,  
Defendants-Appellants.

No. 77-5690.

United States Court of Appeals,  
Fifth Circuit.

April 23, 1979.

Defendants were convicted in the United States District Court for the Western District of Texas, John H. Wood, Jr., J., of having received, concealed and/or sold stolen goods in interstate or foreign commerce and conspiracy to do the same in violation of the National Stolen Property Act, involving their dealings in pre-Columbian artifacts. The Court of Appeals, Gee, Circuit Judge, held that: (1) National Stolen Property Act had application to dealings in pre-Columbian artifacts which were classified as stolen because Mexican government had enacted national ownership of its patrimony, and (2) error in allowing jury to decide question of foreign law as to when Mexican government declared ownership of all such artifacts required reversal of substantive count but, because of overwhelming evidence, did not require reversal of conspiracy count.

Affirmed in part; reversed in part.

[1] COURTS k99(1)  
106k99(1)

Under doctrine of law of the case, it is court's practice to apply rule of law enunciated by court to same issues in subsequent proceedings and appeals in same case.

[1] FEDERAL COURTS k917  
170Bk917

Under doctrine of law of the case, it is court's practice to apply rule of law enunciated by court to same issues in subsequent proceedings and appeals in same case.

[2] COURTS k99(1)  
106k99(1)

Unlike rule of res judicata, doctrine of law of the case applies only to issues that were decided in former proceeding but not to question that might have been decided but were not.

[3] RECEIVING STOLEN GOODS k2  
324k2

National Stolen Property Act has application to dealings in items classified as stolen because a particular country has enacted national ownership of its patrimony. 18 U.S.C.A. §§ 2314, 2315.

[4] CRIMINAL LAW k734  
110k734

Although proper procedure is for judge rather than jury to determine questions of foreign law, it does not necessarily follow that putting matter to jury is reversible error since there is no automatic prejudice to substantial rights of defendant inherent in letting jury decide question on basis of expert testimony. Fed. Rules Crim. Proc. rule 26.1, 18 U.S.C.A.

[5] RECEIVING STOLEN GOODS k2  
324k2

Although National Stolen Property Act is not void for vagueness because general class of offenses to which it is directed

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is plainly within its terms, it cannot properly be applied to items deemed stolen only on basis of unclear pronouncements by foreign legislature. 18 U.S.C.A. §§ 2314, 2315.

[6] CRIMINAL LAW k1172.1(2)  
110k1172.1(2)

In prosecution for violations of National Stolen Property Act involving pre- Columbian artifacts from Mexico, error in allowing jury to decide question of foreign law as to when Mexican government declared ownership of all such artifacts required reversal of substantive count of having received, concealed and/or sold stolen goods in interstate or foreign commerce. 18 U.S.C.A. §§ 371, 2314, 2315.

[7] CRIMINAL LAW k1171.1(2.1)  
110k1171.1(2.1)  
Formerly 110k1171.1(2)

In prosecution for violation of National Stolen Property Act involving pre- Columbian artifacts from Mexico, error in allowing jury to decide question of foreign law as to when Mexican government declared ownership of all such artifacts did not require reversal of conviction for conspiracy to receive, conceal and/or sell stolen goods in interstate or foreign commerce because of evidence regarding continuing illegal purpose of defendants which, if effectuated, would necessarily entail dealings in "stolen" property under any view of Mexican law. 18 U.S.C.A. §§ 371, 2314, 2315.

\*659 Charles E. Biery, San Antonio, Tex. (Court-appointed), for McClain.

Pat Priest, San Antonio, Tex. (Court-appointed), for Bradshaw.

O'Neal Munn, San Antonio, Tex., for A. Simpson.

John S. Broude, Fort Worth, Tex. (Court-appointed), for Wm. Clark Simpson.

James R. McAlee, Washington, D. C., Jamie C. Boyd, U. S. Atty., LeRoy M. Jahn, W. Ray Jahn, Asst. U. S. Attys., San Antonio, Tex., for plaintiff-appellee.

Appeals from the United States District Court for the Western District of Texas.

Before GEWIN, RONEY and GEE, Circuit Judges.

GEE, Circuit Judge:

Again before us come Patty McClain, Mike Bradshaw, Ada Simpson and William Simpson, challenging their second round of convictions for having received, concealed and/or sold stolen goods in interstate or foreign commerce and also for conspiracy to do the same, violations of 18 U.S.C. ss 371, 2314 and 2315. The goods in which they dealt are pre-Columbian artifacts, and in neither this nor the prior trial was there evidence that the appellants or anyone else had taken the items from the personal possession of another. The legal theory under which the case was tried was that the artifacts were "stolen" only in the sense that Mexico generally has declared itself owner of all pre-Columbian artifacts found within its borders. Thus, anyone who digs up or finds such an item and deals in it without governmental permission has unlawfully converted the item from its proper owner.[FN1]

FN1. See generally *United States v. McClain*, 545 F.2d 988 (5th Cir.), Rehearing denied, 551 F.2d 52 (5th Cir. 1977).

Only one other reported conviction has resulted from application of the National Stolen Property Act to dealings in pre-Columbian artifacts. In *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), Clive Hollinshead of Los Angeles, California, was successfully prosecuted for transporting into the United States a known and cataloged Guatemalan stela. Hollinshead was on probation for this offense during the events leading to the instant prosecution. At least appellants Simpson and Bradshaw knew Hollinshead and were aware of his conviction and probation. Hollinshead was to have supplied several of the artifacts that appellants were selling when they were arrested.

\*660 By various formulations, appellants and the amicus curiae, the American Association of Dealers in Ancient,

Oriental & Primitive Art, raise basically three issues in this appeal. They challenge: (1) the propriety of the application of the National Stolen Property Act (N.S.P.A.), 18 U.S.C. ss 2314, 2315, to dealings in pre-Columbian artifacts; (2) the correctness and sufficiency of the jury instructions regarding the Mexican law of pre-Columbian artifacts; and (3) the sufficiency of the evidence to support the convictions as measured under their view of the Mexican law. Though in raising these issues the appellants did not distinguish between their convictions on the substantive count and their convictions on the conspiracy count, we find that their arguments regarding jury instructions compel reversal of the substantive count only. On the conspiracy charges, we find the shortcomings below merely harmless error and thus affirm the convictions on that count for the reasons expressed below. This mixed disposition requires a more detailed account of the facts than is present in the earlier opinion. We first review, therefore, the evidence adduced at trial, cast in the light most favorable to the government's verdict.

#### I. The Appellants' Dealings in Pre-Columbian Artifacts.

In May 1973, Joseph Rodriguez, a resident of Calexico, California, arrived at a Dallas motel with a collection of pre-Columbian artifacts for display and sale.[FN2] He sold pieces at least to a local art dealer and to a law professor who was staying in the same motel. He thereafter moved his wares to a San Antonio motel, apparently as a result of his dealings with the professor, who taught in San Antonio. From the new location Rodriguez contacted prospective buyers, including Alberto Mejangos, who unbeknownst to Rodriguez was director of the Mexican Cultural Institute, an educational outpost of the Mexican government located in San Antonio. Suspecting Rodriguez of illicit dealings, Mejangos and Adalina Diaz-Zambrano, the librarian at the institute, visited Rodriguez to see the collection, without identifying themselves as officials of the Mexican government. Rodriguez showed them a large collection of fine artifacts, many of which were caked with mud and straw. When he was asked how it was possible that he had all these ancient artifacts, Rodriguez said that he had five squads working in various Mexican archaeological zones and that the objects were passed, a few at a time "by contraband" to his Calexico store, which served as a front for his operation. When he amassed enough objects, he said, he would sell them in different localities. He priced the items he showed Mr. Mejangos and Ms. Diaz-Zambrano at figures ranging between \$5,000 and \$20,000, explaining that the prices had gone up as a result of the February 1972 presidential agreement between the United States and Mexico. He said he now had to give more money to the people who were passing the objects to him.

FN2. Rodriguez, a codefendant at the original trial, was not retried with the others because he was found mentally incompetent in the interim.

At some time after these meetings in San Antonio, Rodriguez returned to Calexico, leaving the collection behind with appellants William and Ada Simpson who were authorized to sell the items. The next known transaction regarding the Rodriguez artifacts occurred in early December 1973. Simpson and appellant Mike Bradshaw contacted William Maloof of Cleveland, Ohio, a college friend of Bradshaw, in an effort to raise money for an oil importation venture. They offered Maloof several of the artifacts as collateral for the loan Maloof considered making. Simpson, Bradshaw, and a third man whom Maloof spoke with only by phone,[FN3] told Maloof that the items had been "stolen" or "smuggled" out of Mexico. They said that a man named Rodriguez was "chief of the Mexican Secret Service" and had gotten the artifacts from "a vault" in Mexico. Patty McClain was mentioned as an appraiser who knew the value of the artifacts. Simpson and Bradshaw told Maloof \*661 that they planned to take most of the objects to Europe, "auction" them off, and then return them to the United States. This process would yield bills of sale from European art dealers, which would facilitate later resale. Maloof, suspecting he was being swindled, contacted the FBI and showed the objects to them. After being alerted by the Cleveland office, the Houston office of the FBI delegated Special Agent John McGauley, to determine whether stolen pre-Columbian artifacts were being sold by the group. To assist in the covert investigation, McGauley brought in Travis Benkendorfer, who had proven to be a reliable informant on other occasions.

FN3. The man identified himself as Harry McClain, who is appellant Patty McClain's husband.

In February 1974, after failing to contact Harry McClain, Benkendorfer succeeded in reaching the Simpson residence by telephone. Identifying himself as a Mr. Benks, Benkendorfer told Mrs. Simpson a cover story that he was interested in acquiring stolen treasury bills, stocks, bonds, or other stolen or illegal merchandise for resale. He said that he represented an international combine with Mafia or other underworld connections and that any stolen merchandise they purchased would immediately be flown out of the country by private plane. Mrs. Simpson replied that her husband and his partner Patty McClain were then in California, waiting for a shipment of pre-Columbian artifacts to cross the border.

She said that she would have her husband and Mrs. McClain contact Benkendorfer. When Simpson called Benkendorfer the next morning, Benkendorfer repeated his story. He explained that he had gotten Simpson's name through a Long Island man with Mafia connections and had been instructed to discover for his principal whether Simpson had any artifacts for sale. Simpson replied that he had approximately 150 pieces already in San Antonio and was in Calexico awaiting a new shipment from the diggings. He described a "conduit" by which the items were taken from the diggings to the archaeological institute in Mexico, where documents or permits were forged or backdated. The items were then trucked in disguise to the border at Calexico before distribution to various cities in the United States, particularly San Antonio. Simpson stated that what they were doing "is illegal, but really not illegal, because if the Mexican authorities knew basically what we were doing, they would take them away from us, because the Mexicans really claim all of the items belong to them." Simpson explained further that the backdating of the papers was due to a new "presidential law" that had gone into effect in Mexico, prohibiting private ownership of artifacts after its effective date. He said that the group had planned to ship the items to Europe for sale but that they could save shipping and breakage costs if Benkendorfer and his principal bought the new shipment right at the border. Simpson said that Rodriguez and Patty McClain each had collections that also would be available. Benkendorfer said he would discuss the offer with his principal. He later relayed the message through Mrs. Simpson that he would prefer to have all the items shipped to San Antonio for a single viewing and purchase decision. Simpson agreed to this proposal, emphasizing that all of them would have to be extremely discreet. He said they would get into a lot of problems if the United States government caught them since what they were doing was against the law. He repeated that the Mexicans claimed ownership of the items. Simpson also mentioned during the conversation that his associate Mike Bradshaw was flying from Alabama to Calexico with money to pay for the items that were coming across the border.

Several days later, Benkendorfer received word from Mrs. Simpson that trouble had developed in the conduit or channel. Patty McClain confirmed this when she later contacted Benkendorfer to discuss terms for the sale of her collection. She said that the driveshaft of the truck carrying the artifacts had broken south of the border and that Simpson was sending a new truck to the interior to bring in the goods. In terms highly similar to Simpson's she also described the "channel" from the diggings and the system for getting backdated permits and trucking the items to Calexico developed by \*662 Joe and "staff." She said that she and Simpson were responsible for distributing the goods to various points away from Calexico, especially if they were bound for the European market. When Benkendorfer repeated his cover story, McClain gave him some of her artifacts to show to his principal, Mr. Dooley (Agent McGauley). McClain made Benkendorfer promise not to show the items to an art dealer or museum because a recent similar showing had caused the FBI to investigate. McClain agreed that Benkendorfer and McGauley might bring their own appraiser to the San Antonio showing, though she was anxious that the appraiser not come from Mexico City. She explained that she was afraid he might return and report their doings to the authorities because "what we are basically doing is against the law." A final topic during this meeting involved a mild expression of interest by Benkendorfer in purchasing Mexican gold. When Benkendorfer next spoke with Simpson, in addition to repeating the story of the broken driveshaft, Simpson offered to sell Benkendorfer some gold bars that were coming out of Mexico via the same conduit as the artifacts. Simpson then put "his partner" Joe Rodriguez on the phone to explain the gold deal, which Benkendorfer rejected after hearing the details.

During his next phone conversation with Simpson, who was still in Calexico, Benkendorfer spoke with appellant Mike Bradshaw for the first time. Bradshaw's comments evidenced his knowledge of the conduit and the planned sale, and he stressed the need for discretion due to the danger.

Following this round of contacts the defendants seemed to grow even more cautious. Simpson interrogated Benkendorfer about where he had learned Simpson's name; McClain expressed concern about the amount of information Simpson and Bradshaw had conveyed to Benkendorfer by phone; several of the appellants sought to assure themselves that Benkendorfer was not with the FBI. McClain even tried to renegotiate the timetable of the showing and sale so that the new shipment would not be sold until after the in-country items had been successfully conveyed. Such a split timetable was ultimately agreed upon after Benkendorfer told Simpson that his New York connection had authorized the purchase of artifacts currently held by Simpson, Rodriguez, and McClain and that a decision whether to buy the next shipment would come later.[FN4]

FN4. During one of the conversations to perfect details of the San Antonio meeting, Simpson asked whether Benkendorfer and McGauley would be interested in purchasing a three-ton stela from the Mexican interior. Simpson was contemplating a burro trip down to the monument so the buyers could inspect it before it was cut

into three pieces for transportation out of the country. Benkendorfer declined the offer when he learned that the object was still in place.

On the appointed date, March 4, 1974, Agent McGauley and Benkendorfer arrived at the San Antonio Holiday Inn, chosen by Simpson because it had a meeting room with an outside entrance that would be "discreet." Over supper with the four appellants and Mike Bradshaw's fiance, they discussed various aspects of the deal. McGauley repeated the cover story, adding that his New York syndicate was trying to corner the market on pre-Columbian artifacts. The defendants again voiced concern that McGauley's appraiser was coming from Mexico and might return to inform the Mexican government. McGauley assured them that the expert had been adequately paid and that he had methods of ensuring the man's silence. The defendants mentioned that the items were coming from a dig that the Mexican authorities did not know about. Simpson commented that if the FBI knew the artifacts were at the hotel they would seize them. McGauley assured them that he was not an FBI agent.

At supper the defendants further suggested that McGauley also go to the west coast to buy some very valuable stelae and large figurines accumulated there by Clive Hollinshead. Because McGauley had obtained only a single certified bank draft for the "purchase," the parties worked out an escrow agreement to handle the need to \*663 inspect the items at separate locations. After supper, Benkendorfer and McGauley briefly viewed the artifacts in the locked meeting room and retired for the night.

The next morning the "appraiser," Dr. Eduardo Montes Moctezuma of the Mexican Department of Archaeology, arrived with his "interpreter," another undercover FBI agent. While these two men, Agent McGauley, William Simpson and Patty McClain examined the artifacts one by one, Benkendorfer, Bradshaw and Mrs. Simpson stayed in the coffee shop. During the wait, Bradshaw informed Benkendorfer that he had invested a great deal of time and money to make Rodriguez' conduit secure, that he had been to the diggings and followed the conduit all the way up through Calexico, California. Bradshaw confirmed earlier Simpson comments that the Indians who were stealing the artifacts had no idea of their worth and were paid only a small sum to get the artifacts from the diggings, to "rob the graves." He also stated that Rodriguez had paid off several customs inspectors along the border to pass the items across.

During the appraisal in the meeting room, McClain and Simpson confirmed that, in addition to the artifacts still located in California, Rodriguez was bringing more across the border and that they would be available to McGauley. These had not crossed yet because of the truck breakdown. McGauley arranged to purchase the goods he had just inspected, contingent upon inspection of the items available in California.

Over lunch McGauley negotiated the sale terms with appellants agreeing on a price of \$115,000 for the San Antonio lot, including McClain's items. Bradshaw and Simpson then arranged to meet McGauley, the "appraiser" and the "interpreter" in Los Angeles the next day to view the Hollinshead artifacts. McClain and Mrs. Simpson agreed to remain behind and rewrap and store the items. The next day, March 6, 1974, Simpson and Bradshaw were arrested in Los Angeles during the course of negotiations to purchase the Hollinshead artifacts for \$850,000. McClain and Mrs. Simpson were arrested in San Antonio the same day.

There was evidence at trial that none of the items "purchased" by Agent McGauley bore the indicia of registration with the Archaeological Registry maintained by the Mexican government since 1934 a permanent, coded number placed with indelible ink on an inconspicuous area of the piece. Nor were any documents of registration for these pieces in the names of either Rodriguez or any of the appellants found in the registry. Additionally, no export permits had been obtained for the items. In fact, since 1897 the Mexican government has issued only temporary export permits, and those are issued exclusively to cultural institutions or universities. Permits have never been issued to private individuals or for commercial purposes.

## II. Application of N.S.P.A. to Dealings in Pre-Columbian Artifacts.

Appellants attack the application of the N.S.P.A. to their conduct under two different theories. They first argue that Congress never intended the N.S.P.A. to reach items deemed "stolen" only by reason of a country's declaration of ownership. In any event, they claim, the N.S.P.A. was superseded by the 1972 Law on Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. ss 2091-95, which provides only the civil penalty of forfeiture [FN5] for importation of certain types of pre-Columbian artifacts. [FN6] Second, they \*664 and their amicus argue that due process is violated by imposing criminal penalties through reference to Mexican laws that are vague and

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inaccessible except to a handful of experts who work for the Mexican government.

FN5. 19 U.S.C. s 2093 details the only penalties contained in the 1972 Importation Act. It provides that any object imported in violation of the Act shall be seized and subject to forfeiture under the customs laws.

FN6. This statute prohibits importation into the United States, unless the country of origin has certified exportation, of "stone carvings and wall art which are pre-Columbian monumental or architectural sculpture or murals." The latter term is defined in s 2095(3) as any stone carving or wall art (or fragment or part thereof) that (1) is the product of pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands; (2) was an immobile monument or architectural structure or was a part of, or affixed to, any such monument or structure; and (3) is subject to export control by the country of origin.

Though some of the artifacts seized in San Antonio and Los Angeles seem to come within this definition, the majority of the pieces are movable items such as ceramic dishes, pots, or figurines that may not have been part of or affixed to monuments or walls within the apparent meaning of the statute.

[1][2] We view appellants' first argument as foreclosed by our doctrine of law of the case. Under that doctrine it is our practice to apply a rule of law enunciated by the court to the same issues in subsequent proceedings and appeals in the same case. Unlike the rule of *res judicata*, the doctrine applies only to issues that were decided in the former proceeding but not to questions that might have been decided but were not. *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir. 1978). Though appellants articulated their theories in a slightly different manner in the first appeal, they provoked a square holding that, in addition to the rights of ownership as understood by the common law, the N.S.P.A. also protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government. *United States v. McClain*, 545 F.2d 988, 994-97 (5th Cir. 1977). Moreover, the earlier panel had considered evidence of the 1972 statute, its legislative history and UNESCO negotiations, holding nevertheless that neither statute nor treaty nor our historical policy of encouraging the importation of art more than 100 years old had the effect of narrowing the N.S.P.A. so as to make it inapplicable to artifacts declared to be the property of another country and illegally imported into this country. 545 F.2d at 996-97. Appellants' attempt to raise these points again on appeal is therefore foreclosed Unless

(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work manifest injustice.

*Morrow v. Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978), Quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967).

Of these customary heads of exception, only the third is even a colorable issue. Appellants attempt to identify clear error in the panel's decision largely by pointing to the legislative history of the 1972 statute. From stray congressional remarks, such as that of Representative Byrnes of Wisconsin that the legislation deals with "items Stolen in the country of origin, and we are saying that if it is stolen it cannot be brought in," [FN7] coupled with the statute's noncoverage of movable artifacts such as ceramic pots or figurines and provision of civil forfeiture as the only penalty, appellants seek to establish a very specific legislative understanding and intent. They argue (1) that Congress believed that pre-Columbian artifacts were not forfeitable under preexisting laws such as the N.S.P.A.; (2) that Congress must have intended to allow importation of movable items like most of those in the *Rodriguez/Simpson/McClain* collections; and (3) that Congress intended that illegal importation of immovables be punished by forfeiture of the item and not by imprisonment or fine under the criminal laws.

FN7. 118 Cong.Rep. 37098 (1972) (emphasis added).

[3] Our study of the statute and its scant legislative history persuades us that appellants' reading of it is not correct. Both the Report by the House Ways and Means Committee and the Report by the Senate Finance Committee explicitly refer to the presence of other unspecified sanctions: "While legal remedies for the return of such objects are available in U.S. courts in some cases, these procedures can be extremely expensive and time consuming and do not provide a meaningful deterrent to the pillage of pre-Columbian sites now taking \*665 place." [FN8] Moreover, the Act covers objects imported from all the countries of Latin America. These countries may have acted quite differently to protect their cultural heritages, some by declaring national ownership and others merely by enacting stringent export restrictions. Since it covers artifacts from such a large number of countries, the Act is better seen not as an indication that other available

penalties were thereby precluded, but rather as a recognition that additional deterrents were needed. We cannot see in this congressional intent any desire to prevent application of criminal sanctions for dealing in items classified as stolen because a particular country has enacted national ownership of its patrimony.[FN9]

FN8. H.R.Rep.No.92-824, 92d Cong., 2d Sess. 3 (1972); S.Rep.No.92-1221, 92d Cong., 2d Sess. 2 (1972).

FN9. During the congressional debates, Rep. Byrnes also stated:

The situation is that a narrow class of very valuable archaeological objects from the pre-Columbian period in South America are being taken out of that country (sic) illegally, and being brought into this country.

There is no prohibition in this country about bringing in these articles, the prohibition is against taking these articles out of the country in which they are found, and this is an attempt to cooperate with these countries to avoid this exploitation that is taking place.

118 Cong.Rec. 37097 (1972). Instead of reading into these remarks the specific and technical meaning attributed to them by appellants, we understand the congressman to be referring to the general state of American law regarding the importation of items illegally exported from another country. As the earlier panel observed, the fundamental rule, absent modification as by the 1972 statute, is that it is not a violation of law to import an item of art or anything else simply because it has been illegally exported from another country. 545 F.2d at 996.

But that generalized principle does not preclude federal criminal liability for concealing, selling, or transporting across state or international borders items that are not only illegally exported from a country such as Mexico, but are also incapable of being privately owned or conveyed. Dealing in such items is dealing in stolen goods and may be punished accordingly, irrespective of import regulations.

Appellants' second challenge is not so easily resolved. It is elementary that criminal statutes must give notice of the acts they prohibit before valid penalties may be imposed thereunder. In their first appeal, appellants argued broadly that a reference to any foreign law for the purpose of determining what is or is not "stolen" would "inject an unacceptable degree of uncertainty into the administration" of the N.S.P.A. This argument also drew a firm holding a ruling that application of the N.S.P.A. to foreign exportation did not render that statute void for vagueness. 545 F.2d at 1001, 1002 n.30. The court reasoned that the statute's specific scienter requirement eliminates the possibility that a defendant is convicted for an offense he could not have understood to exist. In support, the court cited *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952), for the proposition that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." The court finally noted that it would have been impossible for the statute to have explicitly described every type of theft that might fall within its broad purview. *Id.*

In assessing whether the law of the case doctrine precludes further challenge under a void-for-vagueness theory, we first observe that the panel's holding was in response to a challenge about reference to foreign law Generally and not to a challenge about the specific Mexican statutes. Moreover, we think it very significant that the panel's response was made in the context of its independent review of the relevant Mexican statutes. Its study of those statutes led the court to conclude that Mexico had not Unequivocally declared national ownership of All artifacts until 1972. 545 F.2d at 997-1000. Entailed in the proposition that criminal penalties on the basis of the 1972 declaration of ownership are proper, is the probable corollary that criminal penalties on the basis of, for instance, the 1897 Mexican statute alone would have been improper because that statute did not declare the nation's ownership of movables \*666 with sufficient clarity.[FN10] The panel's opinion is consistent with the view that, had there been no subsequent enactments that declared ownership with enough specificity to be accessible to and understandable by our citizenry, criminal penalties may well have violated our fundamental standards of due process. We are therefore convinced that, insofar as criminal liability in the second trial may possibly have been predicated on a conclusion that the 1897 Act declared Mexican ownership of all artifacts, appellants' precise due process challenge was not decided before and therefore survives. Because the due process challenge is so closely linked with the issue of the proper view of Mexican law, further discussion of this issue will be postponed until we have described and assessed the record on that point.

FN10. Article 1 of the Law on Archaeological Monuments, May 11, 1897 (Diario Oficial de 11 de Mayo de 1897, See XIV Annario de Legislacion y Jurisprudencia (1897)), declared "archaeological monuments" to be the "property" ("propiedad") of the nation, but "archaeological monuments" were defined in article 2 as "ruins of cities, Big Houses (Casas Grandes), troglodytic dwellings, fortifications, palaces, temples, pyramids, sculpted rocks or those with inscriptions, and in general all the edifices that in any aspect may be interesting for the study

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of civilization and history of the ancient settlers of Mexico." There was no corresponding declaration of ownership of movable artifacts such as codices, idols, amulets, though exportation of such items was forbidden unless legally authorized. Art. 6.

### III. Jury Instructions Regarding Mexican Law, Sufficiency of Evidence.

At appellants' first trial a deputy attorney general of Mexico testified as an expert witness, and the trial court subsequently instructed the jury that Mexico had, since 1897, vested itself with ownership of all pre-Columbian artifacts found in that country. As mentioned above, its independent review of translations of the various Mexican statutes convinced the earlier panel that Mexico had not unequivocally claimed ownership of All such artifacts until 1972. The earlier Mexican statutes seemed only to have claimed national ownership of immovable monuments and such movable artifacts as were found on, and possibly in, the immovable objects.[FN11] Movable objects not in the above classes seemed capable of being privately owned and conveyed, though the Mexican government required that such objects be registered and retained the right to acquire items of great cultural or archaeological value by purchase at a fair price. Certain other provisions referred to in the petition for rehearing seem to have established a presumption against private ownership of any movable not registered within the applicable time limits.[FN12] In view of the complicated and gradual nature of Mexico's apparent declarations of ownership, the earlier panel ruled that the defendants were entitled to a new trial because of the prejudice \*667 that may have resulted from the erroneous instruction that Mexico owned all artifacts as early as 1897. Its analysis of the changes in Mexican law convinced the panel that the jury should have been told to determine when the artifacts had been exported from Mexico and to "apply the applicable Mexican law to that exportation." 545 F.2d at 1003.

FN11. For instance, the Law for the Protection and Preservation of Archaeological and Historical Monuments, Typical Towns and Places of Scenic Beauty, January 19, 1934 (82 Diario Oficial 152, 19 de enero de 1934), broadened the definition of "monuments" to include "all vestiges of the aboriginal civilizations dating from before the completion of the Conquest." Art. 3. But art. 4 clearly declared national ownership of artifacts in more limited categories "immovable archaeological monuments" and "objects which are found (in or on) immovable archaeological monuments." See 545 F.2d at 998-99, including n.20 that explains the dispute over movable items found In immobile monuments.

FN12. Art. 9 of the 1934 statute, Supra note 11, created a Register of Private Archaeological Property" ("Propriedad") with which private individuals were to register movable monuments in their "control" or "ownership." (Translation of any terms suggestive of private ownership was hotly disputed at trial.) Art. 12 of that statute prescribed that objects not registered within the period stipulated in the Act's transitory articles "shall be presumed to come from archaeological monuments which are real property." Because the Act had earlier declared national ownership of all immovable monuments, Supra note 11, the force of this presumption seems to nationalize all movable artifacts not registered by the end of the transitory period.

There is a similar presumption in the statute that superseded the 1934 Act, the Federal Law Concerning Cultural Patrimony of the Nation, December 16, 1970 (303 Diario Oficial 8, 16 de diciembre de 1970). See art. 55 thereof, which provides that movable objects not registered within the allowed time limits are presumed "the property of the nation." ("propriedad").

When the additional complication of the statutory presumptions was raised in the petition for rehearing, the court explained that its earlier discussion of Mexican law had not been "an exegesis of every relevant statutory clause or a holding on every issue that was or might have been raised." Rather, the court contemplated that on remand "objective testimony" on the meaning of the relevant Mexican enactments would be introduced, so as to lighten the burden both of the district court and reviewing court. The court reiterated that the earlier instructions had been "clearly in error" as to Mexican law but added that at any subsequent trial "experts will have an opportunity to correct any misconception of which this Court may have been guilty in venturing forth in the arcane field of the Mexican law of pre-Columbian artifacts." United States v. McClain, on petition for rehearing, 551 F.2d 52, 54 (5th Cir. 1977).

Pursuant to these instructions, at the second trial the judge admitted testimony from several government and defense witnesses about the relevant Mexican law. Only two of the witnesses were accepted by the court as experts specifically on the Mexican law of archaeological monuments. The first, Javier Andres Oropeza-Secura, is the Director of the Judicial Branch of the National Institute of Anthropology and History of Mexico, the office in charge of the official

registry for ancient artifacts. The second was Ricardo de los Rios, an attorney who currently works at the Ministry of Labor and who formerly worked in the Attorney General's office, where he prosecuted about 150 cases under the Mexican laws regulating artifacts. Since each of these men is an employee of the Mexican government and was challenged by defendants as possibly biased, the government introduced other witnesses to corroborate their testimony. Carlos Schon, an attorney in Mexico City with a general practice and a heavily American clientele, was allowed to testify as a licensed practitioner of the general laws of Mexico from whom one may seek legal opinions. His testimony on archaeological law was based on his review of the various statutes and the Mexican Constitution. Though the testimony of these witnesses varied on a specific point here and there, the weight of their testimony as a whole indicated a general opinion that the Mexican government owned all pre-Columbian artifacts at least as early as 1897.[FN13] Rights of private individuals were \*668 limited to the right of possession, but only if the particular artifact had been properly registered, and the mere right to possess does not confer the right to sell an item or to give it as security for a loan.

FN13. The witnesses, though very emphatic in affirming their understanding of longstanding national ownership of all artifacts, were unable to identify specific passages (apart from the 1934 and 1970 presumptions) in the 1897, 1930, 1934, or 1970 statutes that claimed outright ownership of the sort of movables largely involved in this case. By contrast, those statutes contain several explicit declarations of ownership of immovables and smaller movable items found on, and possibly in, the immovable monuments. *Supra*, notes 10 and 11.

On cross-examination, appellants tried to lead the government witnesses to admit that the specific pronouncements of ownership of some objects indicated an obvious legislative intent to leave undisturbed private ownership of other objects, especially since various provisions seem clearly to contemplate private ownership. For instance, art. 26 of the 1930 statute provides that "(i)n order to determine the ownership ('propiiedad') of movable things of artistic, archaeological or historical value that are discovered in a casual manner and not as a result of archaeological excavation or exploration, the provisions of the Civil Code of the Federal District and Federal Territories related to treasures will apply, but the Federal Government may acquire the discovered objects for their fair price, when it deems this appropriate."

The witnesses stood their ground, however, arguing that the expressions of limited ownership did not preclude general ownership of all artifacts. Without succeeding in rationalizing the statutory provisions with his categorical view of government ownership, Carlos Schon at least attempted to identify an arguable source of national ownership by reference to art. 27 of the Mexican Constitution of 1917. That provision, as explained by Schon, provides that the property of the land and the water within the limits of the national territory belongs originally to the nation, which has the power to transmit them to private individuals as private property. He interpreted art. 27 as extending to manmade items buried in the land, in addition to the natural deposits of minerals and ores found therein. Under his view, unless the legislature acts to grant to individuals derived ownership rights regarding any of these things, national ownership is retained.

The testimony of Ricardo de los Rios also touched on art. 27, and there are indications he may have held similar views of its meaning. The questions he was asked did not cause him to focus on the issue with sufficient precision for us to determine his position, however.

These views were further corroborated by two civilian witnesses, one Mexican and one American. Ms. Diaz-Zambrano testified that she had learned in elementary school that the Mexican people own all vestiges of pre-Hispanic civilizations found in the country. Dr. Richard E. W. Adams, Professor of Anthropology and Dean of Humanities and Social Science at The University of Texas in San Antonio, testified that he had participated in several archaeological excavations in Mexico. He stated that in 1953 at a class he attended at the School of Anthropology and History in Mexico City, he was told that all archaeological items are the property of the nation and cannot be exported. He also testified that, insofar as it affected his work and the difficulty of exporting legitimately excavated objects from Mexico, the Mexican law had not changed in the last twenty years.

Against this massive record, appellants offered, in addition to their own views of Mexican law, the testimony of Ignacio Gomez Palacio, an attorney in Mexico who engages in legal research, writing, and a general practice. Like Mr. de los Rios, his opinion was based on independent review of the Mexican Constitution and relevant statutes, rather than on any long-held expertise on the particular subject of pre-Columbian artifacts. His testimony was similar to the conclusions reached earlier by the Fifth Circuit panel, and he seems to be the only witness to explain persuasively several passages in the statutes that are anomalous under the categorical views advanced by the government witnesses.[FN14]

FN14. As observed in note 13, *Supra*, it was difficult for the government witnesses to account for the statutory

declarations of ownership of Some items if the government supposedly owned All types of artifacts already. The declaratory passages made much more sense under Gomez' view that the government only gradually expanded its ownership claims. Contrary to Schon's analysis, Gomez read art. 27 of the 1917 Constitution as restricted to land, subsoil, and materials naturally occurring therein, such as minerals, precious stones, ores, oil. He classified manmade items that were found in the soil as "treasure trove" and noted that ownership claims to such items were regulated by provisions of the Civil Code of the Federal District. He analyzed art. 26 of the 1930 statute, set out in note 13, Supra, as incorporating by reference the treasure trove statutes and as further evidence of the ability of private persons to own at least some artifacts under the earlier statutes.

On this new record the trial judge faced a dilemma. The Fifth Circuit had ruled him in error for having concluded that Mexico had claimed ownership as early as 1897, and the panel had re-emphasized its ruling even while instructing him to allow experts to correct any error in the appellate opinion. Yet the great weight of the government's new expert testimony indicated that his earlier conclusion might still be the proper view of Mexican law at least as interpreted by some of the few Mexican nationals qualified to express an authoritative opinion. Perhaps in view of this dilemma about the paths open to him and because none of the parties urged that it was his function to decide the question of applicable foreign law, the trial judge gave the jury the task of deciding whether and when Mexico Validly enacted national ownership of the artifacts involved.[FN15] In addition to now urging \*669 for the first time that the court erred in failing to make the determination of foreign law, the appellants argue that certain aspects of the instructions were erroneous and that the court erred in refusing to give the instructions they had offered.[FN16]

FN15. The judge instructed the jury as follows:

Now, in order to find any one or more of the defendants guilty on one or more of the counts in the indictment, the government must prove three essential elements of the offense charged in this case beyond a reasonable doubt as follows:

1. That the Republic of Mexico was the owner of the alleged artifacts, if any, at the time such artifacts were exported if and only if you so find, from the Republic of Mexico into the United States of America;
2. That such artifacts, if any, were in fact exported from Mexico and thus imported into the United States of America from the Republic of Mexico; and
3. That such alleged artifacts were produced before the Spanish Conquest of Mexico and the government of the Republic of Mexico had not issued or granted a permit or license allowing and authorizing the defendants or any other person, firm, corporation, governmental agency or others to export such artifacts, if any, from Mexico to the United States of America or to any other country or place; and such artifacts, if any, had not been registered under Mexican law.

As I have said, all three and each and every one of the essential elements that I have just given you must be proved and established to your satisfaction beyond a reasonable doubt before you can find the defendants guilty in this particular case. Now, there is absolutely no presumption that the defendants or any one of them knew the Mexican law. On the other hand, the United States of America is under no obligation to prove that the defendants knew the place from which the artifacts were allegedly stolen, if it is shown beyond a reasonable doubt that they were in fact stolen. What the United States must prove to your satisfaction beyond a reasonable doubt is that the defendants knew that the artifacts were in fact stolen under the laws of Mexico regardless of where they came or from where they were stolen And that the Mexican government had in fact effectively adopted valid laws acquiring ownership of such artifacts, if any, Which were in existence at the time of such theft, if any, and that the defendants knew and understood such laws and that such laws had been violated. (emphasis added).

FN16. On numerous occasions during the trial the judge had clearly indicated his intent to give this issue to the jury. Beyond one tentative expression of doubt by an assistant prosecutor, none of the parties objected to putting this burden on the jury. The judge had also requested assistance from the parties in formulating the instructions on Mexican law, but none responded until the last moment, when they proffered handwritten requests in part tracking the earlier panel opinion. The judge thought his own set of instructions carefully followed the panel opinion because the jury was being told, in effect, to apply the applicable Mexican law to the defendants' behavior. In objecting to the charge, defendants' only points were that their proffered instructions were more precise renditions of the panel's legal conclusions than were the trial judge's. When, during the bench conference after the instructions had been given, the judge commented, "I put quite a burden on (the jury to find whether the Mexican laws were valid enactments)," appellants' attorneys failed to comment on the procedure.

Rule 26.1 of the Federal Rules of Criminal Procedure provides in part that "(t)he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under (Rule 26.) The court's determination shall be treated as a ruling on a question of law." Despite appellants' fond hopes, Rule 26.1 does not itself mandate that the judge rather than the jury decide all questions of foreign law. Rather, it provides that any determination a judge Does make shall be treated as a ruling on a question of law. This "functional approach," carefully sidestepping the issue of who is to decide the question, was deliberate on the part of the draftsmen.[FN17]

FN17. The Advisory Committee Notes on the Fed.R.Civ.P. 44.1 to which we are referred by the draftsmen of the Rules of Criminal Procedure observe that Rule 44.1, to which Rule 26.1 is substantially identical, does not address itself to this problem because the rules generally refrain from allocating functions between judge and jury. The committee adds, "It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law," citing, among other authorities, our pre- Federal Rules cases, *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954), Cert. denied, 348 U.S. 927, 75 S.Ct. 340, 99 L.Ed. 727 (1955), and *Liechti v. Roche*, 198 F.2d 174 (5th Cir. 1952). Advisory Committee Note to Rule 44.1, Fed.R.Civ.P., Title 28, U.S.C.A.

[4] Our pre-Rule cases make clear that the proper procedure is for the judge rather than the jury to determine questions of foreign law. *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954), Cert. denied, 348 U.S. 927, 75 S.Ct. 340, 99 L.Ed. 727 (1955); *Liechti v. Roche*, \*670 198 F.2d 174 (5th Cir. 1952). To close the gap left in the Federal Rules of Criminal Procedure, we reaffirm that division of functions now, as we have done in the corresponding civil context. *First National City Bank v. Compania de Aquaceros, S.A.*, 398 F.2d 779, 782 (5th Cir. 1968). But it does not necessarily follow that putting the matter to the jury is reversible error. There is no automatic prejudice to the substantial rights of a defendant inherent in letting the jury decide the question on the basis of expert testimony. Indeed, the question whether the right to a jury trial in criminal matters Requires submission of a question of foreign law to the jury, because it can be found as a matter of Fact, has never been definitively laid to rest. [FN18] In the absence of compelling evidence of prejudice, we would be loath to reverse a conviction such as this where the evidence of guilt and of intent to violate both foreign and domestic law is near overwhelming. We believe, nevertheless, that reversal of at least the substantive count is required here because the most likely jury construction of Mexican law upon the evidence at trial is that Mexico declared itself owner of all artifacts at least as early as 1897. And under this view of Mexican law, we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards.

FN18. See, e. g., Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)," 81 Harv.L.Rev. 591, 617 (1968). Because no one argues the point here, we express no opinion on the issue.

It may well be, as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years. If so, however, it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens.[FN19] Neither the early statutes nor the Constitution of 1917 clearly declare national ownership of the sort of pre- Columbian movable artifacts in which appellants dealt. One of the government experts testified that a literal translation of the Mexican statutes into English would mislead those not familiar with Mexican law into thinking that such movables had been capable of being privately owned.[FN20] Another admitted that there were "confusions" in the 1934 statute caused by the lack of technical language and that subsequent statutes had been designed to clarify the legal situation.[FN21]

FN19. Because of our disposition of the claims in this appeal largely on the ground of unconstitutional vagueness and harmless error, we need not now undertake the delicate task of deciding the meaning of the Mexican statutes and the manner in which the various provisions interact. We leave that task to subsequent courts should the government prosecute others by reference to pre-1972 Mexican statutes, either directly or as incorporated by art. 4 of the 1972 Transitory. See note 22 *Infra*.

FN20. Carlos Schon took issue with the translations offered in evidence by the defendants the translations used by the earlier panel in assessing the Mexican statutes. He especially objected to translating the word "propriedad" as "ownership" or "property," though he conceded that that rendering was proper in Some of the

statutory passages. He said that only one familiar with the Mexican law could decide when to translate the word as "ownership" because in many instances regarding artifacts the law limits "propiedad" to connoting mere Possessory rights. Translation of "propiedad" as "property" might incorrectly lead those unfamiliar with Mexican law to believe some artifacts could be "outright property." Mr. Schon further testified that "traslacion de dominion" could be translated as "acts of conveyance," provided the latter term was not understood to include "transfer of property or outright ownership." The literal translation, "transfer of dominion," would also be misleading, since the correct meaning of the law does not go beyond allowing "transfer of possession."

FN21. As an instance of such "confusion" in the 1934 statute, Mr. Oropeza identified art. 10, which can be translated as requiring registration of private "transfers of ownership." In the original it reads: "Los propietarios de objetos inscritos deberan dar conocimiento de las traslaciones de propiedad, para que se haga la anotacion correspondiente."

[5][6] The 1972 statute, on the other hand, is clear and unequivocal in claiming \*671 ownership of all artifacts.[FN22] Deferring to this legitimate act of another sovereign, we agree with the earlier panel that it is proper to punish through the National Stolen Property Act encroachments upon legitimate and clear Mexican ownership, even though the goods may never have been physically possessed by agents of that nation. Nor does the infirmity of vagueness attach to the 1970 and possibly the 1934 statute insofar as they established presumptions that unregistered movables belong to the sovereign. Had these theories alone (either post-1972 exportation or post-1934 appropriation, coupled with failure to register) been presented to the jury, our appellate task would have been much simpler.[FN23] There is no doubt that the evidence is sufficient to have sustained convictions under either theory, and there would have been little prejudice involved in letting the jury decide the appropriate Mexican law to apply. But the expert testimony in the main allowed the jury to conclude that Mexico had long owned all these items outright. There was thus little need for the jury to consider legal and factual technicalities such as the probable date of exportation or the effect of the presumptions upon appellants' unregistered items. Unfortunately, under this broad view of Mexican law, our basic standards of due process and notice preclude us from characterizing the artifacts as "stolen." Though the National Stolen Property Act is not void for vagueness because the general class of offenses to which it is directed is plainly within its terms, it cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature. The principle from *Boyce Motor Lines*, employed in the earlier appeal, cannot be used to deflect the vagueness charges directed at the early Mexican statutes. The basic premise of *Boyce* the existence of an area of conduct that is proscribed in reasonably certain terms is absent. *Boyce Motor Lines v. United States*, 342 U.S. at 340, 72 S.Ct. 329. The 1897 statute, the 1930 statute, and even the 1934 and 1970 statutes, unless there is specific focus on the presumption mechanism, do not clearly announce any line that appellants' willfulness can have led them to cross. As the Supreme Court observed in *Screws v. United States*, 325 U.S. 91, 105, 65 S.Ct. 1031, 1037, 89 L.Ed. 1495 (1945), "willful conduct cannot make definite that which is undefined." We therefore conclude that the convictions pursuant to the substantive count must be reversed.

FN22. The 1972 statute also contains a grandfather clause under which rights gained under previous statutes are preserved. Transitory, Article Fourth. Thus, if private persons were allowed ownership as opposed to mere possessory rights under the earlier laws, those rights would be retained provided the owner complied with the requirements of those laws.

FN23. We express no opinion regarding the claim, made by amicus in its brief in the earlier appeal, that predicated criminal liability on a presumption contained in a foreign statute would also infringe due process.

[7] By contrast, the requisite degree of prejudice for reversal is lacking as to the conspiracy count. The evidence presented to the jury amply showed that appellants' conspiracy was much broader than an intent to deal in the single collection already in the United States for an unspecified length of time. It is abundantly clear that they conspired to bring in at least one other load, and most likely a continuing stream of articles that, owing to a broken drive shaft and appellants' subsequent arrest, never arrived. Their plans regarding those loads and the conduit itself were clearly illegal under any view of Mexican law, including that presented by their own witnesses. The evidence is massive that appellants knew and deliberately ignored Mexico's post-1972 ownership claims. In addition, the continuing nature of their enterprise was highlighted in the closing arguments to the jury by the government and the defendants alike.[FN24] Moreover, the instructions regarding \*672 the conspiracy count were separated from the instructions regarding the substantive count and, in outlining the required elements of the offense, the judge made no reference back to the jury's role regarding Mexican law. He correctly charged that the defendants need never have completed the illegal object of their conspiracy to be found

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guilty and also correctly instructed that none of the overt acts need themselves be illegal. The phone calls and meetings with McGauley and Benkendorfer and indeed the sale of the Rodriguez/Hollinshead/McClain collection can each be seen as overt acts in stringing along the "Mafia" buyers until the channel for regular importation of newly dug items was fully operational, as the buyers had requested.

FN24. During closing arguments, William Simpson, who was defending himself, referred to the testimony about the continuing conspiracy and sought to turn it to his own advantage:

Mr. Rodriguez, according to Mrs. Zambrano's testimony, . . . told her that there were five groups of Mexicans, peons, farmers, people trying to make money apparently digging in Mexico and supplying him with great quantities of artifacts.

The same thing holds true with that story. It can't possibly be true. Mrs. Zambrano under my examination, cross examine (sic) stated emphatically that that was happening at the present time, that that was a continuing operation; yet we have an inventory and it has been established that these pieces are the same pieces that Mr. Rodriguez left with me at that time, May of 1973.

If Mrs. Zambrano's testimony was accurate, and I'm not saying it wasn't told to her, I don't believe it was, but if it was accurate, by necessity, being a conspiracy as we are charged here today, that inventory would have increased considerably. Five groups of Mexicans in a conduit as represented by Mrs. Zambrano channeling it into San Antonio, my goodness gracious, it would have filled up my house. We would not only have had the bedroom and the living room filled, it would have been added to and added to in great quantities.

Given the strength of this evidence regarding the continuing illegal purpose of appellants which, if effectuated, would necessarily entail dealing in "stolen" property under Any view of Mexican law, we hold that the dubious shifting of the determination of Mexican law constituted harmless error as to the conspiracy count.[FN25]

FN25. For these and additional reasons, we reject appellants' other challenges to the jury instructions. We can detect no affirmative errors in the statements about Mexican law made by the court. Nor did the judge err in refusing to give the instructions offered by appellants. The proffered summaries of Mexican law were fatally flawed in their treatment of the presumptions in the 1934 and 1970 statutes. Those presumptions, as part of statutes repealed by enactment of subsequent statutes, no longer have Independent legal force. But they were not thereby rendered totally nugatory. The character of items excavated and held without registration for the statutory period may have been irrevocably impressed with a presumption of government ownership. In any event, no legal ownership of such items seems possible after the effective date of the 1972 statute. All items not legally owned by individuals were then nationalized, and it became impossible legally to own items without complying with the requirements of the earlier statutes. Transitory, Art. Fourth.

Accordingly, appellants' convictions on the conspiracy count are **AFFIRMED**, and the convictions on the substantive count are **REVERSED**.

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GOVERNMENT OF PERU, Plaintiff,  
v.  
Benjamin JOHNSON, Lawrence Wendt, David Swetnam, Jacqueline Swetnam, George  
Gelsebach, Oman Gaspar, Ronald Stanman and 352 Peruvian Artifacts, Defendants.

No. CV 88-6990-WPG.

United States District Court,  
C.D. California.

June 29, 1989.

Government of Peru contended that it was legal owner of artifacts which had been seized by United States Customs Service from American citizen. The District Court, Gray, J., held that Peruvian was not entitled to artifacts given fact that it was uncertain in what country artifacts were found, when they were found, whether they were in private possession in Peru more than one year after official registry book was opened, and extent of Peru's claim of ownership as part of its domestic law was uncertain.

Ordered accordingly.

[1] INTERNATIONAL LAW k10.12  
221k10.12

Peruvian government could not establish that artifacts were excavated in modern day Peru so that items seized by U.S. Customs Service from American citizen could be returned to Peru; although Government presented archeologist who recognized artifacts as items of Peruvian style and culture, artifacts could have come from Ecuador, Columbia, Mexico or even Polynesia.

[2] INTERNATIONAL LAW k10.12  
221k10.12

Copies of statutes, upon which Peruvian government relied to establish that from 1822 to present, Peru owned artifacts currently in possession of U.S. Customs Service, which were submitted for first time in second post trial brief could not be considered by district court in rendering decision as to whether Government was entitled to recover artifacts; initial presentation of enactments after case had been tried did not constitute reasonable notice. Fed.Rules Civ.Proc.Rule 44.1, 28 U.S.C.A.

[3] INTERNATIONAL LAW k10.12  
221k10.12

Peruvian government could not claim ownership of pre-Columbian artifacts which were brought into United States before 1929; expert witness on Peruvian law who was former chief justice of Supreme Court of that country indicated that earliest statutes concerning government ownership of such artifacts were effected in 1929.

[4] INTERNATIONAL LAW k10.12  
221k10.12

Under Peruvian law pertaining to governmental ownership of pre-Columbian artifacts, which was in effect from 1929 to 1985, if private owner caused unregistered artifact to be removed from Peru within one year following opening of "special book," whenever that may have occurred, title would not have been transferred from such person to government; thus, such statutes could not support Peruvian government's claim that it owned artifacts currently in possession of U.S. Customs Service.

[5] INTERNATIONAL LAW k10.12  
221k10.12

Peruvian government could not recover artifacts in hands of U.S. Customs Service; extent of Peru's claim of ownership as part of its domestic law was uncertain, given fact that laws concerning artifacts could not reasonably be considered to have more effect than export restrictions which constituted exercise of police power of state but did not create ownership in state.

\*811 W. Noel Keyes, Corona Del Mar, Cal., George H. Wu, Asst. U.S. Atty., Los Angeles, Cal., for plaintiff.

Terry W. Bird, Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, Cal., James F. Fitzpatrick, Edward L. Wolf, Arnold & Porter, Washington, D.C., for defendants.

#### MEMORANDUM OF DECISION

GRAY, District Judge.

The Government of Peru, plaintiff in this action, contends that it is the legal owner of eighty-nine artifacts that have been seized by the United States Customs Service from defendant Benjamin Johnson. The plaintiff charges the defendant with conversion of these articles and seeks an order for their return. Judgment will be rendered for the defendant.

Irrespective of the decision in this matter, the court has considerable sympathy for Peru with respect to the problems that it confronts as manifested by this litigation. It is evident that many priceless and beautiful Pre-Columbian artifacts excavated from historical monuments in that country have been and are being smuggled abroad and sold to museums and other collectors of art. Such conduct is destructive of a major segment of the cultural heritage of Peru, and the plaintiff is entitled to the support of the courts of the \*812 United States in its determination to prevent further looting of its patrimony.

However, there is substantial evidence that Mr. Johnson purchased the subject items in good faith over the years, and the plaintiff must overcome legal and factual burdens that are heavy indeed before the court can justly order the subject items to be removed from the defendant's possession and turned over to the plaintiff. The trial of this action has shown that the plaintiff simply cannot meet these burdens.

#### 1. The Plaintiff Cannot Establish That The Subject Artifacts Were Excavated In Modern Day Peru.

[1] The plaintiff has no direct evidence that any of the subject items came from Peru. It alleges, on information and belief, that they were taken from Peru or excavated from archeological sites in that country. The plaintiff's principal witness was Dr. Francisco Iriarte, who, according to the plaintiff's counsel, is Peru's foremost archeologist in Pre-Columbian artifacts. Dr. Iriarte examined each of the eighty-nine artifacts and in almost every instance asserted that he recognized it as an item of Peruvian style and culture, and he usually asserted the belief that it came from a particular excavation site or specific area in Peru. I have no doubt that Dr. Iriarte has seen artifacts taken from those respective locations that are very similar to the items that he was examining in court. However, Dr. Iriarte admitted that Peruvian Pre-Columbian culture spanned not only modern day Peru, but also areas that now are within the borders of Bolivia and Ecuador, and many of the population centers that were part of the Peruvian Pre-Columbian civilization, and from which artifacts have been taken, are within those countries. The fact that the subject items are identifiable with excavation sites in modern Peru does not exclude the possibility that they are equally similar to artifacts found in archeological monuments in Bolivia and Ecuador. Indeed, the evidence shows that at least one of the subject items is very similar to a figure depicted in a photograph that appears in an article concerning the cultural anthropology of Ecuador.

Moreover, Columbia also borders Peru, and customs documents that appear to pertain to some of the subject items assert Columbia to be the country of origin. Such an assertion is, of course, hearsay and, even though the documents may be business records kept in ordinary course, they should not be given great weight. However, they do further point up the difficulty that the court has in concluding that any specific one of the items concerned in this action originated within the present boundaries of Peru.

I was impressed by Dr. Iriarte's testimony. He doubtless is knowledgeable in his field and honest in his beliefs. He also has a genuine interest in helping his country recover artifacts that are such an important part of its patrimony, and this desire necessarily plays a part in his conclusions as to the origins of the objects at issue. In some instances, he admitted

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that an item may have come from Ecuador or Columbia or Mexico or even Polynesia, but nonetheless retained the opinion that it had been found in a particular area of Peru, due to its similarity to other objects taken from that site. Because of the many other possibilities, this court cannot base a finding of ownership upon such subjective conclusions. We are far from certain as to the country of origin of any of the artifacts here concerned. This unfortunate circumstance precludes an adjudication that they came from Peru.

## 2. The Plaintiff Cannot Establish Its Ownership At The Time Of Exportation.

Even if it were to be assumed that the artifacts came from Peru, in order for the plaintiff to recover them, it must prove that the Government of Peru was the legal owner at the time of their removal from that country. Such ownership depends upon the laws of Peru, which are far from precise and have changed several times over the years.

[2] (a) 1822–1929. The plaintiff, in its Second Post Trial Brief, submitted for the first time copies of the statutes upon which it relies to establish that, from 1822 to the present time, Peru owned the artifacts located \*813 in that country. However, in its pleadings, its responses to discovery requests, and its pretrial memoranda, the plaintiff identified Law No. 6634 of June 13, 1929, as the earliest enactment that formed the legal basis for its ownership claims. Federal Rule of Civil Procedure 44.1 provides that "[a] party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice." I find that initial presentation of these purported pre-1929 enactments after the case has been tried cannot constitute "reasonable notice", and I decline to consider them in rendering this decision.

[3] In any event, the plaintiff's present reliance upon pre-1929 law is substantially undercut by the trial testimony of its expert witness on Peruvian law, Roberto MacLean, a former Chief Justice of the Supreme Court of that country. In response to a question regarding Peru's statutes concerning government ownership of Pre-Columbian artifacts, he said: "even though there are several rules which have some academic importance but for all practical purposes the first law is from 1929; if I recall correctly from 13 of June of 1929."

The defendant's expert, Professor Alan Sawyer, whose qualifications concerning artifacts are comparable to those of Dr. Iriarte, testified that it is impossible to determine from examination of the items here concerned when they were excavated or left the country of origin, and that many Peruvian artifacts were brought into the United States before 1929. It follows that if any of the subject items left Peru before 1929, the plaintiff cannot claim ownership of them.

[4] (b) 1929-1985. A written opinion by Professor MacLean asserts that what Law No. 6634 means "is that if a person found an archeological object before June of 1929 this object belongs to him; but if that person found the object after June 1929 it belongs to the State." Article 11 of Law No. 6634 provides that privately owned Pre-Columbian artifacts must be registered in a special book "which shall be opened at the National Museum of History", and that any "[o]bjects which, after one year beginning on the day the book is opened, have not been registered, shall be considered the property of the State."

From the record at the trial, I cannot determine when the "special book" called for by Article 11 was opened or whether it ever has been opened. Interrogatory No. 9, propounded to the plaintiff by the defendant, asks for the date or approximate date upon which the special book was "opened"; the response was that "[t]his date is unknown." The plaintiff submitted a supplemental answer which said that the "so called 'book' is a card registry" that has been "adequately ordered since 1969 to date." The response further states that "[u]p to the year 1972 the books are found at the National Museum of Anthropology and Archeology, since 1972 to date, the books are found at the 'Museum of the Nation'." The record does not show whether either of these named institutions is the same as the National Museum of History, where the special book was to be opened.

On January 5, 1985, Law No. 6634 was repealed and replaced by Law No. 24047. According to Professor MacLean's written opinion, "[a]fter that date there is also the obligation for private persons to register their archeological objects and if they do not comply with this obligation that could mean that the objects belong to the State." (Emphasis added.)

In undertaking to evaluate Peru's ownership claims in this confusing situation, I am assuming that none of the artifacts have been duly registered. However, I do not know whether the repeal of Law No. 6634 nullifies the registration requirement therein contained. If it does, a private owner could have retained an unregistered item through January 1985

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without losing his title. In any event, if the private owner caused his unregistered artifact to be removed from Peru within one year following the opening of the "special book" (whenever that may have occurred), title would not have been transferred from such person to the plaintiff.

\*814 (c) From January 1985 To The Present. As is mentioned above, on January 5, 1985, the 1929 law was repealed and replaced by Law No. 24047. Professor MacLean's written opinion states that under the latter statute "if a person finds after 5th January of 1985 an archeological object it can belong to him." The next relevant official document is a Supreme Decree of the President of Peru, dated February 27, 1985, which proclaims that Pre-Hispanic artistic objects "belonging to the nation's cultural wealth are untouchable," and that their removal from the country is categorically forbidden. This Decree does not clearly establish state ownership of any such art objects. However, on June 22, 1985, a new statute provided specifically that all archeological sites belong to the state. "So if a private person digs a site and excavates its objects [he] is taking somebody else's property", according to Professor MacLean's written opinion. Thus, it would appear that if any artifacts here concerned were privately excavated between January 5 and June 22, 1985, they would constitute private property, rather than being owned by Peru.

### 3. Michael Kelly's Testimony Does Not Establish Peru's Ownership.

Mr. Michael Kelly testified that in August 1987 he brought to Mr. Johnson's home in California certain artifacts that he believed to have come from Peru. But all of his information as to the country of origin of these items was strictly hearsay. I am also skeptical of Mr. Kelly's ability to identify any of the specific objects here concerned as having been part of the 1987 shipment. Some of the subject items doubtless were in Mr. Johnson's home when Mr. Kelly was present, and he well may have seen them. However, Mr. Johnson submitted documents that quite clearly established his having purchased many of them in the United States well before 1987.

Despite Mr. Kelly's testimony, which was designed to show that Mr. Johnson was implicated in, or at least was aware of, the smuggling activities of Mr. Kelly and Mr. Swetnam, I am not satisfied that Mr. Johnson received any of the items here concerned with the knowledge that they were illegally removed from Peru.

### 4. The Uncertainty Of The Domestic Application Of Peru's Ownership Laws.

[5] Official documents of Peru long have asserted, in one way or another, the interest of the state in preserving its artistic objects as "part of the national cultural wealth," that they are "untouchable, inalienable and imprescriptable," and that their removal from the country is "categorically forbidden." See, e.g., Supreme Decree of February 27, 1985. Such declarations are concerned with protection and do not imply ownership. However, the law of June 13, 1929, does proclaim that artifacts in historical monuments are "the property of the State" and that unregistered artifacts "shall be considered to be the property of the State." Nonetheless, the domestic effect of such a pronouncement appears to be extremely limited. Possession of the artifacts is allowed to remain in private hands, and such objects may be transferred by gift or bequest or intestate succession. There is no indication in the record that Peru ever has sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions, and, as was pointed out in *United States v. McClain*, 545 F.2d 988, 1002 (5th Cir.1977), export restrictions constitute an exercise of the police power of a state; "[t]hey do not create 'ownership' in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner."

The second time that the case of *United States v. McClain* came before the Fifth Circuit, the opinion stated: "It may well be, as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years. If so, however, it has not expressed that view with sufficient clarity to survive translation \*815 into terms understandable by and binding upon American citizens." 593 F.2d 658, 670 (5th Cir.1979). Under all of the above discussed circumstances, I find the same comment to be applicable here.

### 5. Conclusion.

Peru may not prevail in this action to recover the artifacts here concerned because:

- (a) We do not know in what country they were found and from which they were exported.

(b) If they were found in Peru, we do not know when.

(c) We do not know if they were in private possession in Peru more than one year after the official registry book was opened.

(d) The extent of Peru's claim of ownership as part of its domestic law is uncertain.

UNITED STATES of America, Plaintiff,  
v.  
PRE-COLUMBIAN ARTIFACTS and the Republic of Guatemala, Defendants.

No. 93 C 2654.

United States District Court, N.D. Illinois, Eastern Division.

Oct. 14, 1993.

United States filed interpleader action to determine who was entitled to certain pre-Columbian artifacts seized from interpleader defendants which were alleged to have been exported from Guatemala in violation of Guatemalan law. Interpleader defendants moved to strike Republic of Guatemala's claim of possession or, alternatively, for judgment on pleadings. The District Court, Hart, J., held that: (1) legal issue raised by interpleader defendants could be resolved on pleadings, and (2) allegations that under Guatemalan law, upon legal export, artifacts became property of Republic of Guatemala was sufficient to state claim for seizure of artifacts as stolen property possessed in violation of National Stolen Property Act.

Motion denied.

[1] INTERPLEADER k27  
222k27

Under certain circumstances, conflicting claims with respect to interpleader res can be resolved on pleadings.

[2] EVIDENCE k51  
157k51

Although any determination as to foreign law is legal question, any relevant material or source, including testimony, may be considered as establishing foreign law; commonly, oral or written expert testimony accompanied by foreign legal materials is provided. Fed.Rules Civ.Proc.Rule 44.1, 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE k642  
170Ak642

There is no requirement that foreign law and its supporting material be pleaded; other reasonable written notice will also suffice. Fed.Rules Civ.Proc.Rule 44.1, 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE k1061  
170Ak1061

Legal issue raised by interpleader defendants' motion to strike Republic of Guatemala's claim of possession to certain pre-Columbian artifacts seized from interpleader defendants could be resolved on pleadings, where Guatemala contended that Guatemalan law made artifacts its property upon illegal exportation so that defendants' possession of artifacts constituted possession of stolen property in violation of National Stolen Property Act. National Stolen Property Act, 18 U.S.C.A. §§ 2314, 2315.

[5] RECEIVING STOLEN GOODS k1  
324k1

National Stolen Property Act is designed to discourage both receiving and taking of stolen property. 18 U.S.C.A. §§ 2314, 2315.

[6] RECEIVING STOLEN GOODS k2  
324k2

"Stolen," as used in National Stolen Property Act, is not term of art and instead is broad in scope with wide ranging meaning. 18 U.S.C.A. §§ 2314, 2315.

See publication Words and Phrases for other judicial constructions and definitions.

[7] RECEIVING STOLEN GOODS k1

324k1

National Stolen Property Act applies to stolen goods transported in either interstate or foreign commerce. 18 U.S.C.A. §§ 2314, 2315.

[8] RECEIVING STOLEN GOODS k1

324k1

Foreign ownership laws and thefts in foreign countries can be basis for finding goods to be "stolen" in violation of National Stolen Property Act. 18 U.S.C.A. §§ 2314, 2315.

[9] RECEIVING STOLEN GOODS k2

324k2

Mere violation of export restrictions does not make possession of illegally exported property a violation of National Stolen Property Act (NSPA); for property to be "stolen" under NSPA, it must belong to someone else. 18 U.S.C.A. §§ 2314, 2315.

[10] SEARCHES AND SEIZURES k84

349k84

Allegations that under Guatemalan law, upon illegal export, artifacts became property of Republic of Guatemala was sufficient to state claim for seizure of artifacts as "stolen" property possessed in violation of National Stolen Property Act (NSPA). 18 U.S.C.A. §§ 2314, 2315.

\*545 Gillum Richard Ferguson, U.S. Attorney's Office, Chicago, IL, for the U.S.

Roy W. Sears, Gerald R. Singer, Eckhart, McSwain, Silliman & Sears; Eileen Teresa Pahl, Ray O. Rodriguez, Raul A. Villalobos, Rodriguez & Villalobos, Chicago, IL; and Suzan J. Sutherland, Siegel & Wille, Oakbrook Terrace, IL, for Republic of Guatemala.

Thomas Aquinas Foran and Carmen David Caruso, Foran & Schultz, Chicago, IL, for Louis Krauss, Jerome Grunes, and Barbara Grunes.

MEMORANDUM OPINION AND ORDER

HART, District Judge.

The United States filed this interpleader action to determine who is entitled to certain pre-Columbian artifacts seized from interpleader defendants Louis Krauss, Jerome Grunes, and Barbara Grunes (the "Grunes defendants") in November 1990. The artifacts are alleged to have been exported from Guatemala in violation of Guatemalan law. The Grunes defendants claim a lawful interest in the property. [FN1] The Republic of Guatemala claims that the artifacts were illegally exported and/or stolen and should be returned to the Republic. Presently pending is the Grunes defendants' motion to strike the Republic's claim of possession or, alternatively, for judgment on the pleadings.

FN1. The United States also named Robert Stotzter as another person possibly claiming an interest in the property. Although properly served, Stotzter has not filed any response to the interpleader complaint. The Grunes defendants allege that the government also seized artifacts from Stotzter, but that those artifacts are the property of the Grunes defendants.

\*546 [1][2][3][4] The parties do not address the question of the appropriate legal standard. Under certain circumstances, conflicting claims with respect to an interpleader res can be resolved on the pleadings. See C.A. Wright, A. Miller, & M.K. Kane, Federal Practice & Procedure § 1715 at 588-89 (2d ed. 1986). "The usual rules of good pleading are applicable in an interpleader action." Id. at 587. It will be assumed, as the parties apparently do, that the Republic must state a claim for entitlement to the artifacts that would withstand a motion to dismiss under Rule 12(b)(6). One of the disputes, however, depends upon the construction of Guatemalan law. While any determination as to foreign law is a legal question, any relevant material or source, including testimony, may be considered in establishing foreign law. See

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Fed.R.Civ.P. 44.1; Republic of Turkey v. OKS Partners, 146 F.R.D. 24, 27 (D.Mass.1993). Commonly, oral or written expert testimony accompanied by foreign legal materials is provided. See *id.*; C.A. Wright & A. Miller, Federal Practice & Procedure § 2444 at 406 (1971). There is no requirement that foreign law and its supporting material be pleaded; "other reasonable written notice" will also suffice. Fed.R.Civ.P. 44.1; Wright & Miller, § 2443 at 402. Therefore, alleging in a pleading that property is stolen under a foreign law is a sufficient pleading without providing the specifics of the foreign law. See Republic of Turkey v. OKS Partners, 797 F.Supp. 64, 66 (D.Mass.1992) (allegations that ancient coins belonged to Turkey under Turkish law and therefore were held by defendants in violation of the National Stolen Property Act could not be dismissed on the pleadings).

[5] The Republic of Guatemala does not argue that the legal issue raised by the Grunes defendants cannot be considered on the pleadings. On the Grunes defendants' motion, however, the Republic's contentions as to provisions of Guatemalan law will be taken as true; no attempt will presently be made to parse the specific language of the Guatemalan legislation. For purposes of resolving the present motion, it is also assumed that the artifacts were illegally exported from Guatemala.

As stated by the Republic in its brief:

For the purposes of this motion, it is accepted that the law of Guatemala provides that upon export without authorization, the artifacts are confiscated in favor of the Republic of Guatemala, and become the property of Guatemala. Article 21 of Guatemala's "Congressional Law for the Protection and Maintenance of the Monuments, Archeological, Historical, Artistic Objects and Handicrafts" provides for "confiscation in favor of the State" upon illicit export.

The Republic contends that this law therefore makes the Grunes defendants' possession of the allegedly illegally exported property the possession of stolen property in violation of the National Stolen Property Act ("NSPA"), 18 U.S.C. §§ 2314-15. It is undisputed that stolen property possessed in violation of the NSPA is subject to being seized. The Grunes defendants, however, argue that, even assuming unlawful exportation, the artifacts must have belonged to the Republic prior to exportation in order for the artifacts to be considered stolen property under the NSPA. Since the Republic only contends that Guatemalan law makes the artifacts its property upon illegal exportation, the legal issue raised by the Grunes defendants can be resolved on the pleadings.

[6][7][8][9] The NSPA is designed to discourage both the receiving and the taking of stolen property. *United States v. O'Connor*, 874 F.2d 483, 488 (7th Cir.1989); *United States v. Gardner*, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed.2d 89 (1975); *United States v. McClain*, 545 F.2d 988, 994 ("McClain I"), rehearing denied, 551 F.2d 52 (5th Cir.1977). "Stolen," as used in the NSPA, is not a term of art and instead is broad in scope with a "wide-ranging meaning." *McClain I*, 545 F.2d at 995. Accord *United States v. Darrell*, 828 F.2d 644, 649-50 (10th Cir.1987). The NSPA applies to stolen goods transported in either interstate or foreign commerce. The Grunes defendants do not dispute that foreign ownership laws and thefts in foreign countries can be the basis for finding goods \*547 to be stolen. See *United States v. Rabin*, 316 F.2d 564, 566 (7th Cir.), cert. denied, 375 U.S. 815, 84 S.Ct. 48, 11 L.Ed.2d 50 (1963); *McClain I*, 545 F.2d at 994; *United States v. McClain*, 593 F.2d 658, 664 (5th Cir.), cert. denied, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979) ("McClain III"); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir.1974).

[10] Mere violation of export restrictions does not make possession of the illegally exported property a violation of the NSPA. *McClain I*, 545 F.2d at 996, 1002; *Government of Peru v. Johnson*, 720 F.Supp. 810, 814 (C.D.Cal.1989), aff'd by unpublished order, 933 F.2d 1013 (9th Cir.1991). For the property to be stolen, it must belong to someone else. See *McClain I*, 545 F.2d at 995, 1002; *Peru*, 720 F.Supp. at 814. Here, there is no allegation that the artifacts were stolen from any Guatemalan individual. The only allegation is that the artifacts belong to the Republic. The NSPA "protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government." *McClain III*, 593 F.2d at 664. Guatemalan law (as assumed for purposes of the present motion) provides that, upon illegal export, the artifacts became the property of the Republic. Therefore, the moment the artifacts left Guatemala they became the property of the Republic. Thus, while traveling in foreign commerce, the artifacts were stolen in that they belonged to the Republic, not the person who unlawfully possessed the artifacts. The Republic has alleged facts under which the artifacts would be subject to being seized as being stolen property possessed in violation of the NSPA. The Grunes defendants' motion will be denied.

IT IS THEREFORE ORDERED that defendants Barbara Grunes's, Jerome Grunes's, and Louis Krauss's motion to strike

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the Republic of Guatemala's claim of possession or, in the alternative, for judgment on the pleadings [35] is denied. October 22, 1993 ruling date is vacated. All discovery is to be completed by December 22, 1993. Status hearing set for November 22, 1993 at 9:15 a.m.

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The REPUBLIC OF TURKEY, Plaintiff,  
v.  
OKS PARTNERS, et al., Defendants.

Civ. A. No. 89-3061-S.

United States District Court,  
D. Massachusetts.

July 20, 1992.

The Republic of Turkey sued possessors of ancient coin collection allegedly smuggled out of that country, seeking return of coins. The District Court, Skinner, J., held that: (1) Republic had stated cause of action under RICO; (2) Republic had stated cause of action under Massachusetts Consumer Protection Act; and (3) statutes of limitations did not bar action.

Motion to dismiss denied.

[1] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS k75  
319Hk75

Claim by Republic of Turkey, that ancient coins belonging to nation had been smuggled from country and acquired by defendants, was a sufficient allegation of damage to property to satisfy RICO requirements. 18 U.S.C.A. § 1961 et seq.

[2] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS k70  
319Hk70

Republic of Turkey adequately pleaded that collectors of ancient coins had committed predicate acts necessary for imposition of RICO liability, even though two of the statutes collectors were alleged to have violated, Travel Act and Antidrug Abuse Act, were enacted into law after purchase of coins in question; complaint also alleged violation of those statutes was ongoing and that collectors had also violated National Stolen Property Act. 18 U.S.C.A. §§ 1952, 1957, 2314, 2315.

[3] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS k72  
319Hk72

Republic of Turkey adequately pleaded existence of "pattern of racketeering activity," as required to state cause of action under RICO, against collectors of ancient coins allegedly smuggled out of Turkey, even though only two coins were known to have actually been sold to date; Turkey had alleged that collectors intended to sell many more coins in future, and that those sales could be in violation of National Stolen Property Act. 18 U.S.C.A. §§ 2314, 2315, 1961 et seq.

[4] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS k75  
319Hk75

Republic of Turkey suing collectors of ancient coins, seeking return of coins to country, satisfied RICO pleading requirement that collectors' violation be proximate cause of injury; Turkey claimed that it was without immediate possession of part of its cultural heritage, and collectors' continued possession of coins was proximate cause of that injury. 18 U.S.C.A. § 1961 et seq.

[5] CONSUMER PROTECTION k1  
92Hk1

Republic of Turkey, suing to recover ancient coins allegedly smuggled illegally from country, was a "person" for purposes of Massachusetts Consumer Protection Act. M.G.L.A. c. 93A, §§ 1(a), 9.  
See publication Words and Phrases for other judicial constructions and definitions.

[6] CONSUMER PROTECTION k38

001209

92Hk38

Republic of Turkey stated claim, under Massachusetts Consumer Protection Act, against collectors of ancient coins allegedly smuggled illegally out of country, even though it was claimed that collectors were not doing business in state; complaint alleged that collectors had offered coins for sale to the public and in fact some had been sold. M.G.L.A. c. 93A, § 9.

[7] COMMERCE k80  
83k80

Commerce clause did not preclude Republic of Turkey from maintaining action under Massachusetts Consumer Protection Act against collectors holding ancient coins allegedly smuggled out of country; there was only minimal impact on foreign commerce, as case concerned whether coin collection had been stolen, to whom it now belonged, and whether certain statutes were violated in buying, concealing, offering for sale, and selling coins. M.G.L.A. c. 93A, §§ 1(a), 9; U.S.C.A. Const. Art. 1, § 8, cl. 3.

[8] LIMITATION OF ACTIONS k179(2)  
241k179(2)

Allegations by Republic of Turkey that defendants required smugglers to keep sales of ancient coins a secret, that the defendants falsely represented the country of origin of coins in customs documents, and that the defendants withheld publishing any information about the coins for several years after their acquisition of them, if true, could be enough to establish that the facts were "inherently unknowable" to Turkey for purposes of tolling the Massachusetts three years statute of limitations for tort and replevin claims, under either the unadorned discovery rule or the doctrine of fraudulent concealment. M.G.L.A. c. 260, § 2A.

[9] LIMITATION OF ACTIONS k104(2)  
241k104(2)

Four-year statute of limitations for RICO actions had not expired so as to bar suit by Republic of Turkey seeking return of ancient coins allegedly smuggled from country; due to efforts to hide existence of coins, statute did not begin to run until existence of coins was discovered. 18 U.S.C.A. § 1962.

\*66 David S. Weiss, Goulston & Storrs, Boston, Mass., for plaintiff.

James Lee Bryant, D. Lloyd Macdonald, Kirkpatrick & Lockhart, Joseph F. Ryan, Lyne, Woodworth & Evarts, Paul J. O'Connell, Ropes & Gray, Jeffrey Scott Robbins, R. Robert Popeo, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Boston, Mass., for defendants.

#### MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

SKINNER, District Judge.

This case arises out of a dispute over the ownership of nearly two thousand ancient Greek and Lycian silver coins. The Republic of Turkey alleges that the coins were unearthed in Turkey in 1984, and that under Turkish law all such artifacts within Turkey's borders are the property of Turkey even before they are discovered. The complaint alleges that the coins were illegally removed from the country by persons other than the defendants, and that the defendants eventually purchased them with knowledge of their illegal character. In its amended complaint, Turkey asserts claims against the defendants for equitable replevin, conversion, constructive trust, and for violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), and the Massachusetts Consumer Protection Act. Jurisdiction is proper because of the federal question involved as well as diversity of citizenship. The defendants move to dismiss Turkey's claims by way of four separate motions. On December 6, 1992, I allowed defendants' motion to stay discovery pending disposition of these motions.

Discussion

I Ownership

The defendants argue that all of Turkey's claims are predicated on the theory that under Turkish law, Turkey owns the coins. The defendants cite *United States v. McClain*, 545 F.2d 988, reh'g denied, 551 F.2d 52 (5th Cir.1977) (*McClain*

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I), and its successor, *United States v. McClain*, 593 F.2d 658 (5th Cir.), cert. denied, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979) (*McClain II*), which were decided under the National Stolen Property Act, 18 U.S.C. §§ 2314-15, for the rule that a sovereign cannot establish its "ownership" of a class of artifacts in the absence of its prior clear declaration to that effect. Defendants argue that in fact, Turkish law equivocates on the issue of whether artifacts such as the contested coins are state property and that Turkey therefore does not have the requisite ownership interest to maintain its claims. The Republic of Turkey strongly opposes the defendants' characterization of Turkish law and insists that since as early as 1906, Turkish law has been unequivocal in claiming outright ownership of artifacts such as the coins.

The determination of foreign law is a legal issue for the court to decide. Fed.R.Civ.P. 44.1. In deciding it, I may consider all relevant material, including testimony. *Id.* In the interest of justice, I will not decide this important issue of Turkish law on the materials before me at the present time. Rather, I will decide it only after a hearing on the merits, summary judgment motion, or full trial. Therefore, in this case, the plaintiff's allegations are enough to overcome the defendants' arguments based on the *McClain* cases. They are also enough to overcome the defendants' arguments that Turkey's lack of ownership interest in the coins fails to provide Turkey with standing to state a claim.

## II RICO

In the fifth and sixth claims of its amended complaint, Turkey alleges that the defendants violated and conspired to violate RICO, 18 U.S.C. § 1961 et seq. According to the complaint, the defendants and the people who allegedly smuggled the coins out of Turkey have operated and continue to operate an enterprise for the purpose of importing stolen property into the United \*67 States and selling the property for profit in violation of the National Stolen Property Act, 18 U.S.C. §§ 2314-2315, the Travel Act, 18 U.S.C. § 1952, and the money laundering provisions of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 1957.

The defendants move to dismiss the RICO claim on four grounds: that Turkey has failed to allege an injury to its property, that the predicate acts required under RICO have not been adequately pled, that the facts of the complaint do not allege a pattern of racketeering activity as required by the statute, and that the alleged RICO violations could not have proximately caused Turkey's injuries.

[1] In deciding this motion to dismiss, I must "give [the complaint] a highly deferential reading, accepting the well-pleaded facts therein as true and drawing all reasonable inferences in the plaintiff's favor." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 37 (1st Cir.1991). Turkey's allegations are sufficient to allege injury to its property under RICO. In *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358-59 (9th Cir.1988), cert. denied, 490 U.S. 1035, 109 S.Ct. 1933, 104 L.Ed.2d 404 (1989), the complaint's allegation of injury to the sovereign were adequate where it sought the return of "money, funds and property belonging to the Philippines and its people" which the defendant had allegedly improperly removed from the country. Similarly, Turkey's claim that it has been injured by the loss of the coins is a sufficient claim of injury to sustain the RICO claim.

[2] The necessary predicate acts are also adequately pled to survive the defendants' motion. Although the defendants are apparently correct that the provisions of the Travel Act and the Anti-Drug Abuse Act on which Turkey relies were enacted into law in 1986, after the defendants allegedly purchased the coins, the complaint also alleges that the violations of these statutes are ongoing. In addition, Turkey relies on allegations that the defendants on several occasions violated the National Stolen Property Act by purchasing the coins in three separate transactions, and by selling at least two coins. See *United States v. Licavoli*, 604 F.2d 613 (9th Cir.1979), cert. denied, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980). These allegations sufficiently charge that the defendants have committed multiple related predicate acts required to trigger RICO.

[3] The defendants also argue that the complaint does not allege a "pattern of racketeering activity" as required by the statute. In order to show a pattern of racketeering activity, a RICO plaintiff must allege at least two statutorily defined predicate acts, and he must show that the acts "are related, and that they amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989) (emphasis in original). Since I have held that the plaintiff here has alleged several related predicate acts, the only question is whether either prong of the criminal activity continuity test is satisfied. See *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir.1990).

It is not necessary to decide whether the acts complained of "amount to" continued criminal activity, because the "pose a threat of" continued criminal activity prong is satisfied. Taking the facts alleged by Turkey to be true, as I must, the defendants knowingly obtained Turkey's property for the purpose of selling that property to collectors, and although the plaintiff knows of only two coins which have actually been sold to date, the defendants allegedly intend to sell many more in the future. These future sales may be in violation of the National Stolen Property Act, and thus the plain import of the allegations is that the defendants "pose a threat of continued criminal activity." H.J., 492 U.S. at 239, 109 S.Ct. at 2900. Defendants point to no case in which a court has dismissed a RICO claim where the defendant had allegedly committed some prohibited acts and was so poised to commit a pattern of related prohibited acts, and I decline to lead the charge. See *United States v. Busacca*, 936 F.2d 232 (6th Cir.), cert. denied, 502 U.S. 985, 112 S.Ct. 595, 116 L.Ed.2d 619 (1991).

\*68 [4] Defendants submit the recent Supreme Court case of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), for the proposition that a civil RICO plaintiff must make a showing that the defendant's violation must have proximately caused the plaintiff's injuries. Here, however, the plaintiff claims an ongoing injury, i.e., that it is without immediate possession of a part of its cultural heritage, and I hold that the defendants' continued possession of the coin collection is a proximate cause of Turkey's claimed injury. Finally, since I will not dismiss the RICO claim, the claim of conspiracy to violate RICO stands as well.

### III Chapter 93A

[5] Defendants move to dismiss the seventh and eighth claims of the amended complaint, alleging violations of M.G.L. c. 93A, the Massachusetts Consumer Protection Act. The defendants first contend that c. 93A, § 9 protects only "consumers," of which the Republic of Turkey is not one. However, since its amendment in 1987, c. 93A has protected "persons" which include legal entities such as governments. "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." M.G.L. c. 93A, § 1(a). See *Boston v. Aetna Life Insurance Co.*, 399 Mass. 569, 575, 506 N.E.2d 106 (1987) (city of Boston a "person" under c. 93A); *United States v. U.S. Trust Co.*, 660 F.Supp. 1085, 1090 (D.Mass.1986) (United States a "person" under c. 93A). Similarly, Turkey is a "person" able to bring suit under the statute.

[6] The defendants next assert that the complaint does not allege that the defendants are engaged in trade or commerce within the meaning of the statute. Under c. 93A § 9, a person is entitled to relief if he has been injured by another person's "use or employment of any method, act or practice declared to be unlawful by section two." Under section two, "unfair or deceptive acts or practices in the conduct of any trade or commerce" is prohibited. Finally, in section one, "trade and commerce" include "the advertising, the offering for sale, rent, lease or distribution of any services and any property ... and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth." The defendants' argument is that there is no allegation of trade or commerce affecting the people of the commonwealth, because the only occurrence alleged to have anything remotely to do with Massachusetts or its people is that the defendants allegedly possessed the coins in Massachusetts. Defendants maintain that because the only sales alleged are to a dealer in England and another person whose location is not disclosed, this count must fail.

The complaint alleges that at a time that the coins were in Massachusetts and in the possession of the Massachusetts defendants, they were offered for sale to the public, and in fact some were sold. Although it may later prove to be that there has been no trade or commerce in this case which is actionable under chapter 93A, at the pleading stage the allegations as pled are enough to stave off dismissal. See *Schinkel v. Maxi-Holding, Inc.*, 30 Mass.App.Ct. 41, 565 N.E.2d 1219, review denied, 409 Mass. 1104, 569 N.E.2d 832 (1991) (question of whether act was within "trade or commerce" under c. 93A should be decided on a record of facts rather than on a motion to dismiss).

[7] Finally, defendants argue that the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, precludes the c. 93A claim. Defendants characterize the claim as one of a potential patchwork of American laws and policies concerning international trade and argue that c. 93A's application to the facts of this case would be unconstitutional in light of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46, 99 S.Ct. 1813, 1819-20, 60 L.Ed.2d 336 (1979). In that case, the Supreme Court held that the Commerce Clause prohibits states from enacting laws which could lead to non-uniform treatment of foreign commerce entering the United States. The defendants' attempt to fit the \*69 facts of this case into *Japan Line* is misplaced. The Commerce Clause protects foreign business entities from state legislation

seeking to protect or prefer domestic business interests. See *Hunt v. Washington State Apple Advertising Com.*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Where the impact of state legislation on foreign commerce is only incidental, the legislation is unconstitutional only if it "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 8, 106 S.Ct. 2369, 2373, 91 L.Ed.2d 1 (1986).

The impact on foreign commerce in the present case is only minimal. What this case is about is whether the collection of coins was stolen, to whom it now belongs, and whether certain statutes were violated by the buying, concealing, offering for sale, and selling of the coins. Unlike the facts of *Japan Line*, in this case there is no basis for the contention that Massachusetts is penalizing those who deal in foreign commerce in favor of its own citizenry, especially since it is the defendants, some of whom are Massachusetts residents, who bear the potential liability under the Massachusetts statute. The defendants do not assert that there is any inherent commerce clause difficulty with this court deciding the common law claims for conversion, replevin, and the like, and similarly, I do not see any constitutional difficulty with my deciding the statutory question presented by the c. 93A claim.

#### IV Statute of Limitations

[8] Defendants argue that all of Turkey's claims are barred by the applicable statutes of limitations. Under M.G.L. c. 260, § 2A, the statute of limitations for tort and replevin actions is three years. Although a cause of action generally accrues at the time of injury, tort claims are subject to the so-called "discovery rule," under which a cause of action which "is based on an inherently unknowable wrong" only accrues "when the injured person knows, or in the exercise of reasonable diligence should know of the facts giving rise to the cause of action." *Dinsky v. Framingham*, 386 Mass. 801, 438 N.E.2d 51, 52 (1982). A wrong may be inherently unknowable if it is "incapable of detection by the wronged party through the exercise of reasonable diligence." *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 29 Mass.App.Ct. 215, 560 N.E.2d 122, 126 (1990). "Ascertaining 'reasonable diligence,' like ascertaining 'reasonable care,' is ordinarily a fact-dominated enterprise." *Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370, 376 (1st Cir.1991). In addition, "[a] wrong can also be inherently unknowable if the party wronged was the victim of fraudulent concealment so long as the fraudulent concealment was explicit ..." *Id.*, n. 4.

Turkey argues that the facts giving rise to its causes of action were "inherently unknowable" until shortly before it filed suit. The complaint's allegations include that the defendants required the smugglers to agree to keep the coin sales a secret, that the defendants falsely represented the country of origin of the coins in customs documents, and that the defendants withheld publishing any information about the coins for several years after their acquisition of them. Turkey argues that the case is analogous to *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir.1990), where the court, dealing with the discovery rule under Illinois law, stated, "In the context of a replevin action for particular, unique and concealed works of art, a plaintiff cannot be said to have 'discovered' his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that 'other' is." I agree with the Seventh Circuit's analysis and hold that Massachusetts law is in accord on this point. These allegations of the defendants' calculated, successful effort to hide the existence, or at least the provenance, of the coins, if true, could be enough for a jury to find that the facts were "inherently unknowable" to Turkey for purposes of tolling the statute of limitations under either \*70 the unadorned discovery rule or the doctrine of fraudulent concealment. Consequently, Turkey's common law claims cannot be dismissed on statute of limitations grounds at this time.

[9] In our circuit, RICO's four-year limitations period is also subject to the discovery rule, see *Rodriguez v. Banco Central*, 917 F.2d 664, 665-66 (1st Cir.1990) ("[E]ach time a plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action to recover damages based on that injury accrues to plaintiff at the time he discovered or should have discovered the injury."), as are claims made pursuant to c. 93A and its four-year limitations period. See *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985, 994 (1st Cir.1988). Therefore, for the reasons applicable to the common law claims, the RICO and chapter 93A claims cannot be dismissed as time barred on the pleadings alone.

#### V Summary

Accordingly, the defendants' four motions to dismiss are denied in their entirety. The stay on discovery pending

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disposition of these motions is vacated. Discovery in this case may proceed. The clerk shall assign a date for a scheduling conference.

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