

USE OF EXPERT WITNESSES
IN AN ARPA PROSECUTION

Paul Charlton
AUSA Dist. of Arizona
(602) 514-7590

1. **NOTIFICATION OF CRIME:**
 - a. Who is the archeologist?

2. **CONTACT ARCHEOLOGIST:**
 - a. Discuss the Criminal Process
 - i. If necessary, begin with the basics - outline of Crim.Pro.
 - ii. If new, ask who they're speaking with to draft their assessment.
 - iii. Explain the importance of "Loss" as it relates to the Guideline Range for sentencing. **TAB A**
 - iv. Help with investigation? **TAB B**
 - b. Go to the Crime Scene with the Archeologist.
 - i. Bring the Archeologist's report.
 - ii. Get the "ground truth."

3. **DRAFT THE INDICTMENT:**
 - a. Get the "story" from the Archeologist. **TAB C, D**
 - b. Review indictment's allegation, check for correct use of "terms of art" and dates.
 - c. Remember this document will be your first opportunity to educate the Judge and the Jury.

4. **CONTACT WITH NATIVE AMERICANS:**
 - a. Ask Archeologist to write letter to those who might claim provenience (cc to your file) **TAB E**

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ARPA EXPERT OUTLINE CONT.

5. TRIAL:
 - a. Remember definition of Archeological Resource, "any material remains of past human life which are of archeological interest. See 3(a) above.

6. PLEA AGREEMENT:
 - a. Seek concurrence of Archeologist.
 - b. Seek involvement of Archeologist. **TAB F**

7. SENTENCE:
 - a. See 2(a)(iii) above.

8. REPATRIATION:
 - a. See 4(a) above.

9. TRUST BUT VERIFY:
 - a. Ford case.

10. THE "UNUSUAL" EXPERT:
 - a. Tidwell case. **TAB G**

002385

TAB A

002386

PART B - OFFENSES INVOLVING PROPERTY

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION

Introductory Commentary

These sections address the most basic forms of property offenses: theft, embezzlement, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303).

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics

- (1) If the loss exceeded \$100, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$100 or less	no increase
(B)	More than \$100	add 1
(C)	More than \$1,000	add 2
(D)	More than \$2,000	add 3
(E)	More than \$5,000	add 4
(F)	More than \$10,000	add 5
(G)	More than \$20,000	add 6
(H)	More than \$40,000	add 7
(I)	More than \$70,000	add 8
(J)	More than \$120,000	add 9
(K)	More than \$200,000	add 10
(L)	More than \$350,000	add 11
(M)	More than \$500,000	add 12
(N)	More than \$800,000	add 13
(O)	More than \$1,500,000	add 14
(P)	More than \$2,500,000	add 15
(Q)	More than \$5,000,000	add 16
(R)	More than \$10,000,000	add 17
(S)	More than \$20,000,000	add 18
(T)	More than \$40,000,000	add 19
(U)	More than \$80,000,000	add 20.

- (2) If the theft was from the person of another, increase by 2 levels.

Application Notes:

1. "More than minimal planning," "firearm," and "destructive device" are defined in the Commentary to §1B1.1 (Application Instructions).
2. "Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the interest that could have been earned had the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.

Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).

In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle \$5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is \$5,000 (the amount taken), not \$45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.

In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen property), the loss is the value of the stolen property determined as in a theft offense.

In the case of a partially completed offense (e.g., an offense involving a completed theft that is part of a larger, attempted theft), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.

3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.
4. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. See Commentary to §§2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).
5. Controlled substances should be valued at their estimated street value.
6. "Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).
7. "From the person of another" refers to property, taken without the use of force, that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forceful purse-snatching, such as the theft of a purse from a shopping cart.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	2-8	3-9
Zone A	4	0-6	0-6	2-8	4-10	6-12
	5	0-6	1-7	4-10	6-12	9-15
	6	0-6	2-8	6-12	9-15	12-18
	7	0-6	4-10	8-14	12-18	15-21
Zone B	8	0-6	6-12	10-16	15-21	18-24
	9	4-10	8-14	12-18	18-24	21-27
	10	6-12	10-16	15-21	21-27	24-30
Zone C	11	8-14	12-18	18-24	24-30	27-33
	12	10-16	15-21	21-27	27-33	30-37
	13	12-18	18-24	24-30	30-37	33-41
	14	15-21	21-27	27-33	33-41	37-46
	15	18-24	24-30	30-37	37-46	41-51
	16	21-27	27-33	33-41	41-51	46-57
	17	24-30	30-37	37-46	46-57	51-63
	18	27-33	33-41	41-51	51-63	57-71
	19	30-37	37-46	46-57	57-71	63-78
	20	33-41	41-51	51-63	63-78	70-87
	21	37-46	46-57	57-71	70-87	77-96
	22	41-51	51-63	63-78	77-96	84-105
	23	46-57	57-71	70-87	84-105	92-115
	24	51-63	63-78	77-96	92-115	100-125
	25	57-71	70-87	84-105	100-125	110-137
	26	63-78	78-97	92-115	110-137	120-150
Zone D	27	70-87	87-108	100-125	120-150	130-162
	28	78-97	97-121	110-137	130-162	140-175
	29	87-108	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	262-327	292-365	324-405	360-life
	38	235-293	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

TAB B

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Comments: The petroglyphs, either purchased or seized from Adam Bruce, have all had their individual design elements pecked into the rock surface by means of a direct blow with a hand held stone. There is absolutely no doubt that these petroglyphs are of prehistoric manufacture. The natural weathering of the pecked designs and the surrounding rock matrix could not be achieved by any means other than by exposure to the elements. Similarly, the metate fragment has been manufactured by the same basic hand pecking technique and exposed to natural weathering. Also, comparison of the naturally weathered pecked designs and stone surfaces with the recent chipping, scratching and otherwise scarring of some of the stones with metal implements and equipment during their illegal removal argues against the designs having been recently manufactured and intentionally weathered. The matching of several of the petroglyph panels or their templates with recently fractured rock and a ground impression at archaeological sites AR-03-07-01-1670 and -1671 (see the damage assessment report for additional information) which date, based on their associated surface artifact assemblages at between AD 700 to 1100, also supports the prehistoric age of the rock art and metate fragment.

002391

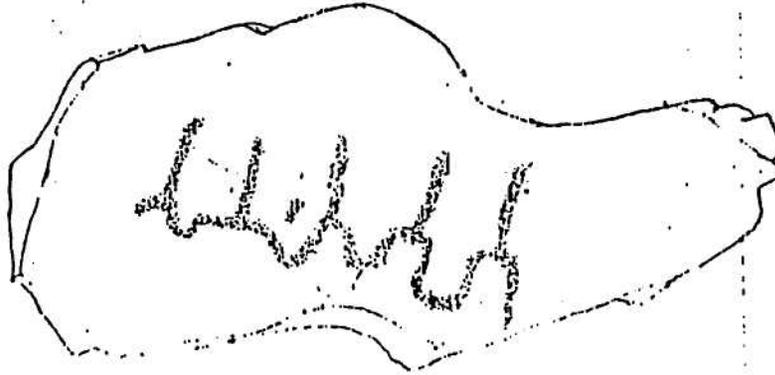
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SCALE
SUBSCRIPTION
7/25/91

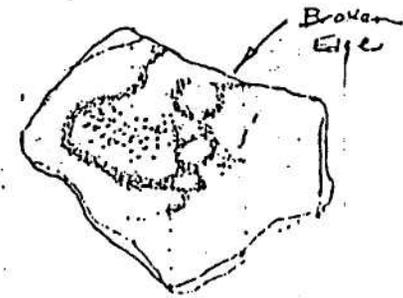
INCIDENT.

3844627

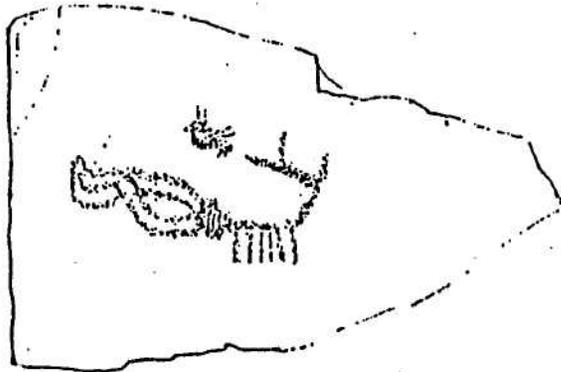
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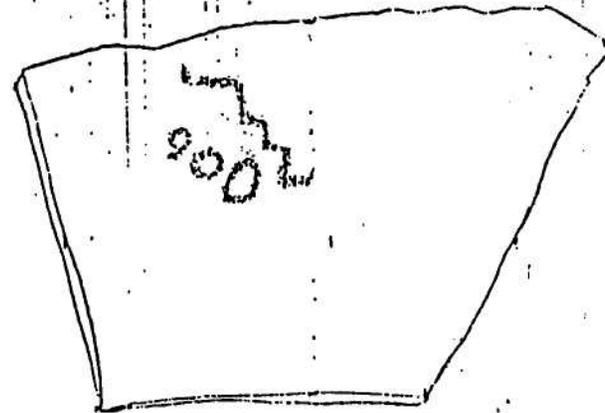
5, PLAN VIEW



6, PLAN VIEW



3, PLAN VIEW



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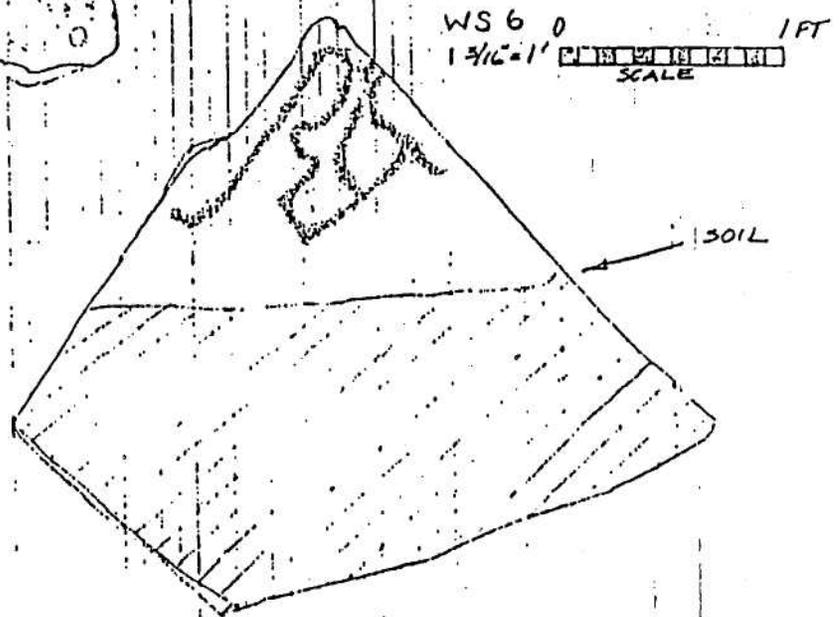
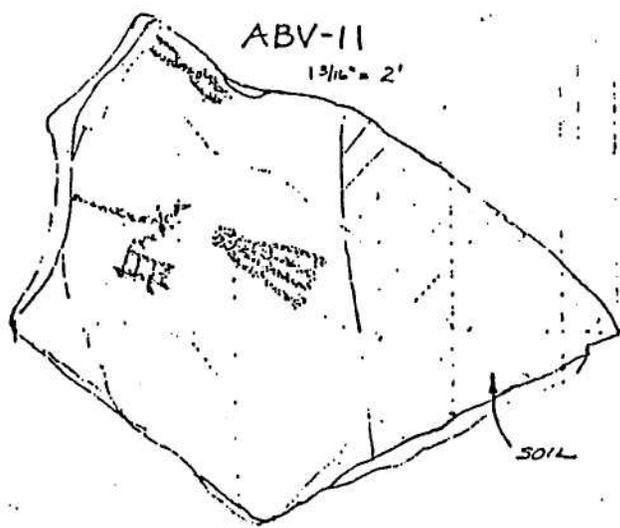
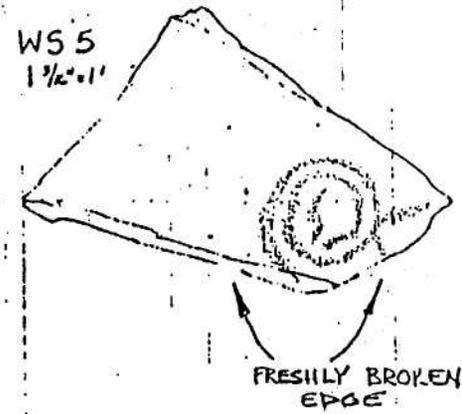
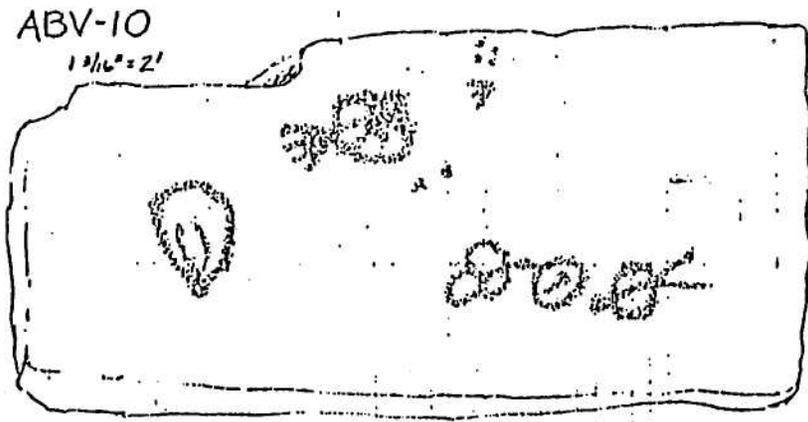
FIGURE 1

SCALE

S. GERMICK

4/25/94

INCIDENT NO.: 3844627



002393

DEL0000018

FIGURE 3

SCALE
S. GERMICK
4/25/94

INCIDENT 3844627

002394

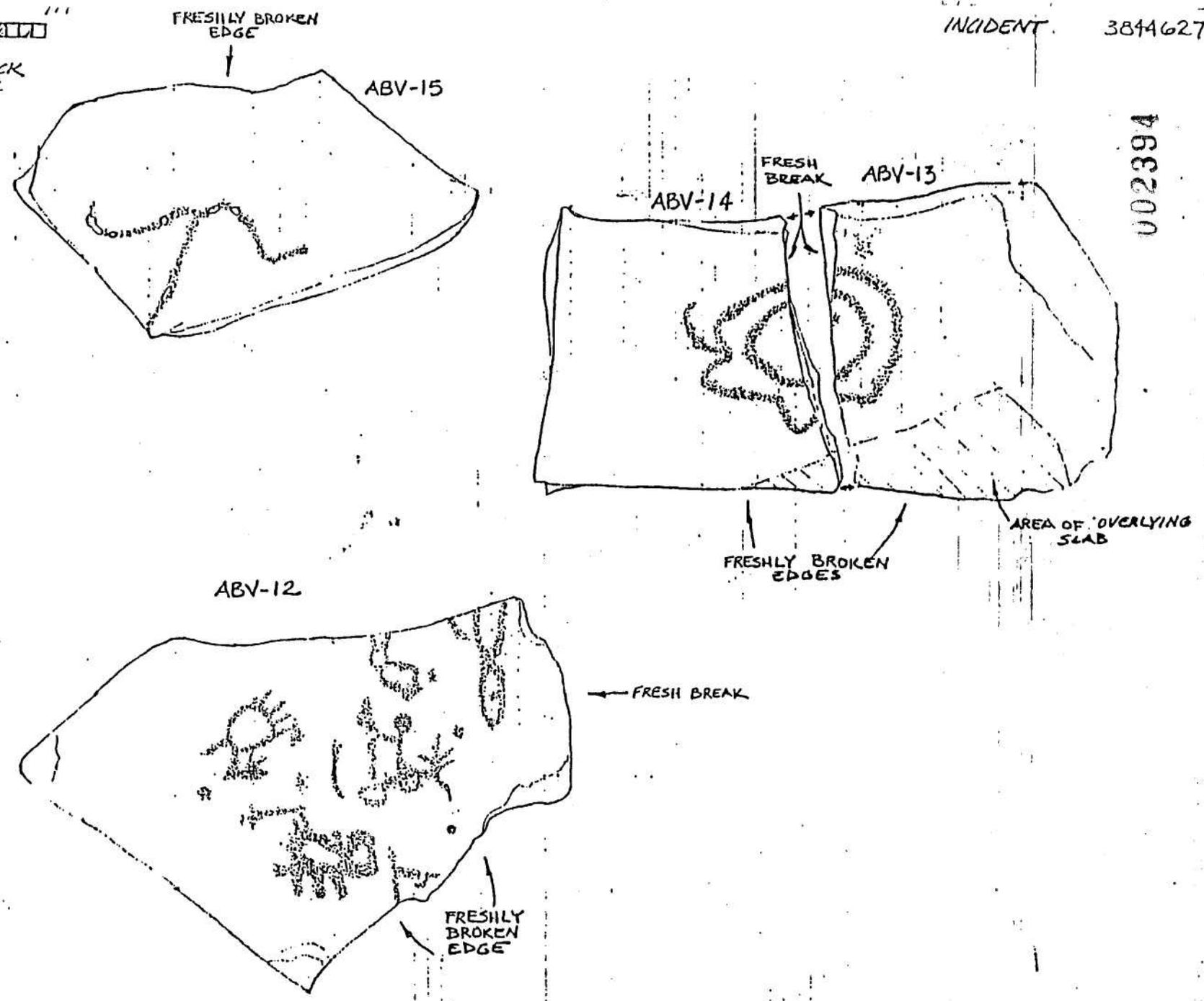


FIGURE 2

TAB C

002395

1 THE GRAND JURY CHARGES:

2 COUNT 1

3 On or about June 22, 1994, in the District of Arizona,
4 defendants, MICHAEL LEE COLLINS and BOBBY GENE SHIPLEY, did
5 willfully, knowingly and unlawfully combine, conspire, confederate,
6 and agreed together to commit the offenses of:

7 16 U.S.C. § 470ee(a) (Unlawful Removal of Archaeological
8 Resources); and

9 16 U.S.C. § 470ee(b) (Trafficking in Unlawfully Removed
10 Archaeological Resources).

11
12 A. BACKGROUND

13 1. Between the years 1150 and 1400 A.D., a native American
14 civilization, currently known as the Perry Mesa Tradition,
15 inhabited an area of land known as Perry Mesa, now owned by the
16 United States and managed by the Bureau of Land Management.

17 2. The Native American people of the Perry Mesa Tradition
18 constructed a residential site on Perry Mesa, known as Pueblo Pato,
19 containing at least 150 rooms.

20
21 B. OBJECT OF THE CONSPIRACY

22 3. It was the object and the purpose of the conspiracy to
23 remove archaeological resources from Pueblo Pato and to keep those
24 archaeological resources for the use and benefit of the defendants,
25 MICHAEL LEE COLLINS and BOBBY GENE SHIPLEY.

1 C. OVERT ACTS

2 4. On or about June 22, 1994, MICHAEL LEE COLLINS and BOBBY
3 GENE SHIPLEY, drove to an area near Pueblo Pato.

4 5. On or about June 22, 1994, MICHAEL LEE COLLINS and BOBBY
5 GENE SHIPLEY, dug for archaeological resources at the Pueblo Pato
6 site using both a shovel and a hoe.

7 6. On or about June 22, 1994, MICHAEL LEE COLLINS and BOBBY
8 GENE SHIPLEY, removed a ground stone tool and a number of beads
9 from the Pueblo Pato site.

10 In violation of Title 18, United States Code, Section 371.

11
12 COUNT 2

13 On or about June 22, 1994, within the District of Arizona,
14 defendants, MICHAEL LEE COLLINS and BOBBY GENE SHIPLEY, did,
15 without a lawful permit, knowingly excavate, remove, damage, and
16 otherwise alter and deface archaeological resources located on
17 public land administered by the Bureau of Land Management, that is,
18 Perry Mesa, the cost of restoration and repair and the value of
19 which exceeds \$500.

20 In violation of Title 16, United States Code, Section 470ee(a)
21 and (d) and Title 18, United States Code, Section 2.

22
23 COUNT 3

24 On or about June 22, 1994, within the District of Arizona,
25 defendants, MICHAEL LEE COLLINS and BOBBY GENE SHIPLEY, did
26 knowingly sell, purchase, exchange, transport, and receive,

1 archaeological resources, that is a number of beads and a stone
2 tool, taken without a lawful permit from public land administered
3 by the Bureau of Land Management, that is, Perry Mesa, the cost of
4 restoration and repair and the value of which exceeds \$500.

5 In violation of Title 16, United States Code, Section 470ee(b)
6 and (d) and Title 18, United States Code, Section 2.

7 A TRUE BILL

8
9 Lawrence E. Piazza
10 FOREMAN OF THE GRAND JURY
Date:

11 JANET NAPOLITANO
12 United States Attorney
13 District of Arizona

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15 PAUL K. CHARLTON
16 Assistant U.S. Attorney
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TAB D

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,
v.
ADAM L. BRUCE,
JOHN BRUCE,
BECKY WHITTED,
Defendants.

NO. CR 94-245 PCT
INDICTMENT
VIO: 18 U.S.C.
§ 371
(Conspiracy)
Count 1
16 U.S.C.
§470ee(a) and (d) and
18 U.S.C. § 2
(Unlawful Removal of
Archaeological
Resources)
Count 2
16 U.S.C. § 470ee(b)
and (d) and 18 U.S.C.
§ 2
(Trafficking in
Unlawfully Removed
Archaeological
Resources)
Count 3
18 U.S.C.
§§ 641 and 2
(Theft of Public
Property)
Count 4

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THE GRAND JURY CHARGES:

COUNT 1

Beginning on or about January 19, 1994, and continuing up to and including February 25, 1994, in the District of Arizona, defendants ADAM L. BRUCE, JOHN BRUCE, and BECKY WHITTED, did willfully, knowingly, and unlawfully combine, conspire, confederate, and agree together to commit the following offenses: Unlawful Removal of Archaeological Resources, a violation of Title 16, United States Code, Section 470ee(a); and Trafficking in Unlawfully Removed Archaeological Resources, a violation of Title 16, United States Code, Section 470ee(b).

A. BACKGROUND

1. Between the years 700 and 1100 A.D., and going back as far as 10,000 B.C., Native American cultures, such as the Cohonina, used hand tools to create petroglyphs within the area presently known as the Kaibab National Forest.

B. OBJECT OF THE CONSPIRACY

2. It was the object and the purpose of the conspiracy to remove petroglyphs from the Kaibab National Forest and to sell them for money and for the benefit of the defendants ADAM L. BRUCE, JOHN BRUCE and BECKY WHITTED.

1 C. OVERT ACTS

2 As part of and in furtherance of the conspiracy, overt acts
3 were committed, including, but not limited to, the following:

4 3. On or about January 19, 1994, ADAM L. BRUCE, met with a
5 federal agent, acting in an undercover capacity, and sold four
6 petroglyphs to the federal agent for \$340.00.

7 4. On or about January 19, 1994, ADAM L. BRUCE, introduced a
8 federal agent, acting in an undercover capacity, to JOHN BRUCE,
9 indicating that JOHN BRUCE was the "master mind" of their business.

10 5. On or about February 15, 1994, JOHN BRUCE, met with a
11 federal agent, acting in an undercover capacity. At that time,
12 JOHN BRUCE showed the undercover agent five separate petroglyphs.
13 JOHN BRUCE advised the federal agents that ADAM BRUCE was "out on
14 the forest getting more rock."

15 6. On or about February 15, 1994, JOHN BRUCE led two federal
16 agents, acting in an undercover capacity, to an area within the
17 confines of the Kaibab National Forest. There, JOHN BRUCE and the
18 two federal agents met ADAM BRUCE.

19 7. On or about February 15, 1994, ADAM L. BRUCE introduced
20 two federal agents, acting in an undercover capacity, to BECKY
21 WHITTED.

22 8. On or about February 15, 1994, ADAM L. BRUCE offered to
23 sell the five petroglyphs referred to in paragraph 5 above to
24 federal agents, acting in an undercover capacity, for \$1,500.00.

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COUNT 3

On or about February 25, 1994, defendants ADAM L. BRUCE, JOHN BRUCE, and BECKY WHITTED, within the District of Arizona, did knowingly sell, purchase, exchange, transport, receive, and offer to sell, purchase, and exchange archaeological resources taken from the Kaibab National Forest without a lawful permit, that is, a number of petroglyphs, the cost of restoration and repair and the value of which exceeds \$500.00.

In violation of Title 16, United States Code, Section 470ee(b) and (d) and Title 18, United States Code, Section 2.

COUNT 4

On or about February 15, 1994, within the District of Arizona, defendants ADAM L. BRUCE, JOHN BRUCE, and BECKY WHITTED, did knowingly embezzle, steal, and convert for their own use, and the use of another, property of the United States, that is more than one ton of moss rock removed from the Kaibab National Forest and valued at more than \$100.00.

In violation of Title 18, United States Code, Section 641, and 2.

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TRUE BILL

 Kathleen Piazza
FOREMAN OF THE GRAND JURY
Date:

JANET NAPOLITANO
United States Attorney
District of Arizona



 PAUL K. CHARLTON
Assistant U.S. Attorney

TAB E

002407



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
ARIZONA STRIP DISTRICT
VERMILLION RESOURCE AREA
345 E. Riverside Drive, Suite 103
St. George, Utah 84770
Phone (801)628-4491 • Fax (801)673-5729

IN REPLY REFER TO:
8560 (015)

May 16, 1995

Ms. Gloria Bullets Benson, Chairperson
Kaibab Paiute Tribe
Tribal Affairs Building
Fredonia, AZ 86022

Dear Ms. Benson:

This is to inform you of a recent violation of the Archaeological Resources Protection Act of 1979 in the Vermillion Resource Area.

Moonshine Shelter (Site No. AZ B:1:238(BLM)), a previously unknown Puebloan (Anasazi) rock shelter and associated midden on Yellowstone Mesa just south of Colorado City, Arizona was vandalized on Easter weekend. The suspects were caught by Mohave County Sheriff's Officers and our BLM Law Enforcement Officers. No human remains or associated burial goods were disturbed, to the best of our knowledge.

The Assistant U.S. Attorney is going to pursue the case. You may hear about it in forthcoming news releases. If you have any questions about the case or want any other information, please call us.

Sincerely,

Dennis Curtis
Area Manager

cc: Mr. Paul Charlton, Assistant U.S. Attorney

002408

TAB F

002409

CHARLTON

FILED LODGED
RECEIVED COPY
OCT 3 1995
RECEIVED
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
95 OCT 3 10:29 AM
U.S. DISTRICT COURT

1 JANET NAPOLITANO
2 United States Attorney
3 District of Arizona
4
5 PAUL K. CHARLTON
6 Assistant United States Attorney
7 4000 United States Courthouse
8 230 North First Avenue
9 Phoenix, Arizona 85025
10 State Bar No. 012449
11 Telephone: (602) 514-7500

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

10 UNITED STATES OF AMERICA,)
11 Plaintiff,) CR-95-226-PCT-SMM
12 v.) PLEA AGREEMENT
13 JOHN ERICK CRAWFORD,) (Sentencing Guidelines
14 Defendant.) Are Applicable)

15 Plaintiff, United States of America, and defendant, JOHN ERICK
16 CRAWFORD, hereby agree to the following disposition of this matter:

PLEA

18 Defendant will plead guilty to the lesser included offense of
19 the indictment, that is, a misdemeanor, charging defendant with
20 Unlawful Damage of an Archaeological Resource, a violation of Title
21 43, Code of Federal Regulations, Section 7.4(a).

PACKAGE PLEA AGREEMENT

23 Defendant understands that he and his codefendant, BRET
24 WILLIAM CHRISTENSEN, must agree to the terms of their respective
25 agreement before either will be allowed to partake in it. If
26 either defendant fails to enter into the agreement, or fails to

1 make a factual basis for his guilty plea as required by the
2 agreement, then the agreement is void as to both defendants. The
3 defendant states that he enters into this plea agreement
4 voluntarily and not as a result of threats or pressure from his
5 codefendant.

6 TERMS

7 Defendant understands that the guilty plea is conditioned upon
8 the following terms, stipulations, and requirements:

9 1. MAXIMUM PENALTIES

10 (a) A violation of Title 43, Code of Federal Regulations,
11 7.4(a), is punishable by a maximum fine of \$100,000.00, or a
12 maximum term of imprisonment of 1 year, or both, a term of
13 supervised release of not more than one year, and a term of
14 probation of not more than five years.

15 (b) According to the Sentencing Guidelines issued pursuant to
16 the Sentencing Reform Act of 1984, the court shall:

17 (1) Order the defendant to make restitution to any
18 victim of the offense unless, pursuant to Title 18, United States
19 Code, Section 3663 and Section 5E1.1 of the Guidelines, the court
20 determines that restitution would not be appropriate in this case;

21 (2) Order the defendant to pay a fine, which may include
22 the costs of probation, supervised release or incarceration,
23 unless, pursuant to Title 18, United States Code 3611 and Section
24 5E1.2(f) of the Guidelines, the defendant establishes the
25 applicability of the exceptions found therein;

26

1 (3) Order the defendant, pursuant to Title 18, United
2 States Code, Section 3583 and Section 5D1.1 and 2 of the Guidelines
3 to serve a term of supervised release when required by statute or
4 when a sentence of imprisonment of more than one year is imposed,
5 and the court may impose a term of supervised release in all other
6 cases.

7 (c) Pursuant to Title 18, United States Code, Section 3013,
8 the court is required to impose a special assessment on the
9 defendant of \$25.00. The special assessment is due at the time the
10 defendant enters the plea of guilty, but in no event shall it be
11 paid later than the time of sentencing.

12 2. AGREEMENTS REGARDING SENTENCING

13 (a) Stipulated Sentence Pursuant to Fed. R. Crim. P.
14 11(e)(1)(C), the United States and the defendant stipulate to the
15 following:

16 (1) The defendant shall be sentenced to probation, with
17 the following terms and conditions, any and all other terms and
18 conditions may be set at the court's discretion:

19 (A) The defendant shall provide the government with
20 information, accompany government officials to, and assist in the
21 archeological documentation and mapping of any archeological sites
22 of which they are aware or at which they have previously dug;

23 (B) The defendant will participate in a video tape
24 presentation to be scripted by the government. The video tape will
25 be used to assist in educating school age children about the value
26 of archeological resources. In the video, the defendant will

1 accept full responsibility for his actions as reflected in the
2 indictment;

3 (C) The defendant will agree to cleanup three
4 illegal, nonhazardous dump sites in the Littlefield Beaver Dam,
5 Arizona area. The government will provide tools such as shovels,
6 and gloves, and a vehicle to haul the waste to an approved dump.
7 The government will provide trash bags and pay any fees at the
8 landfill. The government estimates that the time for cleanup will
9 be 60 hours;

10 (D) The defendant shall pay restitution in the
11 amount of \$2,740 for which he is jointly and severally liable with
12 his co-defendant. The defendant agrees to pay this amount in full
13 at the date of sentencing.

14 (E) Pursuant to 42 U.S.C. §470~~3~~, defendant agrees
15 to forfeit his 1978 GMC pickup truck, Utah registration 7079 BH,
16 used in the commission of this offense. The defendant will
17 surrender the truck to the government on the date of the change of
18 plea. The government will maintain the truck in its possession
19 until the date of sentencing, at which time it will acquire title.

20 (b) If the court, after reviewing this plea agreement,
21 concludes that any provision is inappropriate, it may reject the
22 plea agreement, giving defendant, in accordance with
23 Fed. R. Crim. P. 11(e)(4), an opportunity to withdraw the guilty
24 plea.

25 (c) The United States retains the unrestricted right to make
26 any and all statements it deems appropriate to the Probation Office

1 and to make factual and legal responses to any statements made by
2 the defendant or defense counsel or objections to the presentence
3 report or to questions by the court at the time of sentencing.

4 (d) Acceptance of Responsibility Assuming the defendant
5 makes full and complete disclosure to the Probation Department of
6 the circumstances surrounding the defendant's commission of the
7 offense and, if the defendant demonstrates an acceptance of
8 responsibility for this offense up to and including the time of
9 sentencing, the United States will recommend a two-point reduction
10 in the applicable sentence guideline offense level, pursuant to
11 Section 3E1.1 of the Guidelines.

12 3. AGREEMENT TO DISMISS OR NOT TO PROSECUTE

13 (a) The United States agrees not to prosecute the defendant
14 for any other charges presently known by the United States and
15 reflected in BLM report number AZ-010-04-95-0010060, nor any other
16 crimes relating to the disturbance of archeological sites that have
17 been imparted to the government pursuant to paragraph 2(a)(1)(A)
18 above.

19 (b) This agreement does not, in any manner, restrict the
20 actions of the United States in any other district nor bind any
21 other United States Attorney's Office. The United States is not
22 presently aware of any other federal or state investigations or
23 charges.

24 4. WAIVER OF DEFENSES AND APPEAL RIGHTS

25 (a) Defendant hereby waives any right to raise on appeal or
26 collaterally attack any matter pertaining to this prosecution and

1 sentence if the sentence imposed is consistent with the terms of
2 this agreement.

3 5. PERJURY AND OTHER FALSE STATEMENT OFFENSES OR OTHER OFFENSES

4 Nothing in this agreement shall be construed to protect the
5 defendant in any way from prosecution for perjury, false declara-
6 tion or false statement, or any other offense committed by
7 defendant after the date of this agreement. Any information,
8 statements, documents, and evidence which defendant provides to the
9 United States pursuant to this agreement may be used against the
10 defendant in all such prosecutions.

11 6. REINSTITUTION OF PROSECUTION

12 If defendant's guilty plea is rejected, withdrawn, vacated, or
13 reversed at any time, the United States will be free to prosecute
14 the defendant for all charges of which it has knowledge, and any
15 charges that have been dismissed because of this plea agreement
16 will be automatically reinstated. In such event, defendant waives
17 any objections, motions, or defenses based upon the Statute of
18 Limitations, the Speedy Trial Act or constitutional restrictions in
19 bringing of the later charges or proceedings. The defendant
20 understands that any statements made at the time of the defendant's
21 change of plea or sentencing may be used against the defendant in
22 any subsequent hearing, trial or proceeding as permitted by
23 Fed. R. Crim. P. 11(e)(6).

1 7. DISCLOSURE OF INFORMATION TO U.S. PROBATION OFFICE

2 (a) Defendant understands the United States' obligation to
3 provide all information in its file regarding defendant to the
4 United States Probation Office.

5 (b) The defendant will cooperate fully with the United States
6 Probation Office. Such cooperation will include truthful state-
7 ments in response to any questions posed by the Probation Depart-
8 ment.

9 8. FORFEITURE, CIVIL, AND ADMINISTRATIVE PROCEEDINGS

10 (a) Nothing in this agreement shall be construed to protect
11 the defendant from civil forfeiture proceedings or prohibit the
12 United States from proceeding with and/or initiating an action for
13 civil forfeiture.

14 ELEMENTS

15 The elements for the lessor included offense of the
16 indictment, a violation of 43 C.F.R. §7.4(a), Unlawful Damage of
17 Archaeological Resources, are as follows:

- 18 1. The defendant did knowingly excavate, remove, damage,
19 or otherwise alter and deface,
20 2. an archaeological resource,
21 3. located on public land,
22 4. without a permit.

23 "Archaeological resource" is defined to include shelters that
24 are at least 100 years of age. 43 C.F.R. §7.3(a)(3)(i).
25
26

1 against self-incrimination -- all with the assistance of counsel --
2 and to be presumed innocent until proven guilty beyond a reasonable
3 doubt.

4 I agree to enter my guilty plea as indicated above on the
5 terms and conditions set forth in this agreement.

6 I have been advised by my attorney of the nature of the
7 charges to which I am entering my guilty plea. I have further been
8 advised by my attorney of the nature and range of the possible
9 sentence and that my ultimate sentence will be determined according
10 to the guidelines promulgated pursuant to the Sentencing Reform Act
11 of 1984. I further understand that under certain limited
12 circumstances the court may depart upward or downward from the
13 calculated guideline range.

14 My guilty plea is not the result of force, threats, assurances
15 or promises other than the promises contained in this agreement.
16 I agree to the provisions of this agreement as a voluntary act on
17 my part, rather than at the direction of or because of the
18 recommendation of any other person, and I agree to be bound
19 according to its provisions.

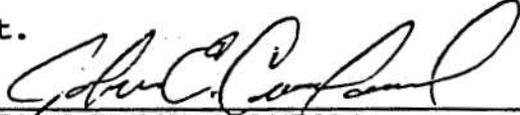
20 I fully understand that, if I am granted probation by the
21 court, the terms and conditions of such probation are subject to
22 modification at any time. I further understand that, if I violate
23 any of the conditions of my probation, my probation may be revoked
24 and upon such revocation, notwithstanding any other provision of
25 this agreement, I may be required to serve a term of imprisonment
26 or my sentence may otherwise be altered.

1 I agree that this written plea agreement contains all the
2 terms and conditions of my plea and that promises made by anyone
3 (including my attorney), and specifically any predictions as to the
4 guideline range applicable, that are not contained within this
5 written plea agreement are without force and effect and are null
6 and void.

7 I am satisfied that my defense attorney has represented me in
8 a competent manner.

9 I am fully capable of understanding the terms and conditions
10 of this plea agreement. I am not now on or under the influence of
11 any drug, medication, liquor, or other intoxicant or depressant,
12 which would impair my ability to fully understand the terms and
13 conditions of this plea agreement.

14 10/3/95
Date



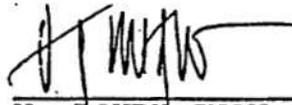
JOHN ERICK CRAWFORD
Defendant

16 DEFENSE ATTORNEY'S APPROVAL

17 I have discussed this case and the plea agreement with my
18 client, in detail and have advised the defendant of all matters
19 within the scope of Fed. R. Crim. P. 11, the constitutional and
20 other rights of an accused, the factual basis for and the nature of
21 the offense to which the guilty plea will be entered, possible
22 defenses, and the consequences of the guilty plea including the
23 maximum statutory sentence possible. I have further discussed the
24 sentencing guideline concept with the defendant. No assurances,
25 promises, or representations have been given to me or to the
26

1 defendant by the United States or by any of its representatives
2 which are not contained in this written agreement. I concur in the
3 entry of the plea as indicated above and on the terms and condi-
4 tions set forth in this agreement as in the best interests of my
5 client. I agree to make a bona fide effort to ensure that the
6 guilty plea is entered in accordance with all the requirements of
7 Fed. R. Crim. P. 11.

8 Oct. 3, 1995
9 Date

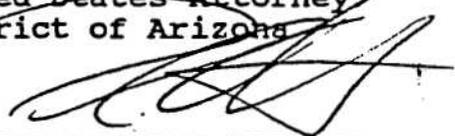

V. LOWRY SNOW
Attorney for Defendant

10 UNITED STATES' APPROVAL

11 I have reviewed this matter and the plea agreement. I agree
12 on behalf of the United States that the terms and conditions set
13 forth are appropriate and are in the best interests of justice.
14

JANET NAPOLITANO
United States Attorney
District of Arizona

15
16
17 October 3, 1995
18 Date


PAUL K. CHARLTON
Assistant U.S. Attorney

19
20 COURT'S ACCEPTANCE

21
22
23 _____
Date

STEPHEN M. McNAMEE
United States District Judge

TAB G

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MAR 11 1997
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DISTRICT OF ARIZONA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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8 UNITED STATES OF AMERICA,
9 Plaintiff,

10 v.

11 ERNEST WENDELL CHAPPELLA,
12 (Counts 1 through 23), and
13 RODNEY PHILLIP TIDWELL,
14 (Counts 1 through 26),

15 Defendants.

NO. **CR97-093 PCT**

INDICTMENT

VIO: 18 U.S.C. § 371
Conspiracy
Count 1.

18 U.S.C. § 1170(b)
Illegal Trafficking in
Native American Cultural Items
Counts 2 through 12, and 24

18 U.S.C. § 1163
Theft of Tribal Property
Counts 13 through 23

16 U.S.C. § 470ee(b) and (d)
Trafficking in Unlawfully Removed
Archeological Resources
Count 25

18 U.S.C. § 2314
Interstate Transportation of Stolen
Property
Count 26

Forfeiture Allegation

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24 THE GRAND JURY CHARGES:
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002422

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COUNT I
CONSPIRACY

1. Beginning in or about 1995, the exact date being unknown to the Grand Jury, and continuing up to on or about November 6, 1996, in the District of Arizona, defendants ERNEST WENDELL CHAPPELLA, and RODNEY PHILLIP TIDWELL, did willfully, knowingly, and unlawfully combine, conspire, confederate, and agree together to commit the offenses of Illegal Trafficking in Native American Cultural Items, a violation of Title 18, United States Code, Section 1170, and Theft of Tribal Property, a violation of Title 18, United States Code, Section 1163.

INTRODUCTION

2. The Hopi Tribe resides on the Hopi Indian Reservation, located within the District of Arizona.

3. The Hopi Tribe has a number of religious societies. Each religious society performs certain ceremonies. Hopi religious societies use ceremonial masks, which the Hopis refer to as "spirit friends," in the performance of their societies' ceremonies.

4. Hopi ceremonial masks are sacred objects, required by Hopi religious leaders for the ongoing practice of the Hopi religion.

5. Hopi ceremonial masks are items of cultural patrimony having ongoing historical, traditional, and cultural importance central to the Hopi people, rather than property owned by an individual Native American, and, therefore, cannot be sold.

THE DEFENDANTS

6. ERNEST WENDELL CHAPPELLA, at the time relevant to this indictment, was a resident of Keams Canyon, Arizona, within the Hopi Indian Reservation, and a maker of Hopi ceremonial masks.

7. RODNEY PHILLIP TIDWELL, at the time relevant to this indictment, was a resident of St. Valley, Arizona, and a trader in Native American objects and artifacts. On or about October 31, 1996, TIDWELL was convicted, in the United States District Court for the District of New Mexico, of Illegal Trafficking in Native American Cultural Items, a violation of 18 U.S.C. § 1170(b).

1 23. On or before October 24, 1996, CHAPPELLA obtained and dressed, that is, assembled,
2 Hopi Ceremonial mask, known as "Avatshoya," for TIDWELL.

3 24. On or before October 24, 1996, TIDWELL paid CHAPPELLA for the "Avatshoya" mask

4 25. On or about October 24, 1996, TIDWELL sold the "Avatshoya" mask.

5 26. On or before November 6, 1996, CHAPPELLA obtained and dressed, that is, assembled, five
6 Hopi ceremonial masks, known as "Hiilili," "Lakana," "Mastop," "Hooli," and "Waagasi" for
7 TIDWELL.

8 27. On or before November 6, 1996, TIDWELL paid CHAPPELLA for the "Hiilili," "Lakana,
9 "Mastop," "Hooli," and "Waagasi" masks.

10 28. On or about November 6, 1996, TIDWELL indicated that the "Hiilili," "Lakana," "Mastop,
11 and "Hooli" masks were for sale.

12 In violation of Title 18, United States Code, Section 371.

13 **COUNTS 2 - 12**

14 **ILLEGAL TRAFFICKING IN NATIVE AMERICAN CULTURAL ITEMS**

15 29. The Grand Jury repeats and realleges paragraphs 2 through 7 of Count 1.

16 30. On or about the dates set forth below, within the District of Arizona and elsewhere
17 defendants ERNEST WENDELL CHAPPELLA, and RODNEY PHILLIP TIDWELL, did knowingly sell
18 purchase, use for profit and transport for sale and profit, the following Native American cultural items
19 obtained in violation of the Native American Graves Protection and Repatriation Act:

20

COUNT	DATE	ITEM
2	April 19, 1996	Hopi "Tsa'Kwayna" Ceremonial Mask
3	July 1, 1996	Hopi "Hoote" Ceremonial Mask
4	July 1, 1996	Hopi "Ho'eh" Ceremonial Mask
5	July 11, 1996	Hopi "Huhunaka" Ceremonial Mask

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COUNT	DATE	ITEM
6	July 11, 1996	Hopi "Mongwu" Ceremonial Mask
7	October 24, 1996	Hopi "Avatshoya" Ceremonial Mask
8	November 6, 1996	Hopi "Hiilili" Ceremonial Mask
9	November 6, 1996	Hopi "Lakana" Ceremonial Mask
10	November 6, 1996	Hopi "Mastop" Ceremonial Mask
11	November 6, 1996	Hopi "Hooli" Ceremonial Mask
12	November 6, 1996	Hopi "Waagasi" Ceremonial Mask

In violation of Title 18, United States Code, Sections 1170(b) and 2, and Title 25, United States Code Sections 3001(3)(C) & (D), and 3002(c).

COUNTS 13 - 23

THEFT OF TRIBAL PROPERTY

31. The Grand Jury repeats and realleges paragraphs 2 through 5 of Count 1.

32. On or about the dates set forth below, within the District of Arizona and elsewhere, defendants ERNEST WENDELL CHAPELLA, and RODNEY PHILLIP TIDWELL, did steal and knowingly and willfully convert to their use and the use of another the following Hopi ceremonial masks, belonging to the Hopi Tribe, an indian tribal organization, said property having a value of more than \$100.00:

COUNT	DATE	ITEM
13	April 19, 1996	Hopi "Tsa'Kwayna" Ceremonial Mask
14	July 1, 1996	Hopi "Hoote" Ceremonial Mask
15	July 1, 1996	Hopi "Ho'eh" Ceremonial Mask

COUNT	DATE	ITEM
16	July 11, 1996	Hopi "Huhunaka" Ceremonial Mask
17	July 11, 1996	Hopi "Mongwu" Ceremonial Mask
18	October 24, 1996	Hopi "Avatshoya" Ceremonial Mask
19	November 6, 1996	Hopi "Hiilili" Ceremonial Mask
20	November 6, 1996	Hopi "Lakana" Ceremonial Mask
21	November 6, 1996	Hopi "Mastop" Ceremonial Mask
22	November 6, 1996	Hopi "Hooli" Ceremonial Mask
23	November 6, 1996	Hopi "Waagasi" Ceremonial Mask

In violation of Title 18, United States Code, Sections 1163 and 2.

COUNT 24

ILLEGAL TRAFFICKING IN NATIVE AMERICAN CULTURAL ITEMS

33. The Pueblo of Acoma, an Indian Reservation for the Acoma people, is located in the District of New Mexico.

34. The Acoma Tribe has a number of religious societies, one of them being the "Altar Society."

35. The Altar Society possessed robes, vestments, and other liturgical items used in the celebration of the Roman Catholic mass, which were said to have belonged to Roman Catholic priests who died during the Pueblo revolt which began in 1680.

36. These robes, vestments, and liturgical items are considered items of cultural patrimony having ongoing historical, traditional, and cultural importance central to the Pueblo of Acoma, rather than property owned by an individual Native American, and, therefore, cannot be sold.

37. On or about June 18, 1996, within the District of Arizona and elsewhere, defendant RODNEY PHILLIP TIDWELL, having previously been convicted of an offense under Title 18, United States Code, Sections 1170(b), did knowingly sell, purchase, use for profit and transport for sale and

1 profit, Native American cultural items, that is, robes, vestments, and other liturgical items used
2 celebration of the Roman Catholic mass, obtained in violation of the Native American Graves Protectio
3 and Repatriation Act.

4 In violation of Title 18, United States Code, Sections 1170(b) and 2, and Title 25, United State
5 Code Sections 3001(3)(D), and 3002(c).

6 **COUNT 25**

7 **TRAFFICKING IN UNLAWFULLY REMOVED ARCHEOLOGICAL RESOURCES**

8 38. The Grand Jury repeats and realleges paragraphs 33 through 36 of Count 24.

9 39 On or about June 18, 1996, within the District of Arizona and elsewhere, defendan
10 RODNEY PHILLIP TIDWELL, having previously been convicted of a violation of Title 16, Unitec
11 States Code, Section 470ee, did knowingly sell, purchase, exchange, transport, receive, and offer to sell
12 purchase, and exchange archeological resources taken from the Pueblo of Acoma without a lawful permit
13 that is, robes, vestments, and other liturgical items used in the celebration of the Roman Catholic mass

14 In violation of Title 16, United States Code, Section 470ee(b) and (d).

15 **COUNT 26**

16 **INTERSTATE TRANSPORTATION OF STOLEN PROPERTY**

17 40. The Grand Jury repeats and realleges paragraphs 33 through 36 of Count 24.

18 41. On or about June 18, 1996, within the District of Arizona and elsewhere, defendant
19 RODNEY PHILLIP TIDWELL, did unlawfully transport and cause to be transported in interstate
20 commerce from the District of Arizona to the District of New Mexico goods, wares, and merchandise
21 which had been stolen, converted, and taken by fraud, that is, robes, vestments, and other liturgical items
22 used in the celebration of the Roman Catholic mass, taken from the Pueblo of Acoma, having an
23 aggregate value of \$5000.00 or more, knowing the same to have been stolen, converted, and taken by
24 fraud.

25 In violation of Title 18, United States Code, Section 2314.

1 **FORFEITURE ALLEGATION**

2 42. RODNEY PHILLIP TIDWELL maintains an ownership or possessory interest in a gree
3 Chevrolet extended cab pickup, Arizona license number KMT-451, vehicle identification numbe
4 2GCEK19K8R1118020, which was used in the unlawful transportation of archeological resources a
5 described in Count 25, incorporated by this reference, and which, therefore, constitutes a vehicle use
6 by any person in connection with a violation of Title 16, United States Code, Section 470ee(b), and
7 subject to forfeiture pursuant to Title 16, United States Code, Section 470gg.

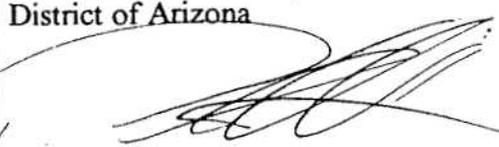
8
9 A TRUE BILL

10
11 *Lehi J. Smith*

12 FOREMAN OF THE GRAND JURY

13 Date: March 11, 1997

14
15 JANET NAPOLITANO
16 United States Attorney
17 District of Arizona

18 
19 PAUL K. CHARLTON
Assistant U.S. Attorney

The

Curation

Crisis

Decad threatens to cave in the canyon of cardboard boxes; water-soaked and crumpling from the weight of their contents. Here and there, artifacts poke through or spill from bags with labels, long gone or blurred beyond legibility. Mice droppings litter the floor; the stench is thick. Clearly this a forgotten corner of the universe.

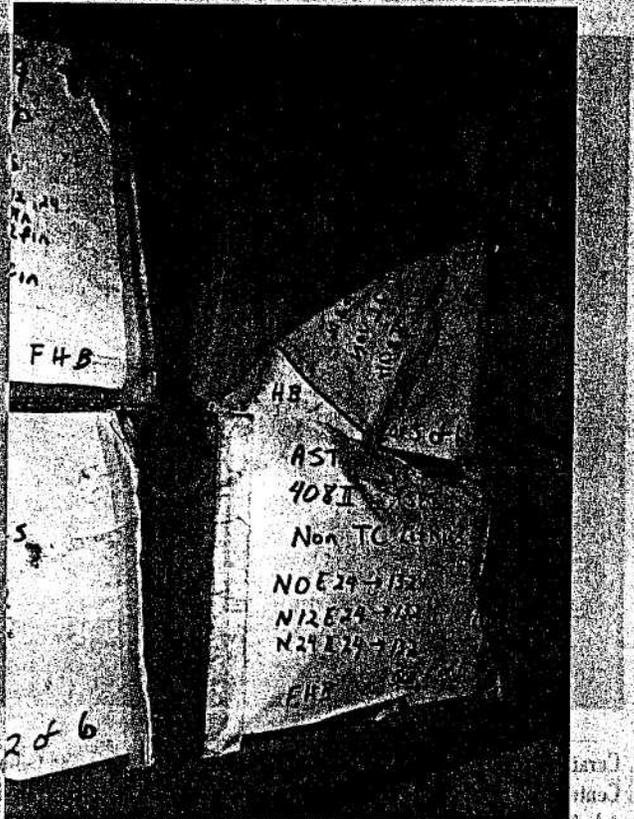
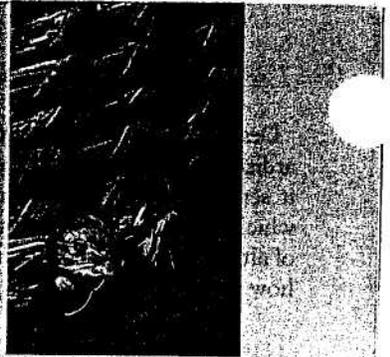
Welcome to a federal curation facility.

What's Happening Down

BY S. TERRY CHILDS

P Armed with new state-of-the-art tools, you want to re-examine some artifacts you saw a few years ago. The problem is, the storage facility seems to have misplaced them. Or, you find what you need, only to discover it's been feeding a platoon of hungry rats, termites, and various other friends of archeology.

Here's another scenario: Imagine you hear about an archeology project rich with soil samples, site records, photographs, and lab reports—not to mention artifacts—that could lead to a major breakthrough in your research. Except that now, less than a decade after the stuff was excavated, the federal agency that sponsored the project has no idea where any of it went, nor the time or resources to look. Never mind the millions of dollars it took to excavate, collect, and catalog it.

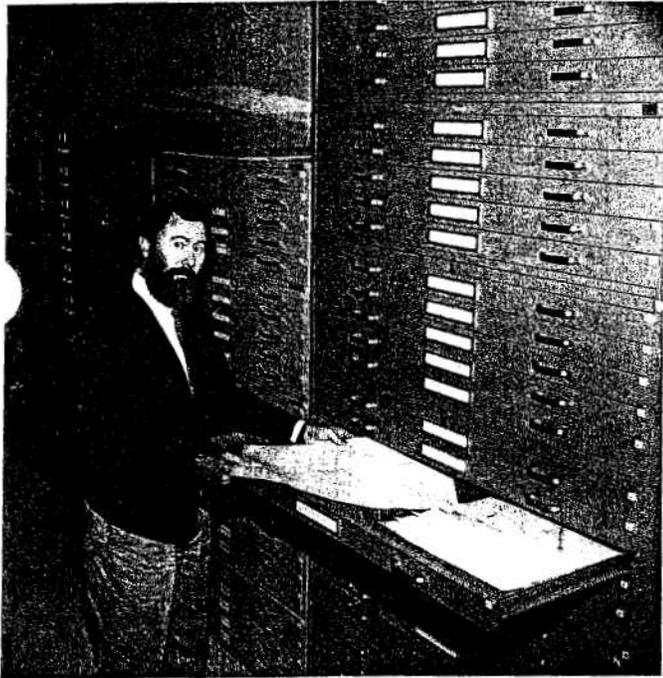


U.S. ARMY CORPS OF ENGINEERS/ST. LOUIS DISTRICT

Despite recent inroads, such situations remain common, jeopardizing the future of archeology and its obligations to the public it serves. We'll examine current initiatives later in this article, which together with the best of the federal facilities offer a range of alternatives for dealing with the situation. But first let's look at how things got this way.

The problems stretch from the earliest planning for excavations all the way up to the highest reaches of federal policymaking.

Some archeologists have no idea where they are going to put the artifacts they plan to excavate, something that should be decided long before projects get underway. Too often, excavation is seen as a more worthy aspect of the profession than what must inevitably come afterward. True, excavating a pot can be an exciting process of discovery. Cleaning, analyzing, inventorying, and boxing that pot, how-



MARLIN ROOS/ILLINOIS STATE MUSEUM

Curator Michael Wiant at the Illinois State Museum Research and Collection Center, which houses large holdings from the Federal Highway Administration, the Corps of Engineers, and the National Park Service.

ever, is frequently viewed as drudge work to be relegated to people who cannot "make it" in the field. All too often, this means women, whose status may mirror the lower pay of indoor assignments.

Sometimes—when it comes to curation—no one is even assigned to do the job at all. To the untrained eyes of many decision makers, non-museum-quality objects such as sherds and soil samples do not seem to rate the time, staff, and financial resources they deserve.

The reality is that, once a site is excavated, these materials are often the only remaining evidence of a past culture. Not surprisingly, they are proving increasingly valuable for thesis, disserta-

tion, and other research projects. Mary L. Powell, director and curator of the University of Kentucky's Webb Museum of Anthropology, notes a marked rise in visits to the archeological collections, as well as more loan requests. The trend parallels the passing of federal laws for improving the protection of archeological resources, which means more artifacts and associated records flowing into facilities like the Webb.

The legislation, paradoxically, compounded the problem. Legislators wanted to ensure that agencies assume responsibility for the long-term care of collections generated on their lands. However, many agencies are ill-fit to monitor what they own. They either have no staff, don't think it's important, or both.

The numbers show the enormity of the situation. Agencies in the Department of Interior, which monitors better than most, must manage an estimated 57 million objects, from bags of quartz flakes to an exotic copper breastplate.

Michael Wiant, curator of anthropology at the Illinois State Museum, says that despite their shortcomings the new laws "draw attention to problems that have a very long history."

For decades, many agencies relied on agreements with non-federal repositories to care for their collections. The Forest Service, for example, estimates that 90 percent of its collections are housed under such arrangements. In many cases, the agencies have provided little or no compensation or aid to these facilities. So when artifacts start arriving from federal construction projects—the building of pipelines, highways, dams, etc.—inadequate funding, staff, and storage become evident.

A 1986 GAO report, *Cultural Resources—Problems Protecting and Preserving Federal Archeological Resources*, gathered the results of a questionnaire responded to by 30 non-federal repositories housing the collections of the Bureau of Land Management, Forest Service, and National Park Service. Local agency officials were also interviewed in Arizona, Colorado, New Mexico, and Utah, the archeologically rich states that were the focus of the study. The report revealed some shocking insights:

Twenty-four percent of the respondents had no inventory of their collections; thirty percent had never inspected them for conservation needs.

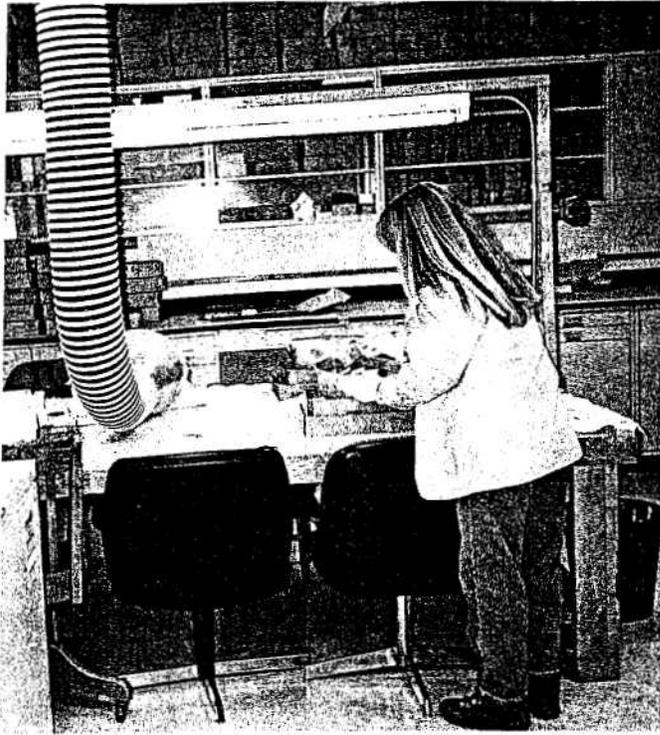
Most records of excavations on Forest Service and BLM lands prior to 1975 and 1968, respectively, had been lost or destroyed.

No formal or binding criteria existed to guide agencies in evaluating repositories.

Agencies often did not know when (or what) objects came into or left repositories, nor did they conduct systematic inspections.

Although the Park Service curated most of its own artifacts and records, there was an estimated cataloging backlog of 15.5 million objects requiring \$19.7 million to rectify. (Revised 1992 figures show that the Park Service owns 24.6 million archeological artifacts of which 16.8 million need to be catalogued. This will require \$46.9 million through the year 2000, or 20 years at current funding levels.)

The Park Service estimated that it would cost \$28.5 million, over 70 years at 1986 funding levels, to remedy thousands of physical



Exhausting fumes during conservation work at Anasazi Heritage Center.

deficiencies in its curation facilities. (Revised 1992 figures show that \$59.8 million is now needed plus \$158 million for new construction. At current funding levels, this will take 20 years.)

Thirty percent of non-federal facilities have already run out of room to store or exhibit archeological objects.

At about the time the GAO report came out, draft regulations were circulating on curating federal collections. In October 1990, "Curation of Federally-Owned and Administered Archeological Collections" was issued in the Code of Federal Regulations, 36 CFR Part 79 (see sidebar).

A month later, the enactment of the Native American Graves Protection and Repatriation Act largely upstaged compliance with the new regulations. NAGPRA, with its specific deadlines, focused agencies and museums on complying with its rules. One benefit of NAGPRA, however, is that it pushed agencies to determine what they own and where it is.

Still, progress has been slow, as demonstrated by an evaluation of Defense Department storage facilities conducted by the Corps of Engineers Mandatory Center for the Curation and Management of Archeological Collections, which found that less than 3 percent of 119 facilities evaluated were complying with the regulations.

In tandem with the recent rush to comply with NAGPRA, several important initiatives have been undertaken or successfully implemented by agencies since the publication of the GAO report.

The Bureau of Land Management, in conjunction with the Bureau of Reclamation, built Colorado's Anasazi Heritage Center

to preserve and manage the archeological remains of the Northern San Juan Anasazi. The center's doors opened in 1988, initiating a broader mission to interpret the collections and educate the public. Pots, woven goods, ornaments, and other items were put on display, while other objects, such as arrowheads and sherds, have been used in a variety of hands-on educational programs.

The Park Service curatorial services division has taken a proactive stand on collections management problems, which it began to document in 1983. In 1987, the division implemented an electronic version of the Automated National Catalog System to tackle the terrific cataloging backlog.

Unfortunately, the backlog grew faster than the surge in cataloging capability due to increased archeological activity on park lands and the incorporation of new parks into the system. After the Park Service issued directives and attached a museum collections management plan to the 1988 budget request, Congress allocated new money to NPS for six years. This support has brought about substantial progress in alleviating the cataloging backlog. The Park Service also published a handbook with curation guidelines for all parks (available through the Government Printing Office).

Several projects to evaluate federal collections were also started. In response to a 1990 Department of Interior audit, a museum property program was initiated to, among other things, account for the Department's collections. A 1991 survey revealed that 753 Interior units are responsible for some 69 million objects (82 percent archeological) and 12,000 linear feet of documents.

In 1992 an interagency federal collections working group, presently comprising 36 agencies, was formed to help the muse-



FIGURE 1. Repositories Housing Defense Department Collections in 23 States. (COE CURATION AND ANALYSIS BRANCH, PERSONAL COMMUNICATION)

um property program better account for the total size and scope of federal collections. In early 1994, the group contacted 12,072 non-federal museums and academic departments to request information on federally associated collections. The project will



Careful, accessible storage at Anasazi Heritage Center.

provide the most inclusive data to date on agency collections in non-federal repositories.

For Department of Defense collections, the St. Louis-based Corps of Engineers Mandatory Center for the Curation and Management of Archeological Collections, led by Michael Trimble, has made important contributions to understanding and combating some of the curation problems. Through phone calls and site visits, center staff have contacted 657 facilities that house Defense collections to date, spread over 23 states.

Many of the findings are dismaying. A significant number of facilities are poorly maintained, have inadequate security and fire protection, and lack curatorial staff. The good news is that the center is vigorously identifying and attacking the problems.

The center is providing some telling insights into the magnitude of the situation. Figure 1 shows how scattered the Defense collections are. Clearly, the public perception that universities and museums curate most of the collections is not true, and many more contracting firms than expected are doing curation.

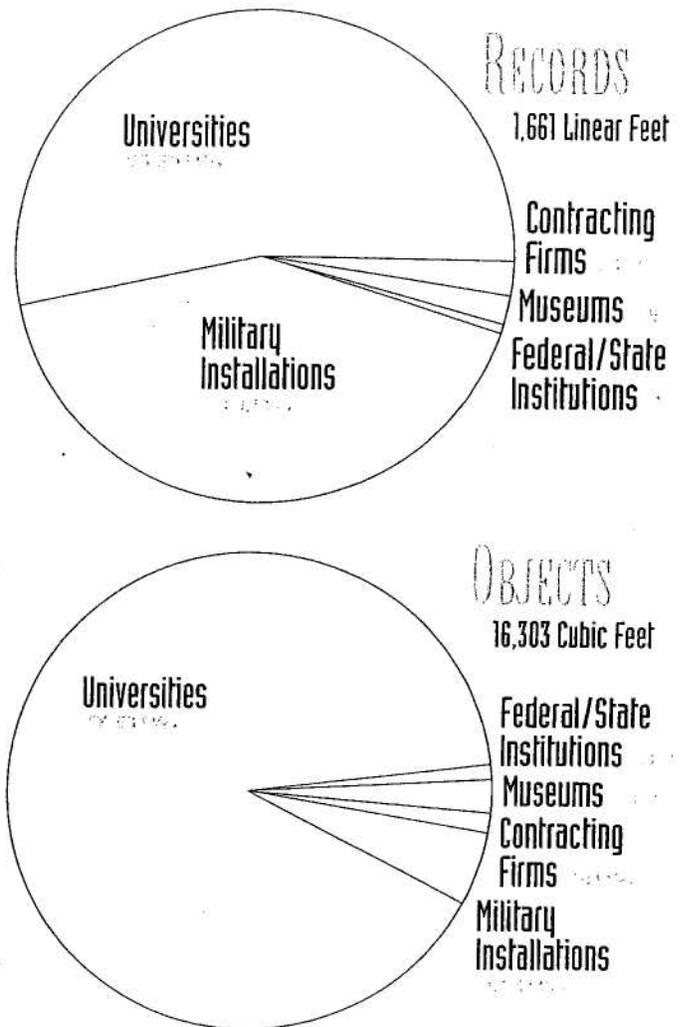


FIGURE 2. Defense Department Archeological Objects and Associated Records by Repository Type in 23 States.

(COE CURATION AND ANALYSIS BRANCH, PERSONAL COMMUNICATION)

Figure 2 vividly shows the tremendous quantity of Defense objects and records in diverse types of repositories. Perhaps more startling is that military installations are keeping a vast majority of the records and giving the objects (not the museum-quality ones though!) to other facilities—such as universities—to curate. This means that objects and records are split up, a practice that seriously impedes research, education, and interpretation.

Despite the breadth of the problem, the center is producing some important information. An exhaustive search and evaluation of Defense collections in the St. Louis District, encompassing projects in both Illinois and Missouri, disclosed that collections were scattered in 10 facilities. A cooperative agreement with the Illinois State Museum, signed in 1990, consolidated the state's collections. Now more accessible, the rehabilitated St. Louis District collections at the Illinois State Museum have been used for over 10 projects, says curator Michael Wiant, ranging from public exhibits and lectures to dissertation research.

Several professional groups, recognizing the seriousness of the crisis, are providing critical input into the cleanup.

In 1991, the Society for American Archaeology launched a task force led by R. Bruce McMillan, director of the Illinois State Museum. After two meetings, the task force submitted *Urgent Preservation Needs for the Nation's Archaeological Collections, Records, and Reports* to the SAA's executive committee in January 1993. The report underscored the need for "a national plan and program for curating collections-associated records and reports, including adequate funding for the program."

A SNAPSHOT OF THE REGS CURATION OF FEDERALLY OWNED AND ADMINISTERED ARCHEOLOGICAL COLLECTIONS (36 CFR 79)

The final rule contains the definitions, standards, procedures, and guidelines that federal agencies must observe to manage and preserve archeological collections and associated records from projects performed under federal statutes. The goal is to ensure that these collections are in repositories that can provide long-term curatorial care and access for the public benefit.

The rule's principal components are:

Its legal authorities

What materials are subject to the rule

Definitions of key terms

Regulations on managing and preserving preexisting as well as new collections and on administrative record-keeping

Methods to fund curatorial services

Terms and conditions that must be included in contracts, memoranda, and agreements for curatorial services

Standards for determining a repository's curatorial capabilities over the long term

Terms and conditions for using collections

Procedures for inspections and inventories

Examples of a deed of gift, a memorandum of understanding for curatorial services, and a short-term loan agreement.

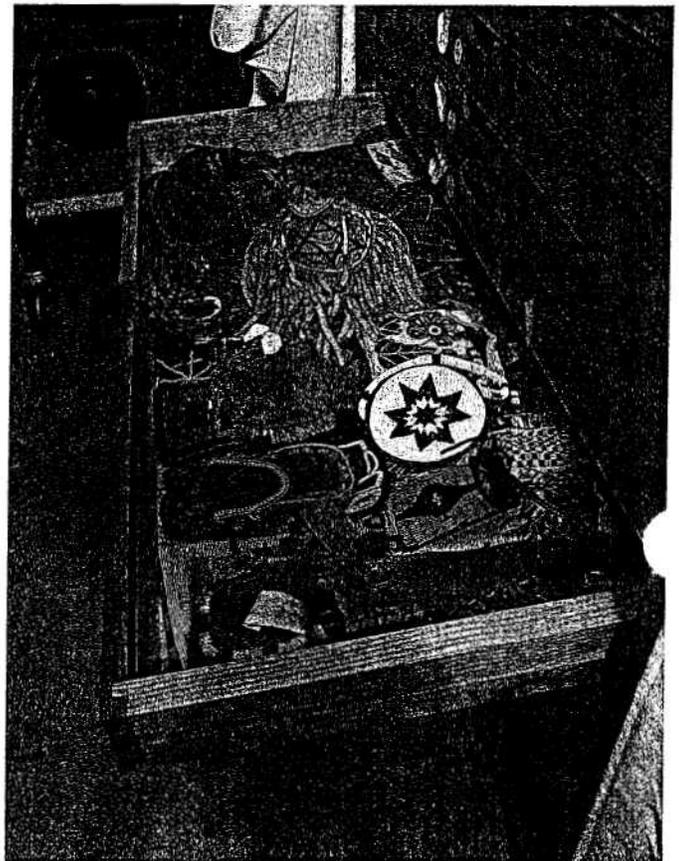
In September of last year, a task force subcommittee met with representatives from several federal agencies with curation responsibilities, the new SAA manager of governmental affairs and counsel, and the SAA chair of the government affairs committee. They discussed how agencies and archeologists could work together to implement the report's recommendations. A number of public relations actions were proposed to focus attention on the problem.

A resulting action plan noted that "tribal, state, and private repositories have been overwhelmed by the size and complexity of the collections they are attempting to curate and cannot continue to be effective partners without expanded federal assistance." The plan recommended that "the SAA urge the President and Congress to provide financial assistance to agen-

cies, repositories, and other institutions involved in federal collections curation making good faith efforts to bring curatorial practices and facilities into compliance with 36 CFR 79."

A week later, this recommendation, along with other support actions, was endorsed by the SAA executive committee at a meeting in Breckenridge, Colorado. A full-fledged effort to secure funding in the form of a grants program will begin this fiscal year.

The current crisis in archeological curation can only be downgraded to a "problem" and then redirected to a "fix" through concerted efforts in a number of areas. A grants program for non-federal repositories, in concert with increased training in curation for



ROCKY MOUNTAIN CONSERVATION CENTER

Overcrowded storage conditions.

archeologists, full accountability of federal collections, good access to collections for the public, and new construction or renovation of facilities for long-term collections care, are vital to a successful outcome. Progress has been made. The momentum must be sustained.

For information on the DOI museum property program or the survey by the interagency federal collections working group, contact Ron Wilson at (202) 523-0268. For information on the COE Mandatory Center for the Curation and Management of Archeological Collections, contact Michael Trimble at (314) 331-8466. For information on the SAA Task Force, contact Bruce McMillan at (217) 782-7386. For information on the care of federal archeological collections and associated records, contact Terry Childs at (202) 343-4101.



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A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History

Adopted by the CAA Board of Directors November 3, 1973; January 23, 1974; November 1, 1975; and January 24, 1995.

Introduction

It is the responsibility of the CAA Committee on Professional Practices (the "Committee") to draft, amend, and revise, as appropriate, a Code of Ethics for Art Historians (the "Code") and its companion, Guidelines for Professional Practice. The Committee is entrusted with the task of codifying the common understanding in the art history profession of ethical behavior for scholars, teachers, and curators of art historical materials ("art historians"). The Code provides a broad framework of rules of professional conduct and both requires and prescribes conduct as well as stating general ethical values. The Code does not, at the present time, include provisions for its enforcement. The Committee on Professional Practices is not empowered to investigate or adjudicate infractions of these canons of professional conduct in individual disputes or to censure infractions by reprimand, sanctions, or expulsion. Nevertheless, the CAA Board of Directors, on its own initiative or on the recommendation of the Committee on Professional Practices, may study and make recommendations on ethical concerns of importance to the profession, may act as an advocate and publicize with a view toward education on ethical issues, make referrals, as and when appropriate, and undertake various initiatives designed to ensure compliance with the Code. The Committee on Professional Practices can recommend that the Board of Directors of CAA issue a "Statement of Concern" regarding a situation which it feels is not in the best interests of the profession or violates proper professional conduct. (This precedent was established by the Board's Statement of Concern about the "deaccessioning" practices of the Metropolitan Museum of Art, January 25, 1973.)

In matters of professional dispute between scholars, it may be proper procedure, under certain circumstances, for the Committee to refer the matter to the CAA Art History Committee which may agree to mediate disputes or to appoint a mediator(s) mutually acceptable to those involved. Persons requesting assistance in allegations of grievances and professional disputes involving a member of CAA should first obtain a copy of the Grievance Procedures (adopted unanimously by the CAA Board of Directors, January 25, 1978).

CAA has adopted rules and resolutions on the illicit international traffic in cultural property and on the rights of access to and publication of archival material to scholars and curators of art historical research materials. In the case of foreign repositories of research materials to which access seems unreasonably or capriciously denied, a scholar may request assistance from this Committee.

It is also recognized that while CAA cannot directly regulate ethical behavior, it can encourage its individual members by education and it can encourage its institutional members to adopt codes of ethics which implement the rules and principles herein.

The revised version of the Code of Ethics for Art Historians, adopted by the CAA Board of Directors January 24, 1995, is dedicated to the memory of Albert E. Elsen, who was instrumental in drafting the original document, adopted by the Board of Directors in 1973. Elsen served the College Art Association as a director (1966-1970), Secretary (1970-1972), Vice President (1972-1974), and President (1974-1976). During Elsen's tenure on the board, he was the moving force behind CAA's issuing of several important professional statements and standards in addition to the Code of Ethics for Art Historians, including, Resolution Concerning the Sale and Exchange of Works of Art by Museums (1973), A Statement on Standards for Sculptural Reproduction and Preventative Measures to Combat Unethical Casting in Bronze (1974), and a focus on toxicity and other dangers in artists materials, leading among other things to the CAA publication Safe Practices. He served on the committee which issued Professional Practices for Artists (1977) and

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continued to remain active in the organization, serving most recently on the Professional Practices Committee, which revised A Code of Ethics for Art Historians, the Committee on Cultural Properties, and the Endowment Campaign Committee.

Albert Elsen's guidance, wisdom, and passionate commitment to professionalism will be sorely missed by the members of the association he served so well.

A CODE OF ETHICS FOR ART HISTORIANS

□ One of the primary concerns of CAA as a scholarly organization is the advancement of knowledge. Art historians must be competent researchers; they must also be fully aware of professional conduct and employ ethical practices. Scholarly integrity demands an awareness of personal and cultural bias and an openness to issues of difference as they may inflect methodology and analysis. Art historians are responsible for carefully documenting their findings and then making available to others their sources, evidence and data. They must guard against misrepresenting evidence and against the offense of plagiarism. They should fully acknowledge the receipt of financial support and institutional sponsorship, or privileged access to research material and/or original works of art, as well as crediting people in the field who give interviews and/or provide access to materials and works. It is equally important that assistance received from colleagues, students, and others be fully acknowledged. The following sections of this document outline the responsibilities of art historians in specific areas of professional practice. Specific applications of these responsibilities are discussed in the Guidelines For The Professional Practice of Art History.

I. Rights of Access to Information and Responsibilities of Art Historians

A. CAA believes that as much as possible there should be full, free, equal, and nondiscriminatory access to research materials for all qualified art historians. All art historical research materials, including but not limited to works of art, photographs, diaries, letters, and other documents in the possession of publicly supported or tax exempt, non-profit, educational institutions, whether in the United States or elsewhere, where not legally restricted as to use, shall be freely and fully accessible to art historians for research and publication.

B. An art historian has the moral obligation to share the discovery of primary source material with his or her colleagues and serious students. He or she is not obligated to share anything of an interpretive nature that has been done with the source material. The recipients of documents or any other form of information from an art historian should in turn give the finder a reasonable opportunity to be the first to publish the material in question. The finder should seek to publish research as soon as possible, thereby showing respect and appreciation of art historians of the past and present who have contributed to the profession and from whom he or she has benefited. In the words of Aby Warburg: "There are no reserved seats in scholarship."

C. Excavations, whether at classical or at other sites, present a special case as regards the "rights of access" of researchers to the finds. Generally, the agency or institution that conducts the excavation through a permit granted by the host government retains the publication rights to all excavated materials, assigning the various categories to individual specialists. In practice, there are two hazards. One is that the publication may be delayed for an unreasonably long period of time, thus "freezing" the finds and making them inaccessible to other art historians. The opposite danger is that an art historian not associated with the excavation may make improper use of photographs or other documentation, to which he or she has somehow gained access, thus anticipating improperly the officially authorized publication. In view of the foregoing, it is the duty of excavators and their assignees to publish with reasonable promptness the materials in their charge and to make such materials freely accessible to other art historians for study and after a reasonable length of time (normally no longer than three to five years after the end of the project) available for publication. During the period of preparation of the publication, a scholar who is not connected with the project, but has gained access to materials, shall only make use of these materials in such ways and to such an extent as permission has been granted by the excavators and their assignees.

II. Acknowledgment of Sources and Assistance

A. An art historian must properly acknowledge assistance provided by other scholars, teachers, students, or anyone else who assists in such matters as calling attention to works

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of art or archival material previously unknown or overlooked by the art historian.

B. Art historical research relating to living art traditions in both the West and in Africa, Oceania, and the Americas often takes the form of observing and recording (photographs, films, tapes) objects in use, techniques of manufacture, oral traditions about the history and meaning of the objects and their practical or ritual use, as well as materials in local or national archives and museums. These field data often constitute unique and irreplaceable documents which must remain under the community's control. Scholars have responsibilities to owners, patrons, and artists in situations in which such individuals have proprietary rights. The generosity of individual informants, as well as host governments, indigenous groups, universities, archives, and museums is essential to the success of research. All too often art historians have failed to file with the host community the results of their research in the form of dissertations, articles, or books and all too often the art historian has failed to file anywhere primary field data in the form of photographs, films and/or tapes.

It is, therefore, the responsibility of art historians working in the living art traditions to deposit copies of all field data related to said publications in the form of documented photographs, films, video and audio tapes, and the like in appropriate institutions in the host community in which they have worked. Should no library/museum want the material, other public institutions should be encouraged to house it. It is also the responsibility of the art historian to deposit some form of any published material within the community.

III. The Illegal Traffic in Works of Art and Responsibilities of Art Historians to Discourage Illegal Traffic in Works of Art

One of the most explosive issues confronting art historians as well as museum directors and Boards of Trustees and traders in cultural property is that of the illegal and illicit international traffic in works of art. For a number of years CAA has been involved with trying to expose this problem. In 1970 the CAA Board unanimously passed the following resolution:

The College Art Association is aware of the increasingly destructive illegal traffic in cultural treasures flourishing in many parts of the world and recognizes that this traffic is detrimental to the preservation and study of the numerous affected cultures while ignoring the right of the countries involved to preserve their own national treasures. This traffic is also highly detrimental to productive archaeological and art historical relations.

The College Art Association therefore urges North American museums, dealers, and art historians to exercise the utmost care and restraint in purchasing important objects. Furthermore, the College Art Association urges the United States Government to work toward implementing proposed international agreements concerning stolen antiquities and/or works of cultural significance, or toward controlling the import of significant national treasures through the creating of bilateral treaties between the United States and any petitioning country.

CAA supports The Hague Convention on the Protection of Cultural Property in the Event of an Armed Conflict and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property designed to curb the illegal international traffic in works of art, and the United States Cultural Property Implementation Act, passed to implement the UNESCO Convention, and other bilateral measures taken by the United States to prohibit the illicit traffic in stolen art.

In 1973, CAA, in conjunction with the Archaeological Institute of America, the American Association of Museums, the United States Committee of the International Council of Museums, the Association of Art Museum Directors, and the American Anthropological Association, adopted the following resolution:

Recognizing that Museums, whatever be their specialty, have a communality of interests and concerns, which comes into particularly sharp focus in matters of ethics and professional behavior, and that they are the custodian of our human material heritage and of that part of our natural heritage which we have collected for study and transmission to future generations;

Be it resolved that the CAA cooperate fully with the United States Government and foreign countries in their endeavors to preserve cultural property and its documentation

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and to prevent illicit traffic in such cultural property.

The CAA believes that Museums can henceforth best implement such cooperation by refusing to acquire through purchase, gift, or bequest cultural property exported subsequent to December 30, 1973, in violation of the laws obtaining in the countries of origin.

We further believe that the governing bodies, directors and curators of Museums should, in determining the propriety of acquiring cultural property, support and be guided by the policies of the UNESCO Convention on the Means of Prohibiting and preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property and the implementing provisions adopted by the signatory states.

It is recommended that all nations establish effective export laws and develop proper control over export so that illicit traffic may be stopped at its sources. However, wherever possible, within the limits of national law, consideration should be given to legitimate and honorable means for the acquisition of cultural property. It is hoped that nations will release for acquisition, long term loan, or exchange, cultural property of significance for the advancement of knowledge and for the benefit of all peoples.

In order to augment and clarify further the intent of this resolution and determine methods of accomplishing its aims, the governing body of a museum should promulgate an appropriate acquisition policy statement commensurate with its by-laws and operational procedures, taking into consideration the International Council of Museums' recommendations on 'Ethics of Acquisition.'

Recognizing that the current international legal framework is largely unsuccessful in arresting illicit traffic in cultural objects, preventing the pillaging and looting of archaeological sites, and promoting the return of cultural objects, CAA supports the efforts of the International Institute for the Unification of Private Law (UNIDROIT) and the draft convention on the International Return of Stolen or Illegally Exported Cultural Objects. CAA supports the broad principle of a unified private law code for claims of an "international character" for the "restitution of stolen cultural objects" and for the return of "cultural objects" removed contrary to the laws regulating the export of such objects because of their cultural significance.

A. Art historians shall conduct their research and activities in such a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in cultural property and stolen art works, cultural objects, and antiquities.

It shall be considered, therefore, unethical for any art historians to be knowingly involved in the illegal exportation of works of art from foreign countries and/or illegal importation of works of art into this country.

It shall be considered unethical for an art historian to acquire knowingly or allow to be recommended for acquisition any object that has been stolen or removed in contravention of treaties and international conventions to which the United States is a signatory or illegally imported into the U.S.

B. It shall be unethical for art historians to purchase or sell art works, artifacts or cultural objects that they suspect were stolen from excavations, architectural monuments, public institutions or individuals. To knowingly aid and abet the illegal exportation and importation of a work of art is professionally unethical and, more likely than not, illegal.

Art historians are often key players in the international trade in cultural property and have a responsibility to distinguish the licit trade from illicit trade and to suppress the latter. If an art historian is asked for advice by a museum about a prospective purchase that he/she has reason to believe may be coming from out of the country, the reasonable action for an art historian is to satisfy himself or herself that he/she is not contributing to looting. If an art historian is asked by an art dealer or a museum to write a catalogue or render an opinion about a work from antiquity or one from a living cultural tradition, similar inquiry should be made. The realities of the art world sometimes make it necessary for a museum or dealer to withhold disclosing the name of the seller; however, it is such secrecy that has contributed to the problem of the growing and flourishing international traffic in pillaged works of art. In many cases the art historian has placed his/her trust in the reputation of the dealer or museum. Without necessarily calling into question such trust, the art historian should undertake a rudimentary investigation to ensure herself or himself of proper provenance in each situation.

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An art historian who has reasonable cause to believe that an item of cultural property has been the product of illegal or clandestine excavation or has been illegally exported will not assist in a further transaction of that object, including, exhibition, attribution, description or appraisal, except with the agreement of the country of export, nor will an art historian under these circumstances contribute to the publication of the work in question.

IV. Conflict of Interest

It is extremely important that an art historian be aware of the potential for conflicts of interest when scholarship and market interests become entangled. In cases where an art historian is asked to render professional judgments on works, it is imperative that reasonable disclosure of an art historian's relationship to a seller, art dealer, auction house, etc., be made. Reasonable disclosure shall be determined in the context of a particular professional judgment, as that degree of disclosure necessary to avoid both actual conflict of interest or impropriety based on self interest or the appearance of bias based on self (financial) interest.

A. To avoid conflict of interest situations, CAA recommends that art historians set fees for attribution and connoisseurship at a fixed fee reasonable for the services provided rather than at a percentage of the sale price of the work of art. This latter practice was, and is, widespread and has led to the damaging of the reputations of art historians who depended upon large fees for a livelihood. Art historians, when consulted on such matters as scholarly attribution, can avoid the appearance of self-interest by establishing in advance, fees which bear no relation to the monetary value of any work of art in question and which do not otherwise relate to the financial complications of any research investigation, opinion or statement by the art historian. It is unethical for an art historian to engage in attributions and/or the publishing or exhibiting of works of art if the art historian or his or her university or other employer has a vested financial interest in selling, brokering, or seeking tax deductions regarding such works, without full disclosure on the part of the art historian of his/her personal financial involvement (other than normal salary and curatorial remunerations) in the said dealings.

V. Acceptance of Gifts and Requesting of Commercial Privileges

A. An art historian's sole professional debt shall be to another person or organization on an intellectual basis. This indebtedness takes the obvious form of assistance given to the art historian in the performance of his or her research and preparation of publication.

B. There are times when an art historian is offered a gift by a grateful donor to the art historian's college or university. We remind the art historian that it is his or her duty first to consult with the administration about the school's policy in these matters. If the policy permits the gift, the art historian should then consider whether or not by its acceptance he or she would compromise self-respect, independence of action, and judgment with regard to the donor. If there seems any possibility of self-interest, or compromise of one's reputation, it is clearly wiser to refuse the gift.

C. A more difficult situation is one in which an art historian is offered the gift of a work of art by an artist who is a friend, or about whom he or she will be writing or has written. There is no question but that in most cases the art historian's publication about the artist will contribute to the increased value of his or her work, as well as of the art historian's gift. The art historian is then placed in a situation where questions of conflict of interest can be legitimately raised. The tactful but outright refusal of gifts from artists may be frustrating, but such practice insures integrity of the process and should not incur loss of respect from the artist. To have works of art given by artists to members of your family similarly creates a conflict of interest.

D. Generally, art historians should not accept gifts from art dealers, even if based on a long and personal friendship; an exception might be a gift given instead of money in remuneration for services rendered. Even to accept price reductions as a "professional courtesy" from a dealer is strictly speaking unethical, as it places the art historian in the dealer's debt. If an art dealer regularly permits installment buying by his or her customers, an art historian would not be risking his or her integrity if he/she asked for similar conditions. If this is not the case, the art historian is acting unethically. The art historian in such a case is, consciously or not, trading upon his/her influence as well as putting himself or herself in the dealer's debt. For an art historian, to ask an art dealer to reserve a work for him/her for an indefinite period, or one longer than is his or her custom for the public, also raises problems of ethics.

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VI. Fakes and Forgeries

At present there are no laws that provide for the confiscation or destruction of fakes and forgeries that have not entered the country illegally. The harm that is done by the continued circulation of fakes and forgeries is to truth, to the reputation of the artist, or to an older culture by misrepresentation of the nature and quality of its art in the eyes of art historians and the public. Fakes impair the value of authentic works of art in public as well as private collections and distort the art market. An art historian who made his or her reputation through knowledge and connoisseurship of the work of a given artist or culture has a moral obligation to these sources to expose fakes and forgeries when to do so comes within his or her competence and can be established beyond a reasonable doubt. It is recognized that the detection and exposure of fakes can be time-consuming. For an art historian to turn away from this activity on the grounds that he or she does not have the time is to pass this obligation on to others who may or may not be competent to expose the crimes involved and the effect could be a diminution of the quality of the profession. It is further recognized that art historians are concerned about legal actions taken as a result of their judgment. The most probable theories are the torts of disparagement and defamation. It is unlikely that an art historian exercising due care by providing a well reasoned, scholarly opinion will lose in the defense of such a suit. Art historians are least at risk from law suits based on their reasonable opinions, when such opinions are provided to the owner of the work at the request of such owner. In the absence of other types of error and omissions insurance, art historians may be able to obtain insurance against defamation suits available under certain home insurance policies.

VII. Appraisals and Attributions

A. Art historians invited to undertake appraisals and/or attributions should be aware of the many hazards involved. Many art historians decline to give appraisals except when clearly in the national or public interest. Nor should an art historian make attributions concerning an object when to do so would conflict with the rules of his or her institution, or when the object is to be given to that historian's institution for purposes of tax deduction or similar benefit to the donor. Monetary appraisals should be undertaken only when the art historian is fully familiar with the current market prices in both public and private sales by the artist whose work he or she is asked to appraise. The need to establish a monetary value for a work of art must have no influence on the objective, scholarly judgment of it. To prevent the appearance of conflict of interest, fees for appraisals, as for attributions, should be fixed and not based on a percentage of the value ascribed. Finally, an appraiser should be aware that an appraisal once made may be used for many purposes other than that for which it was originally made.

VIII.

It shall be the prerogative of the Committee and/or appropriate committees of the College Art Association to review this Code of Ethics and Guidelines every five years in view of updating it to deal with changed circumstances and problems not addressed by the current Code of Ethics and Guidelines.

GUIDELINES FOR THE PROFESSIONAL PRACTICE OF ART HISTORY

It is the purpose of the Guidelines to be of practical assistance to members, particularly those just coming into the profession. Further, it is hoped the Guidelines will amplify some of the resolutions in the Code of Ethics. Both documents are intended to assist the art historian in forming his or her own professional standards while having available the considered judgment of CAA's Board of Directors as well as the Committee on Professional Practices. No claim is made for the coverage of all questions of professional practice and members who encounter situations outside of the Guidelines and who wish advice are encouraged to communicate with the President of CAA who will see that the matter is brought to the attention of the Committee on Professional Practices.

I. Practices Governing the Teaching Profession

A. CAA supports the AAUP Recommended Institutional Regulations on Academic Freedom and Tenure, published in the January/February 1983 issue of *Academe*, bulletin of AAUP. A copy of the CAA's Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History is to be kept on file with AAUP.

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B. CAA supports the AAUP Statement on Instructional Television published in the Summer, 1969 AAUP Bulletin. Increasingly, institutions are requesting that faculty, particularly those teaching survey classes, put their lectures on videotape for future cablecast or broadcast. Since many faculty use their lectures as a forum for trying out ideas which will eventually find their way into publication, CAA feels strongly that faculty should not be required to put lectures on tape; nor should universities automatically assume ownership/circulation control of faculty lectures.

II. Membership in Other Professional Organizations

A. All CAA members who teach should be aware of their right to join the American Association of University Professors, particularly if they are concerned about problems that might arise from appointment and tenure. AAUP is the professional organization that by its size, experience, and reputation is best equipped to assist teachers who encounter unfair or unjust practices.

B. CAA members should also participate in those professional organizations which support their particular craft. For example, CAA members who are also authors should be aware of The Authors Guild Inc., 234 West 44th Street, New York, NY 10036. Besides being an effective lobbyist in Washington for authors' rights, this organization has published important guidelines for the writing of contracts, copies of which are available to members of that organization at a small charge.

III. Practices Governing Rights of Access to Information and Responsibilities to Art Historians

Practices governing rights of access to information and responsibilities to art historians are discussed in the CAA Code of Ethics. It must be emphasized that it is an improper professional practice for an art historian or an institution to request or agree to the exclusive reservation of research or publication rights to art historical material in the possession of the institution.

A. Consistent with the purpose of CAA as a scholarly organization we are concerned with encouraging access to all art historical research material for all qualified art historians. We have passed resolutions setting forth what we feel are the obligations of both art historians and curators or custodians of archives in publicly supported institutions. We consider private universities, colleges, and museums to be included among tax exempt, non-profit, educational institutions. While we believe that all art historians should share documentary material, we do not feel that fair usage involves asking an art historian to share his or her interpretative material. Along with notes, this may take the form of the arrangement of photographs, for example, that constitutes a new chronology, sources of influence, or the separation of original from copies or forgeries. It is to the raw information or document itself to which we support access. In the case of museum art historians working on a project within their own museum, they have the right to keep the material under their control while working on it, but at the same time should recognize the right of other art historians to have access to that part of the material pertaining to their research.

We also recognize that the building of an archive takes time, expense, and knowledge. When this is the personal achievement of an individual art historian, fellow art historians who seek to use that material should be mindful of these facts and it is appropriate to offer to share within reasonable limits, some of the expense incurred in obtaining particular documents.

B. American art historians who are supported by grants and the latest equipment for photographing and copying documents, and who go abroad and there gain access to archives on which other art historians, young and old, may have been working for years, are urged to take into account the importance of publication to their colleagues. We recognize that in many cases in foreign countries, as well as in this country, foreign art historians are treated as if all art historical research material in a public institution is the private property of its curator and what is being asked for is comparable to invasion of family rights. Accordingly, the Professional Practices Committee will try to be of assistance as indicated in the Preamble. What CAA is particularly concerned about is the practice, often of senior art historians, of claiming first publication rights of archival material and its exclusive use in many museums and libraries throughout the world. Often the art historian, conscientious as he or she may be, cannot possibly publish all the material he or she has laid claim to for many years. Younger and other art historians are frustrated in their own work by this monopolizing of source material. There are art historians in art history who feel themselves the only qualified person to write on a certain artist or subject and have influenced heirs or executors of estates not to permit others to

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use archival material in their trust. Some senior art historians trade on their reputations to influence less sophisticated or inexperienced archival custodians to reserve material for them, even though it may be ten or more years before a book can be published. All of these practices we deem improper professional conduct. When reasoning and bargaining in good faith do not avail an art historian access to archival material denied to him/her under the above conditions, we suggest public exposure of the problem as outlined in the Preamble.

C. With respect to all art historical research material in private ownership, CAA recognizes the rights of that ownership to decide upon its use, but urges heirs and executors of estates and artists themselves to provide equal access to their holdings for all art historians. It sometimes happens that the aforementioned may decide to invite an art historian to be the first to publish material in their possession. We also recognize that right and hope that it would be accorded or accepted only after careful deliberation of such matters as the qualifications of other art historians and the period of time before the privileged material will be published. In proposing the following resolution we appeal to the honor of art historians in the profession to observe its spirit as well as letter.

Resolution. It shall be an improper professional practice for an art historian to accept exclusive use and first rights of publication of art historical research material held in private ownership unless he or she agrees to publish or otherwise make available such material within a period of no more than three years.

IV. Literary Contracts and Publishing

A. This committee recommends the Authors' Guild publication Guide to the Authors' Guild Trade Book Contract (1987) for all who enter into contracts with publishers. In addition to the above publication, the Authors Guild publishes the Authors Guild Bulletin four times a year, with news articles and columns on professional writers concerns and provides individual advice and assistance to members.

B. Members should avail themselves of CAA's Guidelines for Fair Use of Visual Materials and consult with a lawyer before signing a contract with a publisher. Your literary properties are valuable not only to you but your family. With the widespread use of electronic devices and increased use of films and tapes on art for educational and entertainment purposes, literary properties which could serve as the basis for scripts or film research gain in value. Be sure that your book contract contains an "Electronic Devices" clause which protects your rights. (See the Author's Guild on electronic uses in publishing contracts, 1993.)

C. Art historians often experience delays in getting book manuscripts approved for publication. As this is prior to signing a contract, there is no written agreement to be violated. We urge authors whose book manuscripts are under consideration by publishers to obtain in writing a time limit before which a decision must be made, otherwise it will be understood between the writer and publisher that the former will take the manuscript to another publisher. For most books ninety days is a reasonable time limit to set as it takes into account more than one reviewer and market research on demand for the book.

There is nothing professionally unethical about an author submitting a manuscript to more than one publisher simultaneously. Such a practice is particularly advantageous to textbook writers as there is much to bargain for such as who is to pay fees and royalties owed for photographs. This practice also reduces delays in decision-making by publishers on whether or not to offer a contract.

D. If you are signing a textbook contract, be sure there is a clause in which you or your estate retain the right to approve or appoint someone to revise your book in the event that you cannot do so, and that no more than fifty percent of all royalties for the resulting revision are assigned to this person or persons. This is to insure that you and your estate retain financial interest in your textbook property for as long as it is in print and under your name.

E. For a discussion of other publishing contract issues which affect art historians see CAA newsletter.

[This Article is currently under review and will be issued as a separate document together with Article V.]

V. Other Written Agreements

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A. If you are invited by a museum to be a guest curator for an exhibition or to do research and a publication, it is recommended that you obtain in advance a written agreement setting both your responsibilities, those of the museum, and your fee or honorarium, as well as what literary rights you might have with respect to publication of your work. All art historians should carefully negotiate issues of copyright and the museum's responsibility to them with regard to curatorial credit and publicity listings. This is particularly important in the case of traveling exhibitions as original contributors to an exhibition may find their contributions omitted as the exhibition moves on to new venues.

Completion dates for catalogue copy should be specified, as well as terms for future distribution, reprinted and foreign editions, etc. Recent cases brought to the attention of CAA include at least one instance of a major museum catalogue in which external contributors were paid a single flat fee for their essays while in-house curators continued to receive significant royalties for their contributions for a number of years.

B. It is proper professional practice for an art historian to request a written contract or letter of agreement from a museum which has invited his or her participation in the preparation of an exhibition. This agreement should clearly set forth the obligations of both parties, as well as honoraria or fees and the ownership of copyright of the catalogue. It is also proper practice for the art historian to be credited, along with the museum (especially if they are not otherwise affiliated with the institution), for any consulting, research, or curatorial work which resulted in an exhibition and/or publication.

C. If you are asked by a school to set up an instructional television course, check to be sure whether this comes under your original condition of appointment, and whether or not government funding is involved in your proposed program. Each faculty member should work out copyright matters and royalties with his/her own institution in writing. Some schools might have policies of either retaining copyright, or allowing it in the teacher's name, but retaining royalties. If the government is involved, there may be regulations prohibiting copyright and royalty assignment to private individuals. Be sure that in your written agreement the question is answered of who edits or revises the televised instructional material as time goes by. If you leave your school without making such provisions you may lose all rights to future use. If you put together a televised course with the assistance of students, they too should receive credit and their rights must be looked after.

[This Article is currently under review and will be issued as a separate document.]

VI. New Technologies and Multimedia Issues

[Draft language for this Article is currently under consideration and review by the CAA Intellectual Property Committee.]

VII. Remuneration for Scholarly Services

A. Art historians are often called upon to provide at no charge professional advice or services. This is particularly true in the case of certain publishers who are scouting for new manuscripts or deliberating the question of a new series. Many art historians may feel that to provide such information at no fee is a way of contributing to the quality of publication. The following resolution is intended for those who question the propriety of asking a fee under the circumstances indicated.

B. It is proper professional practice for an art historian to request or receive a fee for professional services rendered to individuals or organizations where such services are sought or rendered in connections with a commercial project such as advice requested by publishers, representatives of television and film companies, or sale of works of art provided that the regulations of the institution employing the art historian do not restrict him/her. In setting fees, art historians are urged to consult with others of similar rank and experience.

C. If you are invited to be a guest curator for a museum and are asked to set the fee, you may consider either an outright sum or compute the time you will be spending on the project and ask to be paid the equivalent of a junior or senior curator's salary (depending upon your own status) for that period of time. Another model which has been used by faculty is to calculate the rate your home institution pays per course and request pay equivalent to one course per semester. Credit for published material which may be

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reissued in the future should also be worked out in the written agreement.

D. On the matter of fees for connoisseurship or consultation, calling upon your experience with scholarship and academic matters, you might consider emulating the legal profession by establishing an hourly or daily rate graduated to your experience. To avoid the suspicion of self-interest, it is not recommended under our Code of Ethics that you set your fee as a percentage of the market value of a work of art, if such is involved. It seems wisest to establish the fee in advance of undertaking a project and, when possible, to have concurrence in writing.

VIII. Teacher/Student Collaboration

A. It is sometimes the practice of art historians to invite one of their students to co-publish a paper with them. By itself and in principle this can be advantageous to all concerned, providing that the student is given full credit for what he or she has done. Unfortunately, there are cases of teachers who sit on such papers for years because they have other projects to complete first, and the student is the loser. We feel it is proper for a student to ask of his or her instructor when co-publication will occur and where, and to arrange a reasonable time limit. If and when that time limit is not met, the student should be fully entitled to ask for the return of his/her paper, or to publish on his/her own, crediting the teacher for his or her contribution.

IX. The Crediting of Sources

It is a maxim of scholarship that authors should be scrupulous in crediting sources, not only for ideas and textual material but also photographs and suggestions as to the location of documentation. Comments made by other art historians on the mounts of drawings, on the backs of photographs, recorded in museum dossiers or reported orally when relevant to one's research should be cited. The contributions of students to a teacher who publishes must also be acknowledged. Failure to do so establishes disrespect not only for the instructor in question but also to the profession.

A. Many art historians find their published research used without credit by popularizers in various magazines. We urge the aggrieved art historians in every case to write to the editor of the publication setting forth the complaint and requesting either publication of the letter or appropriate recognition. When this is not forthcoming, we recommend taking the case to the readership of CAA publications along with an invitation to the publishers and writers in question to respond.

B. Most, if not all, of us have had the experience of wanting to acknowledge the obstructive efforts of individuals or institutions who have made research difficult if not impossible. As long as the complaint is accurate, tactfully phrased and there is nothing libelous in what you write, such comments may prove to be constructive in the long run, as well as make future work with the obstructionist impossible. Balance the risks. Consider whether or not by explaining your experience as objectively as possible you will be helping other art historians. Too many irresponsible guardians of research materials have received critical immunity as a result of the timidity of aggrieved art historians.

X. Fakes and Forgeries

A. The following are circumstances under which a fake, as opposed to a misattribution, may be encountered with suggested courses of action:

1. If a fake is identified in a public collection, these findings should be reported to the administration. It is appropriate to publicize such findings.
2. If a fake is discovered in a private collection, and is not being offered for sale, the art historian, if consulted by the owner, should inform him or her, and as long as there is no reasonable doubt, cooperate in any lawsuit brought in consequence of such a discovery. If asked, the art historian should assemble relevant material and testify. If the owner does not have a lawyer, the art historian should advise him or her to consult one about recourse under the law.
3. If an art historian can reasonably prove that a work of art offered for sale is a fake, this should be made known to the seller. If there is reason to believe that the seller already knows, or if he or she refuses to withdraw the work in question from the market, the art historian should go to the proper authorities, such as the local district attorney. Since representations of this kind may give rise to defamation action, the art historian as a

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possible defendant may also wish to seek legal advice.

4. To prevent the continued circulation of fakes that have been identified, it is urged that art historians try to publish information about fakes they have discovered so that they become public knowledge. Art historians working as consultants for auction houses or dealers should urge them to remove fakes from circulation.

XI. Attribution

One of the areas of great responsibility, and great controversy, for art historians is that of authenticating works of art. The Code of Ethics and Guidelines cover the question of fees for professional services rendered. If art historians choose to engage in the practice of attribution, it is very important that they be aware of the problems involved in the authentication of works of art.

A. It is highly unusual for an art historian's opinion of a work of art to result in a law suit. Nonetheless, such actions are possible. A claim could be made that an art historian has defamed the owner or the seller of a work of art or that there has been defamation of title, that is that an untruthful statement about a work of art has reduced its value. On the other hand, an art historian providing a favorable opinion on a work of art could conceivably be sued by a purchaser relying on the opinion on the grounds that the work was, in fact, a forgery. Of course, an art historian may defend such an action on the grounds that her/his statements are truthful and that he/she acted with due care and without malice. The wisest course of action, however, is to make authentications in such a manner as to minimize the risk of any law suit. The following procedures are recommended:

1. Art historians should first consult with the institution which employs them to determine whether, and on what conditions or restrictions, the art historian may render opinions with respect to the authenticity of works of art. As a general rule, it is inappropriate for an art historian to render opinions on the letterhead of her institution without the knowledge and consent of the institution. Some institutions have devised forms and procedures for the rendering of scholarly opinions in order to minimize the risks of, or avoid, litigation. Where such forms and procedures exist they should be scrupulously followed. Any questions should be referred to the institution's legal officer. In addition, the art historian should consult his or her own lawyer to become acquainted with the relevant legal considerations and with the applicable state law.

2. The greatest legal risk in rendering scholarly opinions occurs when such opinions are rendered for individual collectors. Opinions should not be rendered for such collectors unless there is a written request by the owner of the work, who should warrant the fact of ownership. In addition, the owner should furnish the art historian with a written release from all liability and an agreement to indemnify and hold the art historian harmless from any damages, legal fees or other costs resulting from the rendering of the opinion. When an art historian encounters a work in a museum which he/she believes to be misattributed, his/her opinion should be communicated to the appropriate curator where the work is owned by the museum. Where the work is not owned by the museum, the opinion should be communicated to the owner of the work. Difficult problems arise when an art historian encounters in a commercial gallery a work which he/she believes to be misattributed. Again, the art historian is on safest legal ground when he/she renders his/her opinion to the owner of the work. Where the art historian has reason to believe that a fraud is being practiced, however, he/she should report the matter to the proper authorities.

3. The art historian should study the work itself before rendering an opinion, although there may be instances where an opinion may be rendered on the basis of a photograph (as where the work is a blatant fake). The art historian's opinion should indicate whether it is based on a study of the work or a photograph. In any event, relevant data, including media, dimensions, location and mode of signature should be obtained and carefully verified. The art historian's opinion should be labeled as such and should include the relevant identification data in describing the work. Wherever possible, a photograph of the work, preferably an 8 x 10 black and white glossy, should accompany the opinion. (Where possible the opinion should be written on the back of the photograph.) It is advisable in any opinion to avoid comment on the character or reputation of the seller of a work. Care should be exercised in the use of the word "forgery," except in cases where a forgery is plainly involved. "Misattribution" or "not properly attributed to" are generally safer phrases. Finally, the art historian should retain for his/her own records a copy of his/her opinion, a photograph of the work and all relevant correspondence.

4. In order to help remove forgeries from the art market, art historians are urged to

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persuade their owners to donate them as such to museums for their study collections. If the art historian is affiliated in some way with a museum, he or she must decide upon the propriety of requesting a forgery for the museum. To urge its donation to a museum with which there is no personal affiliations can add to the persuasiveness of the art historian's argument to the owner.

5. Art historians should render opinions only on works which are within their competence. When an opinion on a work not within the art historian's competence is requested, the art historian should decline to act and should refer the matter to another art historian with appropriate expertise or competence.

XII. Copyright

The CAA statement on "Fair Use of Visual Materials: Reproduction Rights in Scholarly Publishing" has recently been revised to reflect changes in the law and new technologies.

The Board of Directors has directed the Professional Practices Committee to review and revise the "Code of Ethics for Art Historians." Members of the Professional Practices Committee during this period include:

*Ex officio, President Larry Silver, 1992-4
 Ex officio, Judith K. Brodsky, 1994-6
 Ex officio, Counsel Barbara Hoffman
 Ex officio, Chair, Art History Committee
 Samuel Edgerton, chair, 1992-1995
 Albert Elsen, chair, 1971-77
 Whitney Chadwick, chair,
 Gilbert Edelson Former Counsel, CAA
 Darrell Amyx
 Herschel Chipp
 Wanda Corn
 Lorenz Eitner
 Leopold Ettlinger
 Warren Faus
 Egbert Haverkamp-Begemann
 John Merryman
 Ernest Mundt
 Dan Rosenfeld
 Wendy Stein
 Michael Aurbach
 Norma Broude
 Gylbert Coker
 Kathleen Desmond Easter
 Jock Reynolds
 James Rogers
 Monica Visonà*



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Stealing From the 'Cities of the Dead'

New Orleans Antiques Dealers Suspected in Cemetery Thefts

By Paul Duggan
Washington Post Staff Writer
Tuesday, October 26, 1999; Page A01

NEW ORLEANS—On a splendidly warm winter day in 1998, while driving to his brother's house, Ted Brennan decided to detour through Lake Lawn Metairie Cemetery here. A wealthy restaurateur, healthy and happy, Brennan felt an acute appreciation for life that sunny afternoon, and he thought of his parents, long deceased. Turning into the cemetery, he drove to his family's granite tomb, an above-ground vault in which he too eventually will be interred.

Right away he saw that the tall marble statue outside the tomb was missing.

"I felt like throwing up," he said. "When you see something like that gone, you're hoping against hope that maybe the cemetery is doing maintenance on it, cleaning it or something. But deep down, you know it's been stolen."

Thieves indeed had taken it, which appalled Brennan. And what he and other New Orleanians have learned in the months since is even more distressing.

In a city given to memorializing its departed souls with a flourish—where for two centuries the dead usually have been laid to rest above ground, often in mausoleums of such elaborate design that many old cemeteries here are considered architectural treasures—police uncovered an alleged theft ring. They said 250 stolen funerary ornaments worth nearly \$1 million, including Brennan's statue, have turned up in the hands of some of the French Quarter's toniest antiques dealers and their clients.

The allegation that respected purveyors of fine culture were dispatching street thieves to heist urns, statues, benches and other valuable artifacts from New Orleans's revered "cities of the dead" has scandalized local high society and historic preservation circles. Police said they suspect about a half-dozen French Quarter antiques dealers knowingly purchased stolen funerary ornaments and sold them to

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customers who, in some cases, were aware of the thefts. So far, two prominent dealers and a collector have been charged with felony possession of stolen goods.

Outside the Brennan tomb, a nearly life-size sculpture of Mother Cabrini, the first American citizen to be canonized, had stood for decades, commissioned in Italy by Brennan's mother after his father's death in 1955. Ted Brennan was just 7 then. His mother explained to him that his father's favorite charity had been the Mother Cabrini Nursery, near his popular restaurant in the French Quarter. Now Brennan, 51, runs the restaurant. Like the tomb, he said, it gives him a sense of family permanence.

The statue offered the same comfort.

Brennan said his late mother paid \$5,000 for the Mother Cabrini sculpture in 1955, but having an identical one crafted in Italy today would cost \$45,000.

"It's not the money," he said. "I mean, these tombs are almost like extensions of our homes. And when I found out antique dealers were involved, it was really upsetting. You feel like nothing is sacred when something like that happens."

Along Royal Street, the French Quarter's antiques row, and in the elegant, Old World parlors of the city's preservation groups, the same anger is palpable.

"Shock, disappointment, disgust," said Louise Fergusson, director of Save Our Cemeteries. "New Orleans is a small community, in a way. A lot of people know some of the people who have been accused of this, and it's very disturbing."

To understand their sense of violation and betrayal, consider New Orleans's historically intimate relationship with its deceased. Because this part of Louisiana is below sea level and the water table is high, it always has been more efficient to inter the dead above ground, leaving them closer physically, and thus spiritually, to the living. More than 40 cemeteries here date to the 19th century and before, and they resemble scaled-down metropolises--miniature cities of granite and marble reflecting ancient, medieval and Renaissance architectural styles.

"New Orleans' cemeteries are like New Orleans: they swing between destitution and opulence but always with style," wrote poet Andrei Codrescu in his foreword to "Elysium," a book of evocative New Orleans cemetery photographs. While many of the dead are entombed in plain mausoleums or grand ones in decay, thousands of the more fortunate are interred in Byzantine temples and ornate sarcophagi, in pyramids guarded by sphinxes, in Gothic cathedrals and Italian villas, and beneath Greek and Roman columns.

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"The keepers of the graves are mostly old women these days, who remember their mamere and papere and gran'mere and gran'pere," wrote Codrescu. "Their own resting places wait for them in the family crypts. . . . Great care is taken in planning which berth to lie on. Ending up next to a disliked relative can sour eternity. The grave keepers listen to the bones, remember, plot, pray, and scrub."

One of the accused antiques dealers, Peter Patout, 43, whose Bourbon Street home has been featured in *House Beautiful*, *Town & Country* and similar magazines, belongs to a wealthy sugar-growing family whose forebears arrived here in the 1820s. After the alleged conspiracy became public, he declared his innocence at a news conference in front of an ancestor's tomb in the 145-year-old St. Louis Cemetery No. 3.

"I am astonished and outraged at the easy assumptions being made regarding my integrity," he told reporters.

He is charged with six counts of possessing stolen goods worth more than \$500, each count punishable by up to 10 years in prison upon conviction.

"He's a respected, legitimate dealer," Patout's attorney, Arthur Lemann, said last week after a court hearing. "He did acquire some items, but didn't think they were stolen. He buys and sells antiques. This stuff doesn't come wrapped in cellophane with a manufacturer's seal."

A lawyer for antiques dealer Aaron Jarabica, 41, said his client, charged with one count, also is innocent, having acquired a stolen item in good faith. Roy Boucvalt, 55, a New Orleans physician, will offer the same defense at his trial, his attorney said.

Boucvalt, a connoisseur of fine antiques, owns the historic Boucvalt House on St. Louis Street, a circa-1840 Greek Revival townhouse, delicately restored, that often hosts soirees of the Junior League and other New Orleans society clubs. He is accused of two counts of possessing stolen property worth more than \$500. And like the others, he also is charged with conspiracy to commit theft.

One Friday in February 1998, a worker at a cemetery where several thefts had occurred grew suspicious when he noticed a white van cruising among the mausoleums. He jotted down the license plate number and gave it to police. Because the worker hadn't witnessed a crime, detectives decided not to immediately question the van's owner, but to await his return to the cemetery. They hoped to catch him in the act of stealing. And on April 4 that year, they did.

Detective Frederick Morton said the thief identified two accomplices,

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and all of them agreed to cooperate with investigators. The story they told, when it eventually became public, left the genteel devotees of New Orleans culture aghast.

According to Morton, the thieves said they had started out by heisting small urns from cemeteries and peddling them in antiques shops for drug money. Eventually, some dealers urged them to bring in larger, more valuable items, the thieves said, and even directed them to certain cemeteries and taught them what to look for. In time, Morton said, detectives retrieved 250 urns, statues and benches from about 35 antiques dealers and the parlors and courtyards of several well-heeled customers.

"We call our cemeteries 'cities of the dead' for a reason," said Patricia Brady, an official of the Historic New Orleans Collection, a preservation group. "These are communities of our ancestors, and we really like to go there and be with them. So these people who steal things, they're not stealing from the dead. They're stealing from us. We need these things. The city needs these things."

Though the replacement costs for many of the larger objects would run in the high five figures, Morton said, the antiques dealers paid relatively paltry sums for them, then sold them, or offered them for sale, at \$1,000 to \$6,000 apiece. Of the 35 or so dealers, police suspect about a half-dozen took part in the alleged conspiracy. Morton said authorities decided last month that they had enough evidence to prosecute Patout, Jarabica and Boucvalt. After being formally charged, they were released on personal recognizance pending their trials.

The 250 recovered artifacts--including the Brennan family's Mother Cabrini statue, with one of its hands broken off and missing--are being held in an evidence warehouse.

The thieves have identified all of the items as stolen and were able to remember the locations of most of the tombs from which ornaments were taken, Morton said. But they could not recall where some of the artifacts rightfully belong in the vast "cities of the dead," and no family members have reported them missing.

"The sad thing is, they may never be claimed," Brennan said. "Some of these families have died off."

Looting, Collecting, and the Destruction of Archaeological Resources

Ricardo J. Elia^{1,2}

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Archaeological sites, the material remnants of our human past, are finite and nonrenewable cultural resources that are under constant threat from environmental forces, development activities, warfare, vandalism, and looting. Site looting is the destructive removal of archaeological objects to supply the art market. Looting is part of an economic system, the antiquities market, that works to supply the demand of collectors for archaeological objects. The destruction of archaeological resources by looters is an international crisis and threatens to obliterate the world's cultural heritage and our ability to understand past cultures. The scale and intensity of the looting problem can be estimated by studying the extent of site destruction in countries of origin and by investigating the sources of antiquities held by collectors. Finding a solution to the problem of looting will require a focus on the demand side of the market (i.e., collectors) instead of the traditional focus on the supply side (looters, dealers).

KEY WORDS: Archaeology; site destruction; antiquities market; plunder.

INTRODUCTION

Archaeological sites, monuments, and objects are the tangible remnants of our human past. For most periods of human history, archaeological resources provide the primary, and often the sole, source of information. The careful recovery and study of archaeological data provides essential information about aspects of our cultural heritage ranging from topics as broad as the origins of humans and the development of complex societies to questions as particularistic as the nature and chronology of landscape modifications in an 18th century house in rural Massachusetts.

Archaeological information is acquired through the systematic recovery of data, including material culture and environmental specimens, in their context. Context is a critical element of archaeological research;

it has been defined as "the position of an archaeological find in time and space, established by measuring and assessing its associations, matrix, and provenance" (Fagan, 1997). If an archaeological resource is damaged or destroyed, its archaeological integrity is compromised because its original context is no longer available for study. The archaeological information content of a bulldozed ancient habitation site, for example, is likely to be extremely limited compared to an undisturbed site of the same type, even if most of the artifacts remain on the site, because the precise relationships between artifacts, spatial areas of the site (e.g., refuse areas, storage pits, houses, courtyards, etc.), and stratigraphic layers (representing different time periods) can no longer be reconstructed.

Archaeological resources are frequently described as nonrenewable resources. It is true that new archaeological sites are being formed every day by the same processes that created sites in the past—the disposal of refuse, the abandonment of living and working spaces, and natural causes like alluviation, flooding, and earthquakes. But archaeological resources from past epochs can never be renewed. The surviving

¹ Archaeology Department, Boston University, Boston, Massachusetts 02215.

² Correspondence should be directed to Ricardo J. Elia, Associate Professor, Archaeology Department, Boston University, 675 Commonwealth Avenue, Boston, Massachusetts 02215.

stock (including recorded and as yet unrecorded sites) of Sumerian temples, early hominid sites, or Anasazi pithouses is all that we will ever have; the resource base of past sites may be preserved or diminished, but will never be augmented. To cite one specific example, historical records indicate that between 1492 and 1520, the period of European exploration of the Americas, slightly more than 50 vessels were lost in the New World (Keith, 1988). Considering that some of these ships were later stripped for parts and materials, the actual number is probably smaller. The result is a strikingly small potential database for underwater archaeologists who are interested in this important period of nautical history.

The physical remains of the past constitute a fragile and finite archaeological resource base that is regularly threatened with depletion, destruction, and disturbance from several causes, some deliberate and others unintentional. The principal causes of the attrition of the archaeological record are environmental forces, development, warfare, vandalism, and looting. Each factor varies in intensity and scope, but all produce the same result—a steady, irremediable erosion of the record of our life on the planet.

Environmental forces that destroy or damage archaeological resources include natural conditions like rain, wind, erosion, floods, and humidity, and harmful conditions caused by human agency, such as air pollution. The other threats—development, warfare, vandalism, and looting—are all the results of human activities. Of these, development is probably the most extensive and affects the most sites throughout the world. Development includes all construction, building, and earth-moving activities that are the consequence of human habitation, economy, and subsistence. The construction of buildings, shopping malls, industrial complexes, highways, pipelines, as well as other activities like agriculture, lumbering, and dredging of waterways, are common examples of development activities that can destroy archaeological sites if no measures are taken to discover sites and avoid impacts to them before the activity takes place.

Warfare frequently causes intensive damage and destruction to archaeological sites, monuments, collections, and records. Much of the loss results from the destructive forces of war, including weaponry and the movements of vehicles and troops. Often archaeological and cultural resources are plundered or deliberately destroyed during armed conflict. During World War II, for example, a massive and systematic campaign of looting of art treasures, including archaeological

collections, was undertaken by the Nazis (Nicholas 1994). Near the end of the war, Russian trophy brigades carted off artworks from Germany to Russia, including the famous "Priam's Treasure," excavated by Heinrich Schliemann at Troy in 1873 (Akinsha and Kozlov, 1995). In the Gulf War, the contents of the Kuwait Museum were removed by the Iraqis, and the National Museum in Kabul was plundered in the course of the recent civil war in Afghanistan (Dupree, 1996). In the recent conflict in the Balkans, churches, museums, and libraries were regularly targeted by the combatants in a form of cultural genocide (Chapman, 1994). Moreover, the collapse of civil and police authority during armed conflict frequently results in the plundering of archaeological sites, storerooms, and archives (e.g., Zimansky and Stone, 1992).

Vandalism is a relatively minor, though harmful, cause of damage to archaeological resources. Site vandals maliciously deface or damage archaeological sites, monuments, and objects. Examples of vandalism include the damaging of buildings and monuments from gunfire and the defacing of prehistoric rock paintings (Cameron, 1994).

Looting is the deliberate, destructive, and non-archaeological removal of objects from archaeological sites to supply the demand of collectors for antiquities. Site looting is motivated by commercial factors and is stimulated by the international demand of collectors and museums for archaeological objects. In their efforts to supply marketable objects to collectors, looters remove objects from their archaeological context and in the process destroy or disturb the archaeological sites that contained them (Fig. 1). As we shall describe below, looting is both intensive in its damage to specific archaeological sites and global in its scale. It constitutes one of the gravest threats to the archaeological resource base, and, because looting is a deliberate activity, unlike development, where site damage is an unintentional consequence of an earth-moving project, archaeologists regard it as the most pernicious and difficult to control of all threats to the cultural heritage.

LOOTING AS AN ECONOMIC SYSTEM

The illicit removal of objects from archaeological sites is one element of a single economic system that may be termed the antiquities market. The system has three main components: the creation of an inventory or supply of antiquities, acquired either by looting objects from archaeological sites or by producing



Figure 1. Massive looting at Cahuachi, a large early Nasca ceremonial center, south coastal Peru, ca. A.C. 1–300. Photo courtesy of Dr. Helaine Silverman.

fakes; their distribution to dealers, often by smuggling the objects out of the country of origin; and ultimately their purchase by collectors, assisted by a variety of specialists, including art historians, conservators, materials analysts, and curators (Coe, 1993; Elia, 1995a).

The system operates according to the economic laws of supply and demand. The primary cause of looting is collecting. Collectors, both private and institutional (i.e., museums), acquire archaeological objects for their artistic, aesthetic, and investment values. These values may be appreciated without regard for the contextual information required by archaeologists, who are concerned primarily with the scientific and historical information potential of the objects. The collectors, especially at the high end of the market, are often wealthy individuals and prominent figures in society; it is they who create the initial demand for antiquities. Collectors purchase antiquities from dealers, who finance and operate a network of runners, couriers, and smugglers; these agents of the dealers, in turn, pay the looters who furnish the supply of antiquities through their clandestine digging at archaeological sites.

The antiquities market operates as a black market, or, more accurately, as a “double market”—a single

market combining elements of both black market and legal market (Middlemas, 1975). Many aspects of the system are illegal or carried out in secret, especially in the countries of origin, where objects are illegally looted from sites and often smuggled across national borders. Once material enters the market, business transactions between looters and dealers’ agents, dealers and collectors, and collectors and museums are protected by a tradition of secrecy and nondisclosure (Bator, 1981). Generally, however, once a looted object enters the commerce of art-acquiring countries—especially nations like the United States, the United Kingdom, Germany, and Japan—the antiquities market is not only legal and protected by national laws and policies that favor purchasers and possessors, but also a status-producing arena for collectors who can afford to purchase, display, and donate valuable antiquities.

Because the antiquities market system operates for much of the time as a black market, the causal link between collecting and looting is frequently blurred. At any given moment, only individual elements of the system are visible, and they tend to be treated as if they were independent activities. Only rarely are we afforded a glimpse of how the individual components operate as integral parts of a single system, especially in the occasional circumstance when a looting case is

cracked and one can follow the flow of looted material from the archaeological site through the market to its final destination.

The plundering of tombs of the Moche culture in Sipán, Peru provides a glimpse of how the system operates (Nagin, 1990; Kirkpatrick, 1992; Cultural Property Advisory Committee, 1993). Local villagers looted an undisturbed elite tomb at the Sipán site in 1987. Squabbling among the looters over the division of the artifacts brought the case to the attention of the police; arrests were made, and investigations eventually allowed the details of the case to be reconstructed. Many of the Sipán artifacts had been acquired in Lima by an American expatriate who regularly arranged to smuggle Precolumbian artifacts out of Peru; another sizable collection of Sipán material was acquired by a well known Peruvian collector. The expatriate sold a quantity of Sipán artifacts to an American entrepreneur, who had the artifacts smuggled into London. From there they were shipped into the United States, listed as personal items and accompanied by phony papers stating that the artifacts had been acquired prior to Peru's 1929 cultural patrimony law. The American dealer sold the artifacts to numerous collectors, including corporate executives, museum board members, and even a Nobel laureate (Nagin, 1990). (The Sipán case eventually led to lawsuits; the American entrepreneur pleaded guilty to smuggling and served a prison sentence, and some of the looted objects were returned to Peru. Peruvian archaeologists excavated three additional unlooted elite tombs at Sipán, so rich that they earned the nickname "King Tut's tomb of the New World." Finally, in 1990, the United States signed an emergency measure banning the import of Sipán artifacts from Peru).

SCALE OF THE LOOTING PROBLEM

The looting of archaeological sites is a worldwide crisis. Few archaeological regions of the world are immune to the destructive removal of archaeological objects for sale in the antiquities market. Recent estimates put the volume of stolen art, including antiquities, at between 2–6 billion dollars per year (Walsh, 1991). Unfortunately, the clandestine nature of much of the antiquities market system makes it difficult to quantify the full extent of the problem. Two types of empirical data, from opposite ends of the system, may be used to document the scale of looting: first, the evidence of looted sites in the countries of origin;

and second, the continuous surfacing of previously unrecorded and unprovenanced material on the market, in private collections, and museums.

Looted Archaeological Sites

Studies of looting have demonstrated not only that the plundering of archaeological sites is rampant in many parts of the world, but that it is frequently carried out in a highly systematic and organized fashion. In North America, Native American artifacts have long been prized by collectors and historical sites have been mined by bottle-hunters and metal detectorists seeking coins and other relics. In Alaska, Eskimos have been removing ivory and other artifacts from their ancestral archaeological sites (Staley, 1993), with the result that many sites are being destroyed. The site destruction is so serious on St. Lawrence Island that some sites previously listed as National Historic Landmarks have now lost that status (Staley, 1993). In the continental United States, the looting of prehistoric sites has been going on for over a century. It was the looting of sites in the Southwest, in fact, that led to the passage of the Antiquities Act of 1906, the first archaeological protection law in the country (Lee, 1970). Prevention of looting was also a major impetus behind the Archaeological Resources Protection Act of 1979 (amended 1988), which protects archaeological resources on federal property (16 U.S.C. 470aa).

Despite legal efforts to protect sites, looting continues unabated in many areas of the United States. In the Four Corners region of the Southwest, for example, a government study showed that almost one-third of all surveyed sites had experienced some looting (U.S. General Accounting Office, 1987). A well-documented case on private property involved one of the largest Middle Woodland Hopewell mounds, located on the property of the General Electric Company (GE) in Indiana (Fig. 2). In 1988 a machinery operator for a construction crew discovered artifacts at the GE Mound; within a short time, looters trespassed onto the property and the mound was plundered. One of the looters, who was later convicted and jailed, was Arthur Gerber, a dealer, collector, and organizer of an annual Indian artifact show and sale (Munson, Jones, and Fry, 1995). Similar organized looting took place at the Slack Farm site in Kentucky in 1987, where artifact hunters leased a farm for the purpose of mining an important Mississippian period burial ground and



Figure 2. View of the GE Mound site, a Middle Woodland Hopewell (ca. A.C. 100–500) mound in Posey County, Indiana. The site, one of the largest Hopewell mounds ever constructed, was looted in the summer of 1988. Photo courtesy of Judith A. Stewart, U.S. Attorney, Southern District of Indiana.

destroyed much of the site by digging holes in search of marketable artifacts (Fagan, 1988).

Central and South America also suffer from a massive looting problem. The looting of Precolumbian sites increased dramatically in this century after previously unpopular antiquities suddenly became desirable to collectors. Robert Woods Bliss, for example, the founder of the research institution Dunbarton Oaks, was one of the first serious collectors of Precolumbian art (Coe, 1993). Bliss, advised by anthropological luminaries like Alfred Tozzer, A.V. Kidder, and George Clapp Vaillant (Coe, 1993), amassed a collection of Precolumbian artifacts at a time when they were generally considered “primitive” objects of little artistic quality. Nelson Rockefeller was another influential early collector of Precolumbian material (Boone, 1993). Important early collectors like Bliss and Rockefeller were influential in promoting the collection of Precolumbian artifacts as art, which stimulated a fur-

ous cycle of looting of Mesoamerican and Andean sites that shows little sign of diminishing.

The scale of looting in these areas almost defies description. Aerial photographs show entire river valleys in Peru pitted with tens of thousands of looters’ holes (e.g., Cultural Property Advisory Committee, 1993); the scenes are reminiscent of a lunar landscape (fig. 3). In the Cara Sucia region of El Salvador, more than 5,000 looters’ pits were counted by archaeologists (Cultural Property Advisory Committee, 1987). In Belize, a majority of recorded sites have experienced looting, and archaeologists report finding looters’ camps with bulldozers and housing for 70–80 people (Pendegast and Graham, 1989). In Costa Rica, looting of archaeological sites was such a common activity that the looters were organized, for a time, in a legal trade union (Wilson, 1987).

In Europe, especially in the Mediterranean countries, the tradition of looting of Greek and Roman

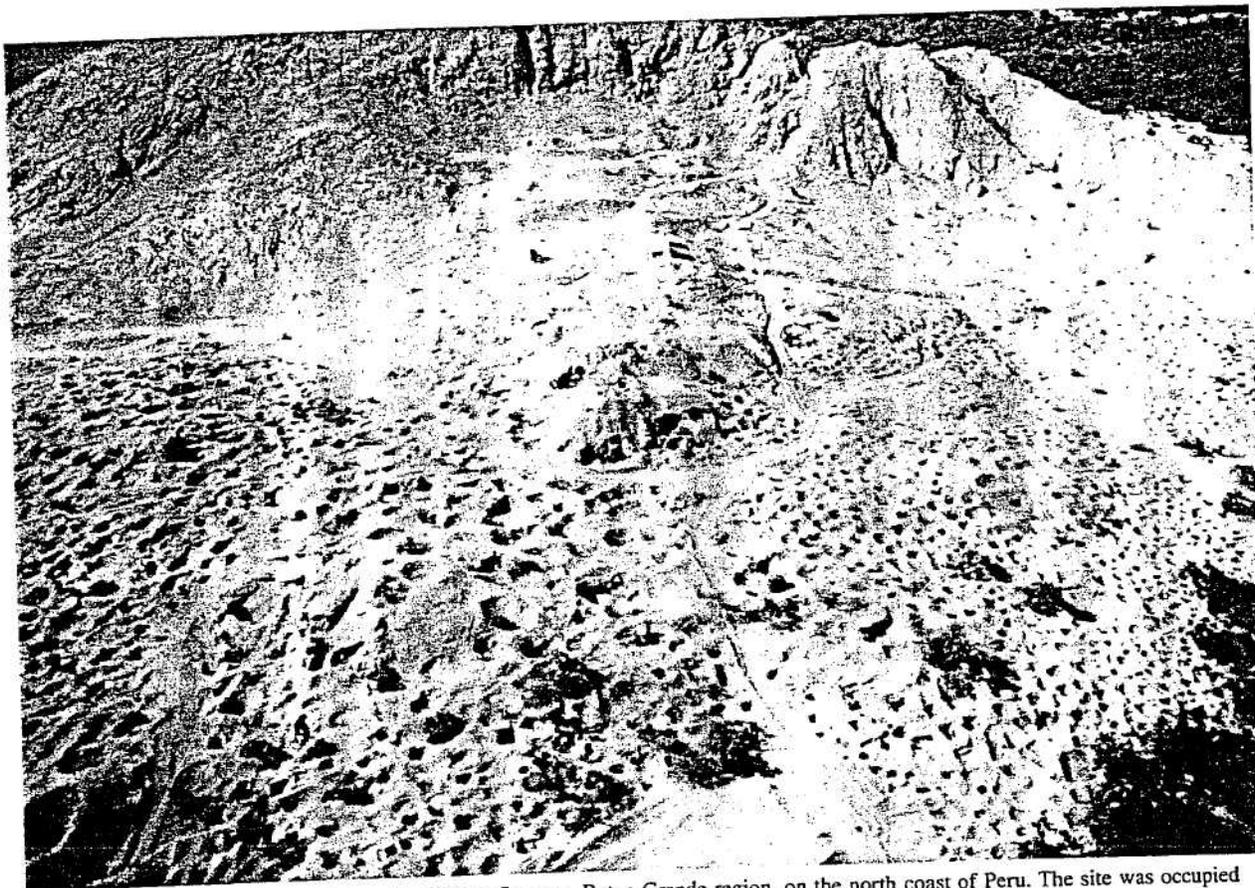


Figure 3. Looted landscape at the site of Cerro Sapame, Batan Grande region, on the north coast of Peru. The site was occupied primarily by Sican and Chimu peoples, ca. A.C. 900–1500. Photo by Dr. Izumi Shimada and reproduced with his permission.

antiquities goes back hundreds of years. In the 18th century, ancient tombs were opened so that wealthy collectors could obtain painted pottery. Before 1960, most of the tombs in several Etruscan cemeteries had already been looted; not only were the movable artifacts removed, especially the prized Greek pottery, but frequently the looters also damaged or destroyed fragile wall paintings (Lerici, 1973). It was probably a looted Etruscan tomb that produced the Euphronios Vase (fig. 4), the famous million-dollar "hot pot" acquired by the Metropolitan Museum of Art in New York in 1972 (Meyer, 1973; Hoving, 1993). Today the discovery of an unlooted Etruscan tomb is more likely to be the result of *tombaroli* (tomb robbers) than archaeologists. Several Italian *tombaroli* have even published their memoirs (van Velzen, 1996).

Greece and Turkey continue to be rich sources of looted antiquities, despite strong protective laws and aggressive policies of claiming stolen art in foreign courts, especially the United States (e.g., Rose and

Acar, 1995). The countries of the Middle East have long been plundered, and political instability and war further hamper the ability of national authorities to protect sites. Egyptian archaeological sites have been looted for centuries to provide artworks for Western collectors and there is no indication that looting in Egypt has diminished. Since the dissolution of the Soviet Union, an upsurge in looting has been noted in Ukraine and the countries around the Black Sea (Emetz and Golentzov, 1993). Asia is another region where looting is rife, and archaeological sites and monuments have been ransacked in the Indian subcontinent, Southeast Asia (e.g., Angkor Wat), and China as collectors accumulate artworks like Gandhara and Angkor sculptures, Chinese bronzes, painted pottery, and tomb fixtures (Maier, 1995a, 1995b; Powell, 1994). In China alone, 40,000 tombs were reported plundered in 1989 and 1990, and tens of thousands of objects destined for the international market have been intercepted since the early 1980s (Murphy, 1994). Chinese antiquities



Figure 4. The Euphronios Vase, an Attic red-figure calyx krater (ca. 515 B.C.) acquired by the Metropolitan Museum of Art in 1972. The vase is widely believed to have been looted from an Etruscan tomb in Italy. (All rights reserved, The Metropolitan Museum of Art. Bequest of Joseph H. Durkee, gift of Darius Ogden Mills, and gift of C. Ruxton Love, by exchange, 1972. [1972.11.10])

are frequently smuggled into Hong Kong and Macau; between 1981 and 1989, customs officials in Guangdong Province alone reportedly recovered more than 70,000 smuggled artifacts (Murphy, 1995). Treasure hunting and site looting went hand in hand with European colonization in Sub-Saharan Africa, and today the market in stolen African antiquities and ethnographic objects is thriving (Schmidt and McIntosh, 1996). Countries in West Africa have been particularly hard hit as peasants dig for terracotta sculptures that have become popular among Western collectors and museums. In the inland Niger Delta of Mali, for example, archaeological sites have been plundered by looters

organized by local dealers and numbering up to 200 peasants (fig. 5) (Chippindale, 1991; Sidibé, 1996; Brent, 1994, 1996).

Unprovenienced Objects in Collections

The evidence from archaeological sites around the world indicates that the pillaging of archaeological resources to supply collectors is organized, widespread, and continuing. Few areas of the world with archaeological resources are unaffected by looting. Additional evidence of the scale of the looting problem



Figure 5. Looters working an ancient site in Mali. Photo by Michèl Brent and reproduced with his permission.

comes from an examination of the other end of the spectrum, the final destination of the looted and smuggled material. Collectors frequently make the unsubstantiated claim that the majority of archaeological objects on the market come from "accidental finds"—chance discoveries made by farmers and peasants, who sell the objects rather than hand them over to the authorities (e.g., Emmerich, 1976). Most experts, however, believe that the bulk of antiquities on the market were illicitly obtained through looting, or stolen from museums and storerooms, and smuggled out of the countries of origin. The percentage of illegally acquired material may be as high as 90%. As Thomas Hoving, the former director of the Metropolitan Museum of Art in New York recently wrote, "almost every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came" (Hoving, 1990).

As we have seen, the clandestine nature of the trade makes it impossible to quantify accurately the extent of the problem, but convincing circumstantial evidence exists in the inventories of collectors and

museums if we ask a few simple questions: Where do the objects come from? What is the provenience of the objects? What is the evidence that they were legally obtained from their countries of origin? Private collections of archaeological objects generally betray their suspicious origins by containing overwhelmingly unprovenienced material ("unprovenienced" means that the source of an object, including its original location and history of ownership, is unknown or undocumented). There are basically three sources for unprovenienced archaeological objects in collections: (1) they may have been looted from archaeological sites; (2) they may be fakes; or (3) they may have come from previous collections. A fourth possibility is that they may have been stolen from a museum, church, storeroom, or other collection; in that case, however, there is a fairly good possibility that the objects were inventoried and can be identified before purchase by a diligent collector or dealer.

Since curators are generally scrupulous about identifying previous owners of objects in their collections, the absence of any information about the source

of previously unpublished and unknown objects in catalogs and inventories suggests that the objects were either removed illicitly or are fakes. With these considerations in mind, an investigation of published collections is revealing. For example, Barbara and Lawrence Fleischmann's collection of Classical art, valued at \$80 million, and recently acquired by the Getty Museum in Malibu (Elia, 1996), is typical: out of 295 entries in a recent exhibition catalog (Getty Museum, 1994), not one has an archaeological provenience. Only three (1%) objects are described as coming from a specific location, while more than 85% have no provenience at all. Four percent are "said to be from" a place, and 8% are identified as coming from other collections. Study of other collections suggests that these figures are the rule, not the exception. For example, out of 230 objects from the collection of Classical art owned by Shelby White and Leon Levy that were exhibited in New York in 1990, only two are described as having a specific origin (Gill and Chippindale, 1993). Similar percentages of unprovenienced material could be obtained from other collections of Old World and New World antiquities and from the inventories of museums throughout the world.

THE CONSEQUENCES OF LOOTING

The most serious consequence of the pillaging of archaeological resources is not the loss of individual objects to the illicit market, although the attention given to the aesthetic values of antiquities as "art", their treatment in law as cultural property, and the focus of countries of origin and possessors alike on the ownership of objects, all tend to reinforce that perspective. The most serious consequence is, instead, the destruction of the original archaeological context in which the looted objects were found. Once destroyed, archaeological context cannot be recovered and the loss of archaeological and scientific information is permanent. Archaeological resources are nonrenewable, irreplaceable, and, as Professor Colin Renfrew (1996) of the University of Cambridge has pointed out, not sustainable.

The looting of archaeological sites both diminishes the informational value of the looted object and destroys or damages the surrounding archaeological resource. Little can be said about a looted object other than what may be gleaned from the physical object itself; often, the very authenticity of the object may be questioned in the absence of a verifiable find-spot. For example, several gold ornaments in the shape of

peanuts surfaced on the market after an intact Moche tomb was looted in the Sipán region of Peru; one sold for \$22,000 (Nagin, 1990). What can be learned from these objects? Nothing certain can be said about their date, function, symbolism, or placement in the grave; how can we be sure that they are even genuine? By contrast, we may compare the abundance of information that is being learned by the scientific excavation and study of unlooted tombs at the same Sipán site that followed the looting. Even though only preliminary analysis has been completed, and full study will take many years, unparalleled new information has been learned about the nature of Moche society, ritual, material culture, and technology (Alva and Donnan, 1993). And, unlike the looted materials, which were ripped from their context and scattered among collectors throughout the world, the artifacts from the excavations are being curated as an assemblage and will be available for continuing study. Most importantly, the results are being made accessible to the scholarly community and the general public.

The damage to archaeological resources caused by looters searching for marketable objects ranges from the odd hole dug into a site to entire archaeological culture areas in jeopardy of being obliterated. At Aidonia in southern Greece, for example, 18 Mycenaean tombs were looted before the authorities could intervene (Elia, 1995b). When an American dealer offered a small number of Mycenaean objects for sale in 1993, the Greek government identified them as coming from Aidonia and sued for their return. A settlement was eventually reached, whereby the dealer donated the material to the Society for the Preservation of the Greek Heritage, allowing him to take a tax deduction. Although the Greeks cheered the settlement as a victory, and the material was returned to Greece, few seemed willing to contemplate the full extent of the loss—the irrecoverable destruction of the information that could have been learned from scientific investigation of the 18 tombs. Even considering the matter from the perspective of the objects alone, the case was hardly a satisfactory resolution: the material returned by the dealer probably accounted for the contents of only one or two tombs; where is the remaining material?

Often our ability to learn about specific ancient civilizations and cultures is dramatically affected by looting. The pillaging of sites in the inland Niger Delta of Mali, for example, where ancient terracotta sculptures are sought, is having a disastrous effect on the potential for archaeology in that region because the area is to date largely undocumented archaeologically (fig. 6) (Brent, 1994; McIntosh, 1994). Here the looting



Figure 6. Malians examine damage to archaeological site caused by digging of looters. Photo by Michèl Brent and reproduced with his permission.

is destroying a region's cultural heritage and, if it continues unabated, will effectively deny the local inhabitants the ability to learn about their own past through archaeology. (Fortunately, efforts are underway to stem the illicit digging; see McIntosh, this volume). A similar catastrophe befell Early Bronze Age sites in the Cycladic islands of the Greek Aegean Sea. Before the 1960s, the abstract marble statuettes

known as Cycladic figures were archaeological oddities of little interest to anyone. During the 1960s, however, fueled by changing fashions in the art world, they suddenly became prized by collectors and museums, and archaeological sites throughout the Cyclades have been looted in search of them. The figures in this case are telling, and point to the irrecoverable destruction of Early Bronze Age burial sites in the

Cyclades: less than 10% of the 1,600 known Cycladic figures throughout the world have an archaeological provenience, and an estimated 10,000–12,000 Cycladic graves, or approximately 85% of all the graves of that culture, have been looted (Gill and Chipindale, 1993).

The virtual destruction of archaeological regions by looters is not limited to Mali or the Greek islands. We have already seen that looting on St. Lawrence Island by Eskimos has caused some archaeological sites to lose their status as National Historic Landmarks, and massive looting in Central America and Peru has obliterated Precolumbian sites. Other cases have been documented as a result of the activity of the U.S. Cultural Property Advisory Committee, which was organized to coordinate the U.S. implementation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Kouroupas, 1996). According to the implementing legislation (19 U.S.C. 2601), which was signed into law in 1983, the United States may, upon request by a country of origin, impose an emergency import ban on looted artifacts in the case of an "emergency condition" involving archaeological or ethnological material that is "in jeopardy from pillage, dismantling, dispersal, or fragmentation" (19 U.S.C. 2603). The import ban applies to three categories of material: (1) newly discovered material important for the understanding of the history of mankind; (2) material coming from a site recognized to be of high cultural significance; and (3) part of the remains of a particular culture or civilization.

To date the United States has imposed emergency import bans in five cases, involving Precolumbian artifacts from El Salvador's Cara Sucia region; antique ceremonial textiles from Coroma in Bolivia; Moche artifacts from the Sipán region of Peru; Maya artifacts from the Petén region of Guatemala; and Mali artifacts from the Niger Delta (Cultural Property Advisory Committee, 1993). It is important to emphasize the intensity of the looting in each of these areas: the plundering was so severe that the U.S. Cultural Property Advisory Committee (which includes three experts in the art trade) determined that the cultural resources in the regions in question were in jeopardy of being destroyed. We are referring to the total, or near total, obliteration of an area's archaeological heritage, not a few accidental finds made by farmers.

The removal of archaeological objects from their contexts and the destruction of archaeological

resources in the search for archaeological objects are two of the most damaging consequences of looting. A third consequence is the uncertainty and corruption introduced into studies of ancient material culture and art as a result of the presence of fakes or forgeries of ancient objects. The development of a trade in fakes is an automatic by-product of any flourishing art market (Alsop, 1982); it thrives in the antiquities market precisely because the overwhelming majority of objects acquired by collectors lack a documented archaeological provenience. Few types of material culture have not been the object of faking, and art historians who rely on stylistic and subjective criteria of authentication have regularly been duped by clever forgeries. Even scientific analysis of materials is not guaranteed to successfully spot the well-made fake.

How fakes corrupt studies of ancient culture and art is exemplified by the case of the Getty kouros, a marble statue of Archaic type acquired by the Getty Museum in the 1980s from a Swiss dealer for as much as \$9 million (Bianchi, 1994). The statue of the male youth (fig. 7), if genuine, would be an extremely rare find but in the absence of an archaeological provenience, the Getty had to consider the possibility that the piece was fake. It conducted a battery of art historical and scientific tests and purchased the kouros even after learning that the documentation showing the statue was in a private collection in the 1930s had been forged. The Getty held a colloquium in Athens in 1992 to discuss the question of authenticity (Getty Museum, 1993). A panel of distinguished art historians, sculptors, and scientists could not agree; some claimed the statue was a genuine masterpiece of Greek art while others derided it as an obvious fake. Today, the statue stands in art historical limbo: if genuine, it remains tainted with suspicion; if fake, then those who treat it as genuine run the risk of corrupting the study of Greek sculpture (Elia, 1994). The problem is one that is repeated in many areas and with many types of material culture, from Chinese bronzes to Precolumbian figurines, and is directly attributable to the willingness of collectors to acquire looted, or unprovenienced, objects. Looting, and the acceptance of looting by the market, allows fakes to proliferate; fakes, in turn, corrupt our ability to make reasoned statements about the past.

CONCLUSIONS

The surviving archaeological resource base provides the basic data sources that make possible the

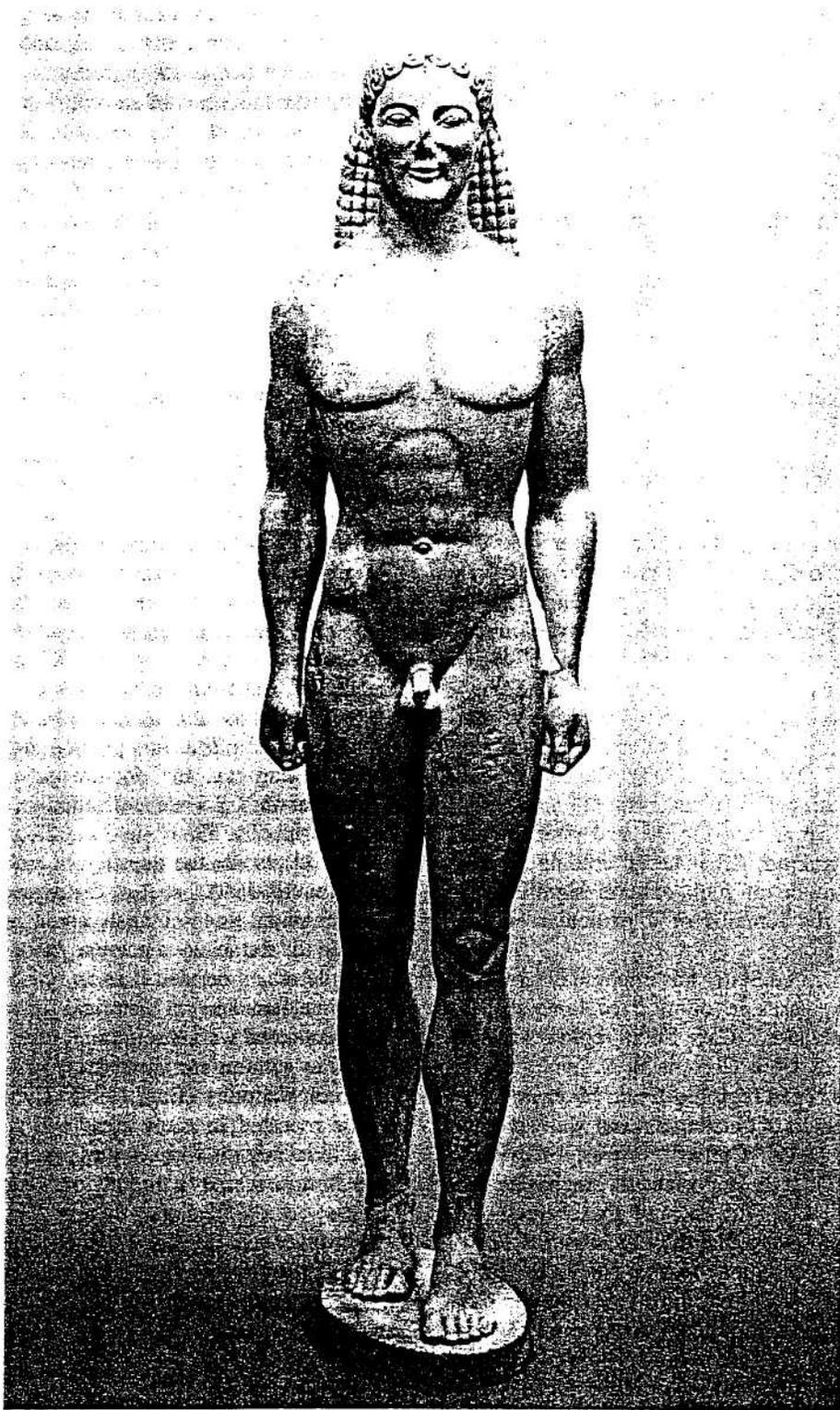


Figure 7. The Getty kouros (standing nude youth). Collection of the J. Paul Getty Museum, Malibu, California. Marble, ca. 530 B.C. or modern forgery. Photo reproduced by permission of the J. Paul Getty Museum.

reconstruction of the human past; that resource base is fragile, nonrenewable, finite, and under constant threat from natural and cultural forces. The collecting of archaeological objects, which causes looting, is one of the primary causes of the destruction of archaeological resources. Factors such as development activities may result in a greater amount of archaeological site destruction, but it is possible to mitigate the harmful effects of development through laws and policies that require that archaeological sites be identified and protected before development projects occur. Site looting, on the other hand, is the deliberate, intentional, and illicit removal of archaeological objects from sites. Its primary cause is an individual's (or an institution's) desire to possess objects, often described by the collectors themselves as a passion or obsession; the secondary components of the system (dealing and looting) are driven by financial considerations. This emotional motivation of the collector has rendered most efforts to stop the illicit trade—whether through legislation, enforcement, or other inducements—essentially ineffective.

Most previous efforts to combat looting have focused on the supply side of the antiquities market system, especially the looters and enforcement agencies in the countries of origin. Many countries have adopted stringent national laws prohibiting the unauthorized removal of antiquities and excavation of sites, as well as their removal outside the national borders. Efforts have been made to educate the local people who do the bulk of the looting, to prosecute looters vigorously, to provide more on-site protection of archaeological resources, and to crack down on smuggling. International treaties like the 1970 UNESCO cultural property convention and the recently signed UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT, 1996) are positive steps, as are the development of museum acquisition policies, and codes of practice among art dealers, conservators, and others involved in the cultural heritage.

These measures, however, are likely to remain generally ineffective as long as the collecting of unprovenienced material—the root cause of looting—does not become a major focus of attention. Education alone will never be sufficient to convince looters to stop plundering sites as long as there are financial incentives for them to do so. In China, where looters are sometimes executed (Murphy, 1995), the illicit trade flourishes. The same may be said for enforcement efforts: no nation, including the United States, and

certainly not the developing nations of the world, has the resources to protect all its sites from looters. And little change can be expected from the dealers: if they ever stopped selling unprovenienced antiquities, their business would dry up.

While efforts have largely focused on the supply side of the antiquities market, little attention has been paid to the demand side—the collectors who cause the illicit market to flourish in the first place. Since collecting creates the demand that leads to looting, any reduction in demand should lead to a reduction in looting. Unfortunately, changing the behavior of collectors will require a major shift in public attitudes. Collectors have traditionally held an honored place in our society. The “great collectors” frequently occupy positions of power and authority; they are revered as connoisseurs and pursued by solicitous dealers and curators. If they donate their collections to museums, they are immortalized by having museum wings named after them and receive public subventions, in the form of tax breaks, for their beneficence. Changing the culture of collecting will require educating not so much the collectors but the general public, which supports collecting in a vague way as a form of socially sanctioned behavior. The destruction of archaeological resources from looting is only likely to be diminished when the collecting of unprovenienced antiquities becomes regarded as antisocial behavior—like the poaching of endangered animals; the burning of the rainforests; smoking in public; or the wearing of animal furs.

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forum news



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out there

THE REAL THREAT TO CEMETERY ART

by Erling A. Hanson, Jr.

We visit them to recall the lives of loved ones who have died or, perhaps, to search out a long-lost ancestor. They are outdoor museums and sculpture gardens, the permanent homes for memories and memorials. Cemeteries, we assume, exist "in perpetuity."

Cemeteries are commonplace. Usually, we take them for granted, becoming only mildly upset at the sight of uncut grass or an overturned tombstone.

Yet when our burial grounds are desecrated, it is front-page news: "Juveniles vandalize local cemetery. Headstones spray-painted with graffiti." These acts offend, even incense us.

As the chief operating officer of 150-year-old Forest Hills Cemetery, Boston's preeminent garden cemetery, I am all too aware of another, far more insidious, threat.

Although it seldom makes headlines and often goes unreported, even unnoticed, cemetery art theft for profit occurs at an alarming rate throughout this country. The systematic removal of funerary items such as bronze statuary, plaques and busts, stone memorials, wrought ironwork, stained glass windows, and marble benches is stripping our cemeteries of their rich heritage. All evidence points to individuals and organized groups of adults who plunder for profit.

Where does the booty go? What is the market for such items? Most are purchased by unwitting customers at flea markets, antique stores, landscaping centers, and auctions. Ignorant of its origins, the buyer places a weathered marble statue in the back garden, a moss-covered bench along a pathway in the side yard, a bronze sundial beside the backyard patio. A memorial planned originally to commemorate a life now accents a stranger's landscaping.

What can be done? We in the memorial business must identify, photograph, and record all objects that are candidates for theft. We must report a theft as soon as possible. Antique dealers, auctioneers, and other professionals must refuse to handle obvious funerary art and must insist on establishing the rightful ownership of questionable items. And, clearly, the public must be made aware of what is happening. The theft of cemetery art must be stopped, or it will devastate a basic part of our American heritage ▼

Erling A. Hanson, Jr. is the president of Forest Hills Cemetery in Boston



PHOTO BY SUSAN OLSEN

This 19th-century sculpture provided a mourner in perpetuity for a grave at Elmwood Cemetery

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The Archaeological Resources Protection Act



**Charting the
progress of the
last decade,
assessing current
and future issues.**

By Sherry Huff

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hen the Archaeological Resources Protection Act (ARPA)¹ was passed on October 31, 1979, its proponents observed a rapid response. By November of that year, three individuals were convicted for looting in Arizona two years earlier.² One of the three received a prison sentence of 18 months, which remained as the longest on record for an ARPA violation for the next ten years.³ ARPA prosecutions were rare prior to the adoption of the Uniform Regulations in 1984, and they increased slightly for the next four years. However, law enforcement agents and archeologists employed by the four signatory agencies to ARPA—the Departments of Interior, Agriculture, and Defense and the Tennessee Valley Authority—were not idle. Beginning in 1983, personnel attended training sessions and worked with lobbyists for the Society for American Archeology to amend the law, all of which resulted in a measurable increase in the use of the act since 1988.

This article will highlight some of the recent prosecutions which utilized ARPA and the progressive events which enabled them to be successful. It will also discuss the legal issues which have arisen or are likely to arise in the near future.

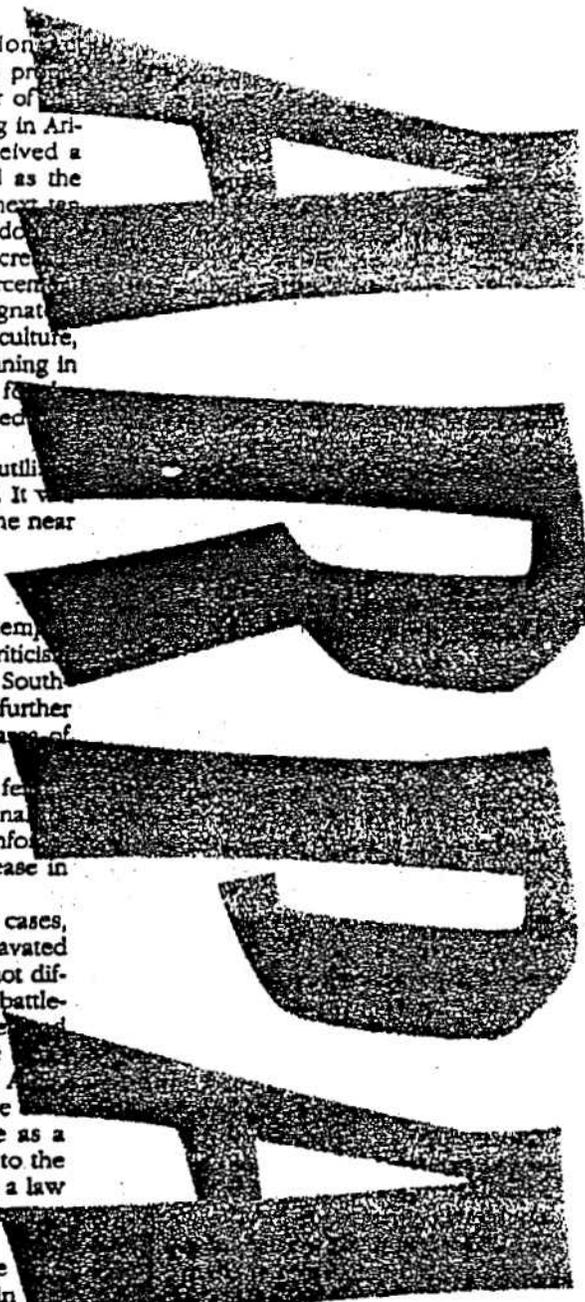
Expanded Developments and Use of the Law

Based on the feedback received from early ARPA prosecution attempts, amendments were enacted in 1988. These amendments overcame the criticism that ARPA was a law geared to the prosecution of "pot hunting" in the Southwest.⁴ The result was a highly flexible law that has proven to need no further adjustments to become an indispensable part of the legal culture in the area of resource protection.

In 1988, ARPA was amended to reduce the jurisdictional limit for a felony from \$5,000 to \$500. By conferring felony status on the majority of criminal investigations then pending, the attention given to ARPA cases by law enforcement agents and prosecutors increases, as evidenced by the sharp increase in ARPA indictments.

Prior to 1988, most of the ARPA prosecutions, and all of the felony cases, were prosecuted in the Southwest. In cases when defendants had excavated large sites looking for expensive prehistoric pottery and baskets, it was not difficult for the \$5,000 damage figure to be met.⁵ By contrast, in historic battlefield sites, a violator could dig just below the surface to obtain old bottles and Civil War artifacts which held much archeological interest, but very little commercial value. In such cases, prosecutors would charge suspects with an misdemeanor and work for a conviction that would serve as a predicate second or subsequent ARPA offense, which would then be chargeable as a felony offense, regardless of the amount of damage calculated, pursuant to the act. Once the minimum damage for a felony became \$500, ARPA became a law of national impact, with cases arising in Eastern battlefields and in underdeveloped parks on the Pacific and Atlantic coasts.⁶

Such an amendment may not have been possible prior to 1988. At the time ARPA became law, it acknowledged a dramatic shift in popular culture in the country. No longer would family picnics include digging for treasure on federal lands. The highly profitable, covert mining of public lands for prehistoric and historic items was dealt a blow. ARPA had its detractors, who appealed to Congress for, and in some cases received, compromises to the legislation. President Carter, an admitted arrowhead collector, signed the law, which included an exemption to the protection of arrowheads, if found on the surface of the ground. Congress included other safeguards to assure that unsuspecting hobbyists would not be made into felons.⁷ Rocks, coins, bullets, and minerals were exempted from the permit requirements of the law, in part in deference to the metal detector enthusiasts. This exception did not apply if the items were located within an archeological resource and were otherwise protected by the law. Not the least of these safeguards was the high threshold for a felony. By 1988, the public was on notice that collecting artifacts on public land was not only an act of common law theft, but was subject to more specific prohibitions. The Boy Scouts dropped the program dedicated to arrowhead



Article in Brief

ARPA provides the government with a powerful tool to protect and preserve these irreplaceable resources.

> Recent events have further defined and strengthened this law.

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collecting.⁸ Preservation legislation was enjoying a renaissance not seen in this country since 1906.

There were two other amendments of note in 1988. One conformed the method of calculating damages in a civil ARPA prosecution to coincide with the calculation of damages in a criminal case. In either instance, archeological or commercial damage amounts could be added to the cost of restoration and repair to determine the total amount of damage to the resource. Further, ARPA was amended specifically to prohibit attempted destruction of an archeological resource. This amendment was in response to the fear expressed in defense pleadings that a law enforcement agent could surveil a violation in progress until the requisite amount of damage for a felony had been perpetrated on the resource area. Such activity would be counterproductive to the purpose of the law and is unnecessary for a successful prosecution.

It is evident from the number of ARPA cases that have followed, that the amendments, the proliferation of training programs for and within federal agencies, and the attention of a caring public have had the cumulative effect of expanding the use of ARPA.

Recent Criminal Prosecutions

While it is not possible to detail the total number of ARPA prosecutions which have been successfully pursued in recent years, the following discussion highlights some of the cases that exemplify the practical use and expanded application of the law. District court cases noted exemplify the uses of the law; reported appellate opinions are still few. The variety of resources areas represented by the following cases demonstrates the versatile application of the law.

In *United States v. Lindauer & Owens*, one of the defendants was convicted of a felony ARPA violation as the result of a plea agreement and received a prison term.⁹ The resource area was located on the Lassen National Forest in the Eastern District of California. Other defendants indicted in the same case received misdemeanor dispositions under ARPA and forfeited to the government an artifact collection and the vehicles used in the commission of the offense. As the stated purpose of ARPA is to protect resource areas and to deter destruction, the *Lassen* case provides an example of an application of the criminal law to the extent necessary to effectuate deterrence.

A jury returned a verdict of guilty for a felony ARPA violation in *United States v. Charlton*, which resulted in a 22-month prison sentence.¹⁰ The case arose on the Cherokee National Forest in the Lake Hole burial cave. Probably the most notable legacy of this case was the involvement of the Cherokee tribe.¹¹ Previously unknown archeological information was collected and preserved. Thereafter, the tribe and the case archeologist jointly planned for an excavation the following year and for the reburial of the human remains by the tribe after scientific analysis of the items was complete.

In an earlier case, individuals who were using metal detectors in a Chancellorsville battlefield were convicted of ARPA misdemeanor violations.¹² The metal detectors used in the offense were seized. Misdemeanor convictions obtained under ARPA have been effective protection methods; a second conviction under ARPA is a felony without regard to the level of damage. The use of metal

detectors to hunt for Civil War artifacts does not in itself cause damage, but in the aggregate, the many small holes dug to retrieve items can leave a resource area in a highly damaged state. For this reason, government prosecutors have brought a number of ARPA cases in the Eastern districts, without requiring a substantial dollar damage figure as a charging standard.

The 1988 ARPA felony conviction of Bradley Owen Austin, which arose from activity on the Deschutes National Forest in Oregon, has become an ARPA milestone.¹³ Austin challenged the constitutionality of ARPA in his appeal to the Ninth Circuit—the same court that, in 1974, had found the Antiquities Act to be unconstitutional.¹⁴ The appellate opinion was written by the same jurist who authored the opinion in the case of *U.S. v. Jones*, which had prompted the passage of ARPA.¹⁵ Austin claimed that he had a First Amendment right to dig in furtherance of his education and that ARPA was vague and overly broad in its protection of "tools and weapons" as archeological resources.¹⁶ The court rejected both arguments and found that the law was constitutional in its scope and that the content of the law was sufficiently specific to give fair notice of what activity was prohibited and what resources were protected.

The Civil Prosecution Option

Although ARPA's civil prosecution option has been available to federal agencies since 1984,¹⁷ until recently there have been few known instances in which this portion of the law was utilized.¹⁸ The civil law was also amended in the 1988 legislation to conform the civil computation of damages with the criminal method.¹⁹ The only impediment to use of the civil process for federal agencies may have been the lack of an administrative law department. That has been rectified by cooperative agreements between the Department of the Interior, which has an office of hearings and appeals, and other agencies.²⁰ Given the rapid rise in criminal ARPA cases since 1988, it may be safe to assume that the number of civil ARPA actions will grow in the near future.

The U.S. Forest Service has pursued a civil ARPA case through the full extent of the process. In the case of *Bel River Sawmills v. United States*, a subcontractor to a timber sale purchaser was alleged to have damaged an archeological site when a road was built through a protected area.²¹ The Forest Service took action against the primary contractor, Bel River Sawmills, and its subcontractor and finally issued a notice of assessment. The respondents then appealed to the Department of the Interior's Office of Hearings and Appeals. The subcontractor claimed that its efforts to develop a water source inadvertently caused the damage and that its agents did not see the flags marking the area. The land manager had offered to settle the matter informally for less than the \$43,500 indicated in the damage assessment. That offer was refused. The administrative law judge (ALJ) accepted the amount of the damage assessment as the penalty, although he indicated that the actual amount of damage exceeded the penalty. Further, the ALJ found that inadvertent acts may be prosecuted under ARPA civilly, as intent was not an issue. In addition, the ALJ held that the regulations have the force and effect of law and are therefore binding.

The sawmill claimed that the court lacked jurisdiction to hold it liable for statutory penalties by vicarious liability.

the hearing officer agreed. The ALJ held that the remedy of the government was in contract, and the government has not appealed this decision.

Jurisdiction on Private Land

The passage of ARPA drew a loud response from those who thought of public lands as open territory for artifact mining. Clearly the law establishes the trust nature of the land, which belongs to the public as a whole and is managed by the various land management agencies.²² The fact that ARPA may be applied to private land is even more surprising and intolerable to these people. Under general criminal law, the taking of property from individuals without their permission is punishable as theft. Theft of private or state-owned property, which is then transported across state lines, has long been punishable in federal court under laws proscribing interstate transportation of stolen property. ARPA merely adopted existing law into its provisions.

In *United States v. Gerber*, the defendant called into question the applicability of the law to archeological resources located on private land.²³ Gerber and others had helped themselves to archeological items unearthed during road construction on property in Indiana owned by General Electric. Gerber took his booty to Kentucky. He entered into a guilty plea to ARPA and preserved for appeal his attack on the law. The Seventh Circuit discussed the relationship of state law to federal law and rejected Gerber's claims. Further, the court found that ARPA clearly stated its application to private lands.

Several associations of amateur archeologists filed amicus briefs in *Gerber*. They raised arguments reminiscent of those raised in *Austin*: their liberty to seek knowledge was infringed upon by a restriction which is applicable to private, as well as to state, lands. The court in *Gerber* reminded these people that "there is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them." ARPA does not restrict what landowners do on their own land, that is otherwise within the law.

Criminal Intent

Although the matter of intent continues to arise as a pre-trial issue, the criminal provisions of ARPA clearly establish a general intent law.²⁴ Trial courts have long held that the government is not required to prove specific intent.²⁵ ARPA's legislative history indicates a number of safeguards to protect the unwary hobbyist who may violate the law. The government need not prove that those accused knew they were on federal or Indian lands while excavating, or knew they were violating a state or local law when transporting protected items across state lines.

Forfeiture

Since the first forfeiture under ARPA in 1984, there have been no attacks on the entitlement of the government to archeological resources found in the possession of a

suspect or vehicles and equipment used in connection with an ARPA violation.²⁶ In recent years, it has become common practice for the government to seize and then forfeit vehicles and tools used in the commission of an offense. Archeological resources are seized as the property of the government or a tribe without using ARPA procedures.²⁷

Recently, in *Austin v. United States*, the U.S. Supreme Court has discussed whether a forfeiture may constitute an excessive fine in violation of the Eighth Amendment.²⁸ This is not likely to be a serious issue in ARPA forfeitures as the statute is not as pervasive as the drug forfeiture laws. ARPA forfeiture law does not allow a house to be seized merely because it is used to store protected resources. Vehicles used to transport protected resources, but which are not used to transport the items across state lines, to transport for sale of the items, or to remove them from public or Indian lands, may not be subject to an ARPA forfeiture.

In *Austin*, Justice Scalia took the position that a close connection between the property seized and the underlying offense is a relevant factor to sustain a forfeiture. This is consistent with the narrow drafting of the ARPA forfeiture law. It was acknowledged by the Supreme Court that forfeiture may serve the dual purposes of punishment and of removing the instrumentality of a crime. The Court also indicated that society may be compensated, in part, by the forfeiture for harm done by the illegal activity. This analysis is particularly applicable to an ARPA forfeiture when the archeological resources are priceless pieces of our heritage and when the financial ability of the defendant may be inadequate to compensate for even the costs of restoration and repair of the resource. It is therefore not likely that an ARPA forfeiture would be vacated by application of the Eighth Amendment.

Archeological Interest

To be protected under ARPA, an archeological resource must be material remains of past human life which are both of archeological interest and over 100 years old. Age and human involvement are not complicated factors to describe and prove. The controversy more often centers on the determination of archeological interest. This too is not as complicated as it may seem. Archeological interest is not synonymous with archeological significance. The term "significant" is not found in ARPA. Archeological interest is defined, in part, as "means capable of providing scientific or humanistic understandings of past human behavior."²⁹ Therefore the scientific or historic information which could have been derived from the site prior to the disturbance is of archeological interest, without regard to the singular nature of the information.

Proof of archeological interest is an essential part of the archeological resources element of a criminal ARPA prosecution. Therefore, it is necessary for the expert witness to describe the information which would have been gained, and, except for the disturbance, the part it would have played in the understanding of prior human existence.

will be used continually by those who want to deter the destructive activities and by those who feel they have been excessively assessed for transgressions.

This story-telling aspect of an ARPA case not only is interesting, but also is material. The burden on archeologists and other expert witnesses in a court case may have been alleviated by the proposed 1988 amendment to ARPA that would have deleted archeological interest as a component of proof, but it would have made the court cases less interesting and less appealing to jurors as a result.

Calculation of Damages

Damages to an archeological resource may be substantial. Further, the amount of damages in a criminal ARPA case may determine whether the matter is to be prosecuted as a felony or misdemeanor. In a civil ARPA matter, the damage amount forms the basis for the fine, which may be doubled for a second or subsequent offense. Therefore, a great deal of attention is focused on the expert witness and the calculation of damages.

Damages include the archeological or commercial value of a resource, plus the cost of restoration and repair. The method for calculating these damages is specified in the Uniform Regulations.³⁰ Therefore, although archeological value is an artificial construct devised as a method to determine a value for something that may have been destroyed, it is a statutory measurement and not the creative opinion of the expert. It is simply a method to determine a value for court purposes of something that may, in fact, be priceless. When a site is involved, the damage calculation may be for archeological value, whereas when an artifact is involved, commercial damages may be calculated. When both a site and an artifact are involved, the calculation may be for both damages to be proved in the alternative. Either amount is then added to the cost of restoration and repair for a total damage assessment.³¹

The components of the costs of restoration and repair are also specified in the Uniform Regulations. Since the adoption of these regulations, the cost component has been impacted by additional responsibilities placed on federal land management agencies, such as the return or reburial of Native American human remains.³² Costs associated with these obligations may be added to damage assessment.³³ The Native American Graves Protection and Repatriation Act specifies a process for the inventory and repatriation of Native American human remains. The costs associated with reinternment of human remains is specifically listed in the ARPA Uniform Regulations as a factor in a damage assessment. Items that are not repatriated remain in the custody and care of the federal government. These items are subject to curation under the curation regulations.³⁴ The cost of curation in compliance with these regulations is also a factor in a damage assessment.

Tribal Application and Use of ARPA

Criminal ARPA violations which occur on Indian lands are subject to prosecution in federal court. However, as the tribes develop ARPA regulations as part of their civil code, they will have jurisdiction to prosecute civil ARPA cases in tribal court. Judgments obtained in tribal court will then be subject to domestication and collection in the appropriate state court. ARPA requires that any penalties collected, and any items seized pursuant to the law which concern archeological resources located on Indian lands, are to be transferred to the affected tribe. Civil cases pursued in a tribal court would simply give the tribe more

control over the disposition of matters and perhaps increase the deterrence impact of ARPA on tribal territory where the law is known to be aggressively utilized.

Expanded Civil Prosecution

Although the civil aspects of ARPA were seldom utilized prior to the Eel River Sawmills case, the number of civil cases will grow dramatically in the future. If there is a correlation to be drawn from the growth of ARPA criminal prosecutions, once the process is utilized, numerous cases will follow.³⁵ Those federal agencies that do not have access to an administrative law court may enter into a memorandum of agreement with agencies that have such courts available. The next wave of ARPA prosecutions may be those involving government contractors who are held responsible for actions outside of their contract authority or for damages done during their control of an area.³⁶

Increased Use of Experts

As ARPA court cases increase, the need for specialized experts will also increase. Experts in the field of forensic archeology have gained a great deal of experience in ARPA court cases over the last ten years. Most of the testimony has come from federal agency and university archeologists who are familiar with contract archeology. They are well-suited to compiling the damage analysis required in assessing the amount of archeological damage.³⁷ When the testimony needed pertains to assessing the site or item as an archeological resource, experience in contract archeology is not an issue. These witnesses may or may not be PhDs, rather their knowledge of the particular area will determine their expertise. Academic credentials may pertain to the weight and not the admissibility of the testimony of the witness.

Experts in Native American tradition may also give testimony pertaining to the archeological interest of an item or site. The testimony of Native Americans in court provides compelling evidence of cultural practices. They may also testify as to the cost of reburial.

Conclusion

The last ten years have been eventful for those involved in resource protection, as well as for those involved in resource mining, collection, and sales. Now that ARPA is well ensconced in the legal landscape, the courts will be used continually by those who want to deter the destructive activities and by those who feel they have been excessively assessed for transgressions. There are no further amendments to ARPA on the horizon and none are needed. Although the body of appellate law may grow, the basic issues are clearly defined. The application of the law may be as flexible as the individual situation requires to deter destruction and to protect irreplaceable resources. ■

Sberry Hutt is a superior court judge in Arizona. She is the co-author of Archeological Resources Protection (Preservation Press, 1992), and is a lecturer on ARPA for federal agencies and the University of Nevada, Reno. Hutt received her J.D. from Arizona State University in 1975. © 1995, Sberry Hutt.

Endnotes

¹Pub. L. No. 96-95, 16 U.S.C. §§ 470aa-470mm (Oct. 31, 1979).

²United States v. Jones, et al., 449 F. Supp. 42 (D. Ariz. 1978); rev'd, 607 F.2d 269 (9th Cir. 1979); cert. denied, 444 U.S. 1085 (1980).

³LOOT Clearinghouse, Archeological Assistance Div., National Park Service, Report (1989).

⁴The ARPA definitions listed Southwest artifacts as examples, and the \$5,000 damage criteria for a felony was more likely to be met in Southwestern sites where extensive digging was prevalent and the 100-year requirement for protection was more applicable to ancient Indian sites than to historic sites, such as battlefields found in the East.

⁵Archeological value is determined by calculating the cost to scientifically excavate a site that is hypothetically drawn adjacent to the damage area and of approximately the same size. 16 U.S.C. § 470ee(d) and 43 C.F.R. pt. 7 § 14(a). Commercial value is determined by the fair market value of any items found. 43 C.F.R. pt. 7 § 14(b).

⁶See generally LOOT Clearinghouse Report, *supra* note 3; FEDERAL ARCHEOLOGY REPORT, ARCHEOLOGICAL ASSISTANCE DIVISION, NATIONAL PARK SERVICE. Both documents list recent prosecutions brought under the various protection statutes.

⁷16 U.S.C. § 470ee(g), and first-time ARPA offenses of less than \$500 in damage are misdemeanors, 16 U.S.C. § 470ee(d).

⁸BRUCE GRANT, THE BOY SCOUT ENCYCLOPEDIA 12 (1965 ed.) (arrowheads)

⁹No. 1134105 (E.D. Calif., Oct. 26, 1990).

¹⁰No. 290-73 (E.D. Tenn., Oct. 18, 1990). Ten defendants were charged with ten felonies and four misdemeanor counts and all ten were found guilty by a jury or by guilty plea.

¹¹The Tribal Council of the Eastern Band of Cherokee Indians were kept informed of the case as it progressed and passed a resolution regarding their feelings to be used at the sentencing.

¹²United States v. Newcamp, No. 87-1110-M (E.D. Va., Sept. 11, 1987).

¹³United States v. Austin, 902 F.2d 743 (9th Cir.), cert. denied, 111 S. Ct. 200 (1990).

¹⁴United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) (holding that the term "object of antiquity" was void for vagueness).

¹⁵449 F. Supp. 42 (D. Ariz. 1978).

¹⁶902 F.2d 743 (9th Cir.).

¹⁷ARPA Uniform Regulations, 18 C.F.R. 1312 (Tennessee Valley Authority), 32 C.F.R. 229 (Defense), 36 C.F.R. 296 (Agriculture), and 43 C.F.R. 7 (Interior). (Jan. 6, 1984).

¹⁸Prior to 1992, there are no reported cases in which an ARPA civil case proceeded to an administrative hearing. There were, however, a few instances in which a notice of civil assessment was served and a penalty was paid. One such action was taken by the Bureau of Land Management in Battle Mountain, Nevada, in 1987.

¹⁹16 U.S.C. § 470ff(a)(2)(A). Commercial value was added to archeological value as an option for a compo-

nent of civil penalty computation. The Uniform Regulations, as amended, appear at 52 F.R. 47721.

²⁰U.S. Department of the Interior Departmental Manual 519, DM 2, Appendix 1, (Agriculture, Feb. 10, 1988), (TVA, Feb. 22, 1990). See also, THE CIVIL PROSECUTION PROCESS OF THE ARCHEOLOGICAL RESOURCES PROTECTION ACT, TECHNICAL BRIEF NO. 16, ARCHEOLOGICAL ASSISTANCE DIV., NATIONAL PARK SERVICE, DEPT. OF INTERIOR (Feb. 1994).

²¹Eel River Sawmills, Docket Nos. ARPA 90-1 and 90-2, before the U.S. Department of Hearings and Appeals, Hearings Division, Salt Lake City, Utah (Aug. 10, 1992).

²²The law does not limit land managing responsibility to the four signatory agencies to ARPA; Interior, Agriculture, Defense and TVA. Federal lands managed by other agencies, such as the Department of Energy, may adopt the ARPA Uniform Regulations.

²³999 F.2d 1112 (7th Cir. 1993).

²⁴The *mens rea* required in ARPA is "knowing." See H. REP. NO. 96-311, reprinted in 1979 U.S. CODE CONG. & AD. NEWS, at 1714 ("This is a general intent crime . . .").

²⁵See, e.g., United States v. Kohl, No. 85-10044 (D. Idaho), Feb. 13, 1986).

²⁶United States v. Tidwell, No. CR 84-026PHX (D. Ariz.) (vehicle forfeiture by plea agreement in 1984).

²⁷16 U.S.C. § 470gg(b) (provides for the forfeiture of archeological resources involved in a violation, however, items known to have come from federal or Indian lands as the property of the landowner are retrieved and not forfeited).

²⁸61 U.S.L.W. 4811 (June 28, 1993).

²⁹43 C.F.R. pt. 7 § 3(1).

³⁰43 C.F.R. pt. 7 § 14.

³¹16 U.S.C. § 470ee(d). The damage assessment in a civil matter forms the basis for the penalty. However, in a criminal matter, it is not synonymous with a fine. A fine, which is punitive, may exceed the damage assessment to achieve deterrence. The damage amount may be considered as a basis for court ordered restitution to the agency or the tribe.

³²Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3052 (1990).

³³The list of items in the Uniform Regulations 43 C.F.R. pt. 7 § 14(c) is not all inclusive.

³⁴Curation of Federally-Owned and Administered Archeological Collections, 36 C.F.R. § 79.

³⁵Civil archeological protection cases may occur under other authority than ARPA. A civil action was brought before an administrative law court for the Department of Commerce, National Oceanic and Atmospheric Administration regarding the looting of a shipwreck under NOAA jurisdiction. Seven Los Angeles scuba divers were assessed a total fine of \$132,000 for removing artifacts from two historic shipwrecks in the Channel Islands National Park and the Channel Islands Marine Sanctuary.

³⁶Most federal government contracts now contain a specific requirement for ARPA compliance.

³⁷The site damage assessment compiled in an ARPA case will incorporate the standard in the industry for scientific excavation of archeological resources.



The Civil Prosecution Process of the Archaeological Resources Protection Act

Sherry Hutt, Judge, Superior Court, Maricopa County, Arizona

This Technical Brief details the procedure for pursuing a civil violation of ARPA through the administrative law process. Its purpose is to provide a succinct blueprint for use by land managing agencies when civil prosecution under the law is the desired option. Note that in the event of any discrepancy between this Technical Brief and applicable ARPA regulations, the regulations control. Citations in this brief will depart from the standard American Antiquity style in favor of the legal citation format used by lawyers and Administrative Law Judges.

Introduction

The Archaeological Resources Protection Act of 1979 (ARPA)(1), as amended, provides a means to assertively protect the ancient and historic remains of the cultures that have inhabited Federal and Indian lands. The Act provides for criminal and civil penalties against those who excavate, remove, damage, or otherwise alter or deface archeological resources, or attempt to do so, without a permit.(2) ARPA with its amendments and accompanying Uniform Regulations offer agencies flexible alternatives to employ in the preservation of resources under their protection.(3)

Criminal enforcement of ARPA has become an active part of the repertoire of agencies across the United States.(4) It is not unusual for vehicles and the tools of the violation to be subjected to seizure in connection with the criminal prosecution.(5) In contrast, civil prosecution under ARPA has been rarely and only recently pursued.(6) The purpose of this technical brief is to provide a familiarity with the civil provisions of ARPA that may expand its future use.

Background of the Civil Process

Development of the Civil Law

ARPA provides for civil penalties and outlines a description of damage calculation to determine a penalty assessment.(7) Criminal violations are specifically set forth in statutes, whereas the civil process depends upon descriptive regulations. Although ARPA became law on October 31, 1979, the Uniform Regulations were not adopted until January 6, 1984. The Department of the Interior Supplemental Regulations, which are an integral part of the process, were promulgated in 1987.(8) By the time the civil process was a completed package, agencies were actively training law enforcement personnel and archeologists to enforce the criminal aspects of the law. Priority was given to those cases that merited criminal prosecution and much time was spent preparing those cases to overcome reluctant prosecutors

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who were unfamiliar with the law. In 1988 ARPA was amended to establish a \$500 threshold for felony prosecution, in place of the previous \$5000 threshold, and ARPA criminal prosecutions grew in number rapidly.(9) Since 1988, successful ARPA criminal prosecutions have been reported with some frequency throughout the country.(10) Experienced ARPA prosecutors, while in great demand, are no longer rare.

It is now time to explore the use of the other ARPA prosecution, the civil prosecution. The use of the civil option will not replace criminal prosecution. Rather, those incidents that for one reason or another do not merit criminal prosecution will become the subject of the civil process. These are the incidents that have been overlooked although they are no less important in the effort to preserve and protect archeological resources.

Cooperative Agreements

In order for an agency to proceed in a civil matter it must have access to an Administrative Law judge (ALJ). The Department of the Interior Office of Hearings and Appeals is ideally suited to the task, but not every agency is similarly staffed. The lack of an agency ALJ impeded active civil enforcement for agencies outside of the Department of the interior. That problem has now been rectified with the issuance of Memoranda of Agreement with Interior executed by the Forest Service and the Tennessee Valley Authority.(11) One of the first civil ARPA cases to utilize the Interior ALJ was brought by the Forest Service.(12)

The Civil Advantage

There are a number of reasons to favor civil prosecution over criminal. Some of these are inherent in civil procedure regardless of the particular substantive law.

Burden of proof: In a criminal trial the prosecutor must prove the defendant guilty beyond a reasonable doubt. This is a substantial burden, which calls upon jurors to feel as comfortable about their decision as they would in making a decision in the more important affairs of their daily life. Punishment is not to be discussed in a criminal trial, but the jurors know that their verdict could impact the liberty of the defendant. The standard of proof in a civil case is one of a preponderance of the evidence. That is a tipping of the scales in favor of the claim being made.

Non-Jury Trials: A criminal defendant who faces a significant loss of liberty (six months or more) is guaranteed a jury trial. This fundamental right is not an issue in civil matters, which are tried before an ALJ outside of the jury trial process, since the only loss is monetary. Civil penalties may include a prohibition from entering a Federal or Indian enclave or may require some constructive activity but will never include incarceration. Administrative proceedings are therefore less time-consuming, less expensive, and less formal.(13) To convict a criminal defendant the twelve member jury must reach a unanimous verdict. To find that the civil defendant is responsible the agency must convince the ALJ that the facts are complete. ARPA criminal trials also may be interesting instructive sessions that educate the jury and instill in them an understanding for the law and reasons to care about archeological sites. Every jury trial, however, carries the ever-present possibility of error and a mistrial requiring a repeat of the process. In contrast the civil hearing is simple and direct.

Optional Use of Lawyers: Depending on its policy, the individual agency is not necessarily represented by an attorney at an ALJ hearing. A case may be presented by the law enforcement agent and the archeologist. Therefore, if criminal prosecution of ARPA is declined by the U.S. Attorney's office in the appropriate district, the agency is not foreclosed from taking action against an alleged violator. In a civil case the defendant is not entitled to representation by a lawyer as a matter of constitutional right. The

defendant may obtain counsel or proceed *in proper persona*, on behalf of one's self, but the agency does not bear the cost of the defendant's legal representation.

Civil Penalties Versus Fines: In a criminal prosecution, in addition to or in lieu of a period of confinement, the defendant may be ordered to pay a fine. The fine also may replace a prison term. Fines have two limitations: first, they may not exceed \$100,000 for a misdemeanor conviction and \$250,000 for a felony conviction, and second, they are paid not to the agency but to the general fund of the U.S. Treasury.(14) Restitution may be paid to the agency in an amount deemed appropriate by the judge after considering everything else levied against a defendant and the ability of those held responsible to pay. Penalties in a civil proceeding are assessed based on the actual damages proven at the hearing.(15) These assessments become judgments that may be collected directly by the agency or the Indian tribal authority affected by the violation.

Agency Discretion: A criminal case presented to the office of the local U.S. Attorney transfers decision making authority to that office. Depending on the policy of each district office the recommendations of the Assistant U.S. Attorney to whom the case is assigned will usually determine whether to prosecute, whom to prosecute, when, and for what offenses. That office will determine whether to forfeit items and what items to forfeit. Although the Assistant U.S. Attorney will consult with the agency through the law enforcement agent, the office of the U.S. Attorney makes decisions in plea bargaining and prosecution resolution. In a civil proceeding the agency never loses total control over the presentation of the case. Negotiations prior to judicial resolution are handled by the agency area manager, who has been delegated the authority by each respective Secretary or agency official.

Agency Policy Determination

The agency area manager, or equivalent officer, determines whether to maintain a case for civil prosecution or to refer the matter to the U.S. Attorney's office for criminal prosecution. The number of ARPA violation investigations has grown to a point that now may allow the agency area manager to establish policies for the referral of a case. This information will assist the agent in the field to properly direct their reports and to involve the appropriate lawyer, U.S. Attorney, Solicitor, Office of General Counsel or Judge Advocate General. It will also assist the first contact officer in the field in determining which option should be employed.

There are other options beyond criminal or civil prosecution under ARPA alone. It is possible to seize the tools and vehicles used in a violation without the prosecution of an individual.(16) Each agency has published regulations in the Code of Federal Regulations (CFR) that prohibit various activities that apply to the protection of sites managed by that agency.(17) All of the pre-ARPA options available to land managers still exist. ARPA merely adds to those options. However, if an individual is cited prematurely under a CFR section that protects archeological resources, and if the individual quickly enters a plea of guilty to that violation before the nearest magistrate, the agency will be prevented from proceeding further under ARPA, criminally or civilly. To do so would constitute double punishment. The agency may still bring an action to forfeit a vehicle or tools used in the commission of the offense.

Avoiding Double Punishment: Once the agency submits a case for criminal prosecution, the agency loses control of the case until and unless the U.S. Attorney issues a declination letter indicating a decision not to proceed. If the criminal case does proceed but the sentence does not include forfeiture, the agency may still seek forfeiture in a separate civil proceeding. Forfeiture is available under ARPA if the defendant is cited for a CFR violation rather than an ARPA violation.

It is important to realize that if a criminal case is negotiated by an Assistant U.S. Attorney and if the

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negotiations include financial considerations, either as a fine based on the damage amount or as restitution, the agency may not later assess a civil penalty against the defendant. This would amount to double punishment. When a defendant in a criminal case is sentenced to pay a fine in lieu of incarceration and the amount of the fine is based upon an amount calculated to deter future violations, civil prosecution remains an option.(18)

Issues in the Proof of a Civil Case

Jurisdiction

Civil and criminal prosecutions have the same jurisdictional basis. That is, for the law to apply, Federal or Indian lands must assertedly have been impacted by the alleged violator.(19) Indian lands include lands of Alaska Native Village corporations and Native Hawaiian as well as trust lands subject to a restriction on alienation. Federal lands include those in Puerto Rico, Guam, and the Virgin Islands or any lands held in fee title by the United States.(20) The only exception to tying the violation to Federal or Indian lands is when an otherwise protected item is obtained in violation of a State or local law and then transported in interstate commerce.(21)

Any person who commits a prohibited act on the lands under the jurisdiction of ARPA is liable under the law. Person is defined as "an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision thereof."(22) The description of person is important to note in the context of a potential civil action because the type of "person" will more often be broadly construed than in the typical criminal case. For example, a corporation that is not charged in a criminal ARPA indictment nonetheless may find itself facing civil ARPA charges. The reason for the difference may be found in the intent exhibited by the violator. Intent is discussed below.

Identification

In all cases, the "person" to be held accountable must be identified. This may be a direct identification, as in a criminal case, where the violator is observed at the scene. In a civil case the alleged violator may be identified as the "person" responsible for the care and control of a site such as the private contractor who allows a protected area to be bulldozed. The alleged violator also may be a business that allowed equipment to be rented if the firm knew or had reason to know the use planned for the equipment (see intent). More than one person may be held responsible, although each may have had a different level of involvement. Directors of corporations and even government employees are not immune from civil liability.

Protection of Archeological Resources

Under ARPA the protected items are the same in both civil and criminal prosecutions.(23) Archeological resources are those material remains of past *human* life where there is sufficient material remaining to extract scientific data.(24) The ability to gain information about past human life from the material remains is referenced in the law as "archeological interest." The items also must be over 100 years old.

Expressly excepted from the protection of ARPA is the collection of arrowheads found on the surface of the ground.(25) Although technically protected, as a practical matter "arrowhead" includes any object that would appear to the common person to be an arrowhead even if it is actually a spear point or a scraper. To be protected the stone point must be totally subsurface. Generally, unworked minerals, rocks, and paleontological (fossil) specimens are not protected by ARPA unless they have evidence of human

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interaction.(26) However, where these items are found within an archeological site they are protected if they can render clues to the past human existence. The proof of this issue will rely on the expert testimony of an archeologist. Similarly, coins and bullets are not protected unless they are found in a direct physical relationship with an archeological site, such as in a battlefield.(27)

Authority of a Permit

Where the person holds a valid ARPA or comparable permit and acts within the permit, there can be no violation.(28) Any lawful excavation will be overseen by an individual holding the permit. Government contracts and government employment status may take the place of an ARPA permit because they act as authority to undertake the activity obligated by the contract or within the scope of employment. Government contracts do not excuse the obligation to act responsibly, and all government contracts will or should contain ARPA language.(29) Government employees and volunteers working with the government do not need a permit. However, if their actions exceed the scope of the job they may face civil sanctions.

ARPA violations may still be perpetrated by the holder of a permit or government contract where the action taken exceeds the authority of the document.(30) This may occur if unnecessary excavation takes place or if the contractor or permittee strays from the designated area.

Calculating the Amount of Damage

Civil and criminal archeological site damage calculations are conducted in the same manner, but the application of the information varies. Damage calculations in civil actions become the penalty amount, whereas in criminal actions the amount of damage determines the severity of the crime, and the damage may be a factor in sentencing. A criminal defendant may be ordered to pay the damage amount as restitution to an agency.

Quantifying Damages: The amount of the penalty is determined by calculating the archeological damage to the area or the commercial value of the materials and adding either, but not both, to the cost of restoration and repair of the materials or the area that was damaged.(31) This is another aspect of case preparation that is dependent wholly upon the archeologist acting as an expert witness. Commercial value of an object may be determined by the price placed on the object by the alleged violator, by the going price of similar objects offered for sale, or by research in collector catalogs. Archeological value is described in the Uniform Regulations as the cost of scientific data recovery that would have been attainable prior to the violation in an area that is adjacent to the violation site, and that is of comparable size.(32) It assumes that the disturbance has created a situation of forced excavation even though no further data recovery may occur in the near future. It enables the agency to arrive at a dollar amount of damage even though the actual loss of a nonrenewable resource is priceless.

Added to the archeological damage or commercial value is the cost of restoration and repair. This includes the actual costs of reconstruction or stabilization of the archeological resource, surface stabilization, research to carry out stabilization, physical barriers or protective devices to guard against further disturbance, analysis of the remaining archeological materials, reinterment of human remains, curation, and the preparation of reports necessary to do any of the above activities.(33)

Damages as Civil Penalties: In a civil ARPA case the damage amount becomes the actual amount that may be assessed to the person or persons found to be responsible. There is no minimum or maximum amount. When there are subsequent violations by a person, the amount of the damages assessed is doubled.(34) In no situation may the person be assessed more than double the actual damage amount.

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The land manager does have the discretion in the negotiation of a civil penalty amount prior to an administrative hearing to reduce the assessed penalty. When the violation is so egregious that the damage assessment as a sanction is insufficient, then criminal prosecution may be the more appropriate course of action. The criminal law provides for incarceration and penalties over and above the actual damage amount. However, the maximum fine in a criminal action against an individual is \$250,000 and against a corporation is \$500,000.(35) It is possible for civil penalties to exceed these limitations.

Forfeiture

As part of the civil proceeding, the ALJ may order that archeological resources in the possession of the person and all vehicles and equipment which were used in the violation be forfeited.(36) All items which were forfeited by order of the ALJ and that involved violations that originated on Indian lands are to be turned over to the Indian or Indian tribe affected. Where Indian interests are not affected, the items are forfeited to the United States. Agencies receiving forfeited vehicles and tools place them into agency use. Native American human remains are subject to repatriation wherever they are found, and non-repatriated items are subject to curation under the Federal curation regulations.(37)

Intent, a Non-Issue in Actions Based on Negligence

In every criminal action the intent of the defendant must be proven. The criminal statute will either call for the government to prove the specific intent of the alleged wrongdoer or show general intent. That is, the government must show that the defendants actually knew they were doing wrong and persisted in their actions, or that they knew what they were doing though they may have had no knowledge of the law. The ARPA criminal statute is a general intent law.(38) In a civil case intent is not an issue. A person may be liable civilly even if the person had no knowledge of the prohibited activity if the actions of the wrongdoers occurred while in the employ of that person or under that person's supervision. Negligence, which gives rise to civil liability, is:

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.(39)

Inadvertence, carelessness, thoughtlessness, and inattention are all negligence. Where there is a duty to act or a contractual obligation to take action, the failure to act is negligence. Therefore a person may be negligent due to an action or failure to act. Negligence may exist even where there is no ill will or no desire that injury occur.

Civil penalties also may be assessed for any violation of a permit.(40) Intent is not an issue, and the alleged violation may be technical or inadvertent. In the case of technical violations of a permit, agencies must proceed cautiously in seeking sanctions. During the passage of ARPA, Congress expressed concern that penalties not be used to harass citizens in their normal use of public land.(41)

Procedural Component of a Civil Case

The decision whether or not to proceed in a civil ARPA case rests wholly within each individual agency and the designated divisions therein. ARPA gives the land manager, that is the designee of each Secretary or the head of a Federal land managing agency, the authority to initiate proceedings. Therefore, each Area or Park Superintendent, Forest Supervisor, or Base Commander may set policy to govern the option to proceed in house. Over time each division will develop policy that guides agents in the field so that they can determine whether the violation that confronts them should be handled civilly or criminally.

Once a matter is submitted to the office of a U.S. Attorney the agency control is held in abeyance until the U.S. Attorney decides how the matter is to be handled and concludes its action. Those who investigate ARPA matters should not be overly concerned with what the land manager decides since the ARPA investigative work is the same regardless of how the case eventually will be handled.

The ARPA case begins with the determination by the land manager as to how to proceed. The following procedure applies when the decision is to proceed civilly and when forfeiture is a desired option. Also, after the conclusion of a criminal matter where actual monetary damages related to the disturbance of the site were not sought or negotiated in a plea agreement, or where forfeiture was not pursued, the land manager may proceed with the following civil process.

Report to the Land Manager

The agency law enforcement personnel, or investigative personnel in the case of the Corps of Engineers, will compile the ARPA case report. It will contain the information necessary to determine whether evidence exists for each of the issues of proof discussed above. The report also will contain a site damage analysis and the basis for archeological interest that places the site within the protection of ARPA. Photographs, maps, returns on search warrants, and descriptions of seized property will be included when they apply.

The use of legal support for the agencies varies. In most instances the land manager will decide how to proceed based on the report. In the Forest Service, policy now requires that the report be submitted to the office of General Counsel when civil action is contemplated so that an attorney may advise the land manager at each stage of the proceedings. The law does not require, and civil actions are not dependent upon, representation of the agency by counsel (see ALJ hearing below).

Notice of the Violation

Service: A civil action begins with the Notice of Violation which is served on each alleged violator. A corporation is served through a statutory agent who is listed with the Secretary of State. Personal service may be by a process server although the regulations allow service by registered mail, return receipt requested.(42) All actions that follow will be predicated on the ability of the land manager to prove that actual service on the suspected violator has occurred.

Contents: The notice will be in letter form, signed by the land manager designee (Appendix A). It will contain a short statement of the facts that indicate what occurred, where, and how the alleged violator was involved.(43) This brief statement is not a recitation of everything in the report. The notice letter will indicate whether the asserted violation occurred without a permit or outside the scope of a contract or employment agreement.(44) The notice normally will state the amount of the proposed penalty, although the regulations allow the notice to be sent with an indication that the actual amount is to be ascertained and will follow in a separate notice. (45) Since the notice is not complete without a specific penalty amount stated, two separate letters may impact on the ability of the land manager to show proper service. There will be instances, however, when prompt notice will prevent further damage even though the site damage analysis is not complete.

The notice must advise the violator of the options (1) to discuss the matter informally with the land manager, (2) to file a Petition for Relief which will trigger the administrative law process, or (3) to take no action and receive a notice of final assessment.(46) The notice will advise the alleged violator of the option to remit payment which will close all further proceedings. Finally, the notice must advise the alleged violator of their right to seek judicial review of all administrative determinations.

Timing: The Notice of Assessment should be served in a reasonable time after the incident is investigated. While there are no specified time limits, general principles of timeliness do apply. If the matter languishes until the evidence of the violation becomes obscured, it may be no longer appropriate to pursue the action. It is reasonable for several months to elapse while investigative work is being completed, and it may take time to find the alleged violators and to tie them to the scene. After four years an action may be prohibited.(47) The 45 day period within which the alleged violator must respond does not begin until the receipt of the notice letter which contains the assessed penalty amount. Therefore the suspected violator may be notified of the asserted violation, but the obligation to respond would not begin until receipt of the second notice letter with a specific penalty.

Respondent's Options

Once the suspect, who is termed the respondent in a civil action, receives the notice one of four courses of action must be taken within 45 days. The first and most desirable option for both sides is the scheduling of a meeting with the land manager to informally discuss the asserted violation and the amount of damages.(48) Such an informal discussion complies with the Presidential "Civil Justice Reform" order issued in October 1991.(49) The intent of the Executive Order is that no formal litigation commence without an attempt to informally resolve the matter.

The respondent may bypass the land manager by filing with the land manager a Petition for Relief.(50) This will place the matter before an ALJ to hear and decide. If the respondent accepts the damage amount and responsibility for the damages, the land manager may be paid in full or the respondent may notify the land manager in writing that the amount is acceptable.(51) This acceptance of the civil penalty by the respondent, in writing, relieves the land manager of any obligation to send a second letter as a formal notice of assessment. If the respondent later reneges on the payment of the penalty, the land manager may obtain a court judgment and proceed to collect on the judgment (see judgment below). The respondent may take no action and await the notice of the final assessment from the land manager.(52)

Informal Meeting

When a request is made for an informal meeting within the 45 day period, the land manager is obligated to comply. This discussion may be attended by the respondent with or without counsel. The land manager may have present any personnel deemed necessary, which may include the investigator and the archeologist. Whether counsel is present for the government will depend upon the policy of each agency.(53) The Office of Hearings and Appeals prefers the use of counsel at all times, since this furthers orderliness and due process.

During the informal discussion the respondent may try to impress the land manager that there is no responsibility or that the damages are too high. If a negotiated compromise is reached, it should be put in writing and signed by both the land manager and the respondent. This agreement will become the amount indicated in the notice of assessment. If no compromise is reached, the land manager still will prepare a Notice of Assessment.

If the land manager determines that no violation has occurred or that the respondent is not the responsible party, a written notice of that fact will be sent to the respondent indicating that no penalty shall be assessed.(54) The land manager may determine that additional information is necessary, which will continue the investigation.(55) When the additional information is received the land manager will then issue the Notice of Assessment. The regulations do not contemplate a second informal meeting after further investigation, but there is nothing in the regulations to preclude such action. If at the initial

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informal meeting the land manager determines that further investigation is warranted and if this further investigation reveals a good deal of new information that impacts the original Notice of Violation, the land manager could serve a second or amended Notice of Violation, and the process would begin anew.

Petition for Relief and Formal Hearing

The uniform regulations to ARPA provide for the respondent to request a formal hearing with the land manager.(56) The Petition for Relief is a letter, which responds specifically to the Notice of Violation (Appendix B). This petition must be in writing and must be signed by the individual respondent or an authorized officer of a corporate respondent. It must be filed with the land manager no later than 45 days from receipt of the notice of violation. Although the uniform regulations do not resolve the possible problem of the running of the 45 days while informal negotiations are pending, it would seem reasonable that the 45 days to file a petition for relief be extended in writing when the respondent has requested and scheduled an informal meeting within the 45 day period. The petition for relief must indicate specifically the factual or legal reasons for any relief requested by the respondent. This document gives the land manager another opportunity to consider all issues before the determination of an assessment. The filing of a petition for relief does not entitle the respondent to a hearing with the land manager.

Assessment of a Penalty

The land manager will issue a written Notice of Assessment which is to be served on the respondent(s) in the same manner as the Notice of Violation (Appendix C). The assessment will be sent after the 45 day period has lapsed or at the conclusion of any informal meetings and the receipt of a timely Petition for Relief.

Determination of the Penalty Amount: If the alleged violator does not respond, the assessment may repeat most of the initial Notice of Violation. If a hearing or meeting has taken place, the Notice of Assessment must discuss the information presented at the hearing or meeting or furnished in the petition for relief.(57) The penalty shall be assessed in accordance with the law and regulations discussed above.(58) Nonetheless, the land manager may assess an amount that is less than the maximum calculations for reasons enumerated in the regulations. The assessment may be reduced if:

1. the respondent agrees to return archeological resources taken from public or Indian lands, which agreement may extend beyond the items originally noticed;
2. the person agrees to assist in preservation, protection, and study of archeological resources on public and Indian lands;
3. the person will give information to assist in the detection, prevention, or prosecution of other violations of ARPA;
4. first time offenders show a demonstrated hardship and inability to pay;
5. there is no willful commission of the violation;
6. the proposed penalty is excessive;
7. the proposed penalty is unfair.(59)

Content of the Notice of Assessment: The Notice of Assessment will contain the facts and conclusions that resulted in the determination that a violation occurred and that the respondent committed the violation.(60) It will indicate the basis for the assessment, including the site damage amount (doubled after the first offense), less any amounts due to mitigation for any reasons stated.(61) The assessment shall advise the respondent of the right to an administrative hearing and provide the addresses of the appropriate administrative forum and the office of counsel for the agency. The notice shall state that the decision of the ALJ may be appealed administratively, and thereafter, judicial review of the final

administrative decision may be sought in the appropriate United States District Court.(62) Finally, the notice should advise the person that failure to request a hearing, in writing within 45 days, will result in a waiver of the right to a hearing.

Administrative Hearings

Request for a Hearing: Within 45 days of the receipt of the Notice of Assessment the respondent must request a hearing or the right is deemed to be waived.(63) The request must be in writing and accompanied by a copy of the Notice of Assessment.(64) The regulations do not indicate specifically that a Petition for Relief be included with the request, but it would be appropriate for the respondent to indicate the specific aspects of the assessment with which exception is taken.(65) The request may be delivered in person or sent by registered or certified mail, return receipt requested. It is important for the respondent to show proof that a hearing request was timely. The regulations allow the person to deliver the request personally and thus save the cost of a process server. The addresses for delivery of the notice are given in the Notice of Assessment.

Administrative Law Judges: The ALJs function within and are part of the Executive Branch. They are not part of the Federal court system. Not every agency employs ALJs, and until recently a civil ARPA case may not have been an option. By Memorandum of Agreement the Forest Service and the Tennessee Valley Authority (TVA) have removed this impediment.(66) The following description will track the process before the Hearings Division, Office of Hearings and Appeals, Department of the Interior.

ALJ Process: The Department of the Interior ARPA Supplemental Regulations specify the documents to be mailed to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954, with the request for a hearing.(67) The request must be in writing and dated. It must include a copy of both the Notice of Assessment and the Notice of Violation. Further, "the request shall state the relief sought, the basis for challenging the facts used as the basis for charging the violation and fixing the assessment. . . ."(68) Therefore, the request establishes the issues for the hearing. In addition the respondent may indicate preferences as to the place and date for the hearing.

A copy of all documents sent to the ALJ must be sent to the legal counsel for the agency that initiated the procedure. For example, if the agency is within the Department of the Interior, the Solicitor of the Department must receive a copy personally or by registered or certified mail, return receipt requested. Forest Service matters will be handled by its Office of General Counsel, and TVA matters will be handled by its General Counsel.(69) The respondent must serve notice to the office listed in the Notice of Assessment.

Once a specific ALJ is assigned to the case, all communications are sent directly to that judge. Copies of all documents sent to the ALJ must be sent to the other party.(70)

Representation by Counsel and Appearance at a Hearing: Each Department's policy states when counsel will appear on its behalf at ALJ hearings. Currently the offices of General Counsel for the Forest Service and the TVA prefer to be involved in ARPA civil proceedings at each stage of the process. This is strongly recommended by the ALJs. The Department of the Interior Supplemental Regulations provide that the departmental counsel designated by the Solicitor officially will enter the case once an assignment is made to a specific ALJ for hearing.(71) Thus the land manager will receive the request for hearing from the respondent and the notice of the ALJ assignment and then forward the entire case file to the appropriate Solicitor's or General Counsel's office. Thereafter the attorney assigned the matter will be responsible for determining that all documents have been filed with the ALJ. The rules for the ALJ

hearings do not require that either party be represented by an attorney.(72) The Interior Supplemental Regulations allow for the appearance at a hearing of the party in person, by a representative, or by counsel.(73) If the respondent fails to appear at the hearing and there is no good cause for the absence, the ALJ then will make a decision without a hearing based on the documents provided.

Conduct of a Hearing: The rules for a hearing before an ALJ are more relaxed and abbreviated than the rules of procedure in a Federal district court.(74) Testimony under oath will be heard by the ALJ from the witnesses for each side. Each side will have an opportunity to question each witness. A transcript of the proceeding will be made. Exhibits such as maps, titles to vehicles, and archeological materials may be submitted to the ALJ. The ALJ will consider the evidence and the briefs filed and render a decision. There is no jury. The decision will be in writing and will specify findings of fact and conclusions of law upon which the decision is based. The ALJ is not limited to the determinations made by the land manager in the Notice of Assessment. Based on the evidence produced at the hearing, the ALJ may increase or decrease the assessment.(75)

Final Order and Administrative Appeal: The decision of the ALJ becomes final 30 calendar days after the written ruling is sent to the parties, unless in the case of Department of the Interior land managers either the respondent or the land manager files a Notice of Appeal within 30 days.(76) A "Notice of Appeal" is a brief statement of intent to appeal, and it is mailed to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954.(77) Copies must be mailed to the other party and to the judge who rendered the decision. The Notice of Appeal must have attached to it an affidavit that the copies were sent.(78) An Ad Hoc Board of Appeals will be appointed by the Director, Office of Hearings and Appeals, pursuant to 43 CFR Parts 4.1(b)(4) and 4.700, to decide the appeal. The appellate review is not a repeat of the first hearing.(79) The appeal panel will consider the matter on the record compiled by the ALJ and supplemented by briefs in support of the appeal and oral argument if necessary. The appeal panel will issue a written decision, which constitutes the final administrative determination of the matter.(80) It may be subject to judicial review in the appropriate Federal district court. If the administrative order is not appealed it will be final and collectable.

The administrative appeal panel will determine if there are facts to support the ALJ's decision, if all of the procedural aspects of the process were in compliance, and if the ALJ's decision complies with the law. A Federal district court judge presented with a Petition for Review of the administrative appeal panel will consider only the specific issues designated by the party who pursues the appeal. This judge will not substitute a new opinion for one supported by evidence. The predominant issue on appeal may be a claim by the respondent that he or she was not properly served or was denied due process.

Payment of the Penalty

Payment of an assessment is due:

1. when the respondent receives a Notice of Violation and opts to pay in full without further discussion;(81)
2. 45 days from the receipt of the Notice of Assessment from the land manager and the respondent does not request a hearing;(82)
3. 30 days after the decision of the ALJ and the respondent does not file a Notice of Appeal with the Office of Hearings and Appeals;(83)
4. 45 days after the appeals board issues a decision and a final assessment and the respondent does not appeal to a Federal district court;(84) or
5. the Federal district court issues an order affirming the final administrative decision.

If at any point the respondent does not pursue the available process, the penalty is deemed to be accepted, and payment becomes due. Given the usual time delays, a respondent may postpone payment for a period of time. Although the civil process does not provide an instant remedy and fast payment, it is still less cumbersome than obtaining financial redress through the criminal process. During this time if it appears that the respondent may be dissipating assets or frustrating the possibility of collecting on a judgment, steps may be taken by the appropriate office of the U.S. Attorney who will handle collection.(85) Under normal circumstances the agency will refer the matter to the U.S. Attorney for collection when the penalty is not paid. In some cases, such as the TVA, agency counsel will pursue collection.

A final penalty becomes a judgment, which is a court-ordered demand for payment of a set amount. The judgment will accrue interest at the highest legal rate.(86) To obtain payment on the judgment from a respondent who does not voluntarily pay requires a second tier of legal actions. The office of each U.S. Attorney contains a collection division to pursue payment of judgments owed to agencies of the Federal Government. The collection attorney will file a copy of the judgment in the district in which the respondent lives, transacts business, or can be found and served.(87) Liens may be placed on properties owned by the respondent, and any income may be garnished. If there is no collection attorney available, civil collection actions may be initiated directly.(88) Some of the costs of collection will be added to the amount owed by the respondent.(89) In a collection action the debtor may not attack the amount of the judgment, the basis for the judgment, the calculation of the penalty, or ask that the judge go behind the judgment to examine the reasons for the judgment. If, however, the judgment is defective due to a procedural omission, the judgment may not be enforced.

Penalties collected from incidents occurring on Indian lands are paid to the appropriate tribal entity. All other funds collected above the costs of collection are paid to the agency bringing the action. How these funds are allocated within the agency is a matter of internal agency policy.

Forfeiture of Vehicles and Tools

Items Subject to Forfeiture: Materials excavated or taken from Indian and Federal lands will be seized, as they are the property of the Indian or Federal landowner.(90) The person from whom the materials are seized may be given a receipt for these items as a matter of record keeping. Property, including vehicles and tools, that belongs to the alleged violator and is used in the commission of the asserted violation is subject to forfeiture.(91) These items may be seized and held at the time of the asserted violation. They are to be released either to the owner or to the seizing agency depending on the outcome of the forfeiture action.

Each agency and the land manager determine whether to pursue forfeiture. Even though forfeiture may be a legal option, the condition of the item or the lien on the item may make forfeiture undesirable. Forfeiture may be negotiated by the land manager in the informal meeting or hearing process.

Forfeiture Procedure: Items may be forfeited civilly by inclusion in the Notice of Violation as part of the demand or as an action against the item itself.(92) If the Notice of Violation served on a respondent contains the appropriate language, the forfeiture becomes an integral part of the civil penalty process (Appendices A & C). If at any time the forfeiture is not appealed or preserved in the civil process outlined above, the item becomes the property of the agency or the Indian tribal entity if the violation occurred on Indian lands.(93) If the items to be forfeited are not associated with a person, the government may file an *in rem* judicial action, which is an action against the thing. Notice is published in a newspaper that the described items are subject to forfeiture, and any interested persons must come forth or lose their ability

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to claim the items. The *in rem* action is filed in the Federal district court where the items were found. The determination by the court that the items were used in an ARPA violation is sufficient to award the property to the government or tribal entity. If someone appears to contest forfeiture, the individual has the burden of proving lawful ownership, and connection with or knowledge of the violation must be dispelled. Even if the lawful owner had no actual part in the ARPA violation, the item still will be forfeited if the owner knew or should have known how the item was to be used.

Prognosis for Use

If there is a correlation to be drawn to the growth of ARPA criminal actions, once the civil prosecution process is known, its use could expand significantly. Civil actions will not replace all criminal prosecutions for ARPA violations that have become commonplace nationwide. Similarly, citations issued under the various agency CFRs still will be appropriate. However, where financial recoupment of damages is the desired result, the civil process is waiting to be used.

This brief is intended to assist in the use of the civil law. To keep updated on civil ARPA matters, copies of decisions in civil penalty proceedings may be obtained by a written request to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22303-1954. There may be a fee for this service.(94)

Endnotes

1. P.L. 96-95, as amended by P.L. 100-555 and 100-588, 16 USC 470aa-mm (1988).
2. 16 USC 470ee.
3. 43 CFR Part 7, Department of the Interior; 36 CFR Part 296, Department of Agriculture; 18 CFR Part 1312, Tennessee Valley Authority; 32 CFR Part 229, Department of Defense.
4. LOOT Clearinghouse, reports of cases under ARPA and related laws, compiled by the NPS Departmental Consulting Archeologist, Archeological Assistance Division, Washington, D.C.
5. 16 USC 470gg.
6. In 1990, 20 individuals were charged with a total of 52 counts of civil and criminal violations of ARPA and other Federal and state laws, including National Oceanic and Atmospheric Administration regulations, at the Channel Islands National Marine Sanctuary. Extensive property was seized and \$132,000 in fines was imposed. The first civil matter to utilize the ARPA civil process, as outlined in this document, was *Eel River Sawmills, et al. v. U.S.*, Docket nos. ARPA 90-1 and 90-2, before the United States Department of the Interior Office of Hearings and Appeals, Hearings Division, Salt Lake City, Utah. The ALJ decision imposed a civil penalty of \$43,500, against two of the three alleged violators. After initially filing an appeal of the ALJ's decision, the violators subsequently reached a settlement of the judgement with the Forest Service.
7. 16 USC 470ff.
8. 43 CFR Part 7(7) [52 FR 9165; 1987].
9. P.L. 100-555 and 100-588 (1988).

10. LOOT, *supra*, note 4. See also Technical Brief no. 11, June 1991.
11. TVA: Feb. 22, 1990; Dept. of Agriculture: Feb. 10, 1988.
12. *Supra*, note 6.
13. Administrative Procedures Act, P.L. 89-554 (1966), 80 Stat. 378, 5 USC 500-559; Administrative Hearings, 18 USC 556.
14. Criminal Fines Improvements Act of 1987, P.L. 100-185, 18 USC 3623, 101 Stat. 1279.
15. 16 USC 470ff; fines may be double the damage assessment amount for a subsequent offense (criminal or civil), see sec. 470ff(1)(B).
16. 16 USC 470gg(b)(3). (470gg(b)(1) & (2) require conviction by a court for an ARPA violation for a forfeiture while 470gg(b)(3) does not).
17. 36 CFR Part 296 (Forest Service); 50 CFR Part 27 (Fish and Wildlife Service); 43 CFR Part 7 (Interior); 32 CFR Part 229 (Defense); 18 CFR Part 1312 (TVA); 36 CFR Part 2 (NPS).
18. Criminal fines, unlike civil penalties, are deterrence or retribution, and a criminal defendant assessed a fine also may be subject to a civil penalty judgment. *U.S. v. Ward*, 448 U.S. 242, 250, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980). If a fine is assessed strictly as an alternative to incarceration, in the true sense of "punishment," and is not linked by the judge's order or the negotiations of counsel to the amount of the damage assessment, civil remedies are still available. If forfeiture is not considered in the criminal indictment or in a plea agreement, civil forfeiture remains an option.
19. 16 USC 470bb(3).
20. 16 USC 470bb(3) & (7).
21. 16 USC 470ee(c). See also *U.S. v. Gerber*, 999 F2d 1112 (7th Cir. 1993), affirming the conviction. Gerber and others were criminally charged under ARPA for removing archeological resources from private land and transporting the items across State lines. The defendants questioned the validity of 16 USC 470ee(c).
22. 16 USC 470bb(6).
23. 16 USC 470ff(a)(2)(civil) and 470ee(d)(criminal).
24. 16 USC 470bb(1).
25. 16 USC 470ff(3) and 470ee(g).
26. 16 USC 470kk(b) and 470bb(l).
27. *Id.*
28. 16 USC 470ee(a).

29. The contract will contain a paragraph within the document or as an addendum stating that Federal law prohibits the excavation, removal, damage, alteration or defacement of any archeological resource on Federal or Indian lands, that the contractor shall control the action of its employees and subcontractors at the job site to ensure that any protected sites will not be disturbed or damaged, and that it is the obligation of the contractor to ensure that employees and subcontractors cease work in the event of a newly discovered site until further authorization is obtained.

30. In *Eel River Sawmills* (*supra*, note 6), a contractor to the Forest Service was alleged to have damaged an archeological site when a road was built through a protected area to develop a water source. Eel River Sawmills claimed that its actions were inadvertent and that its agents did not see the flags marking the area. It also disputed jurisdiction and the method of calculating damages. The Forest Service contended that the contractor acted outside the scope of its contract because it is customary to develop water sources only with prior consultation with the contracting agency. Inadvertence is not a defense to a civil matter. No machinery was seized, and the land manager offered to resolve the matter at the initial hearing for an amount of damages that was less than the full damage assessment. A decision was issued on August 10, 1992. The parties agreed to a settlement of the judgement on January 19, 1993.

31. 16 USC 470ff(a)(2).

32. Title 18 CFR Part 1312.14(a).

33. *Id.*, at 14(c).

34. 16 USC 470ff(a), and 18 CFR Part 1312.16.

35. 18 USC sec. 3623.

36. 16 USC 470gg(b).

37. 36 CFR Part 79, (effective Oct. 12, 1990).

38. H.R. Rep. No. 96-311, 96th Cong., 1st Sess. (1979), reprinted in 1979 *U.S. Code Cong. & Ad. News*, 1709, 1714; *United States v. Kohl*, no. 85-10044 (D. Idaho, Feb. 13, 1986), memorandum opinion.

39. Black, Henry Campbell, 1968, *Black's Law Dictionary*, 4th revised edition, West Publishing Co., St. Paul, MN, p. 1184.

40. 16 USC 470ff(a)(1).

41. H.R. Rep. No. 96-311, 96th Cong., 1st Sess., reprinted in 1979 *U.S. Code Cong. Admin. News*, 1709, 1714.

42. 43 CFR Part 7.15(b).

43. 43 CFR Part 7.15(b)(1).

44. 43 CFR Part 7.15(b)(2).

45. 43 CFR Part 7.15(b)(3).

46. 43 CFR Part 7.15(b)(4).
47. Title 28 USC sec. 1658, sets four years as the time to bring an action arising under an Act of Congress. The statute is effective on incidents occurring after the date of the Act, Dec. 1, 1990. The application of the statute of limitations is a matter to be discussed with counsel.
48. 43 CFR Part 7.15(c)(1).
49. 56 FR 55195 (Oct. 25, 1991).
50. 43 CFR Part 7.15(c)(2).
51. 43 CFR Part 7.15(c)(4).
52. 43 CFR Part 7.15(c)(3).
53. The Forest Service and the TVA request that counsel be involved at all stages.
54. 43 CFR Part 7.15(e)(3).
55. 43 CFR Part 7.15(e)(2).
56. 43 CFR Part 7.15(d).
57. 43 CFR Part 7.15(e)(2).
58. *Supra*, note 32, calculating damages.
59. 43 CFR Part 7.16(b)(1)(i-vii).
60. 43 CFR Part 7.15(f)(1).
61. 43 CFR Part 7.15(f)(2).
62. 43 CFR Part 7.15(f)(3).
63. 43 CFR Part 7.15(g).
64. 43 CFR Part 7.15(g)(2).
65. Department of the Interior Supplemental Regulations, 43 CFR Part 7.37(a) requires that a written statement of the basis for the relief accompany the request for hearing. All agencies with Memoranda of Agreement to use the Interior ALJs must follow the Supplemental Regulation procedures.
66. TVA, Memorandum of Agreement approved Feb. 1990. Service of notice on the TVA is to be made to: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tenn. 37902-1499. Forest Service notice shall be given to the Office of General Counsel, Department of Agriculture.
67. 43 CFR Part 7.37(a).

68. *Id.*

69. *Supra*, note 64.

70. 43 CFR Part 7.37(c).

71. 43 CFR Part 7.37(d)(2).

72. *Supra*, note 66.

73. 43 CFR Part 7.37(d).

74. 5 USC 554-557, Rules of Procedure for Administrative Hearings.

75. 43 CFR Part 7.15(g)(3).

76. 43 CFR Part 7.37(e)(3).

77. 43 CFR Part 7.37(f).

78. *Id.*

79. 43 CFR Part 4 A, B & G.

80. 43 CFR Part 7.37(h).

81. 43 CFR Part 7.15(c)(4).

82. 43 CFR Part 7.15(c)(3).

83. 43 CFR Part 7.37(e)(3).

84. 43 CFR Part 7.37(f).

85. Prejudgment actions to preserve assets pending future judgments are part of an aggressive collection process. Individual State laws will control the available remedies.

86. The amount of interest on the judgment will be determined by the law of the State in which the judgment is ordered.

87. 43 CFR Part 7.15(1)(2).

88. *Id.*

89. The sum varies, depending on State law.

90. 16 USC 470gg(b).

91. *id.*

92. 16 USC 470gg(b)(2 & 3).

93. 16 USC 470gg(c).

94. 43 CFR Part 7.37(g).

APPENDIX A Notice of Violation

Date:

Addressed to:

An investigation has revealed that you are responsible for damage to an archeological site on *(location and popular name of site, if any)*. The damage occurred *(between dates)(on or about)* during an activity that was conducted outside of the permit or contract authority or without a permit or a contract, that is *(describe)*. The specific location of the damaged site is *(describe)*.

You have damaged an archeological resource located on *(Federal or Indian)* lands in violation of the Archaeological Resources Protection Act of 1979 (ARPA, 16 USC 470aa-mm) and *(agency regs. that apply)*. The total damages have been ascertained pursuant to the law and are in the amount of *(\$)*. The proposed penalty amount is *(\$)*.

Archeological resources removed from the site are the property of the United States Government and are to be returned *(or if seized, are to be maintained in government custody for appropriate disposition)*. Certain tools and vehicles were used in the commission of the violation of ARPA, and those are *(fully describe)*. These tools and vehicles are subject to forfeiture, and, if seized, will remain in the custody of the *(agency)* until the final disposition of this matter.

You have 45 days from the service of this notice to take one of the following actions: seek informal discussions with the *(identify the agency authority, address and telephone)*; file a petition for relief, stating the basis for your request, to be sent to *(person and the address)*; pay the amount indicated above; or take no action and await the issuance of the Notice of Assessment. Any Petition for Relief must comply with the requirements of *(agency regulations)*.

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

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

Signature and Title Date

(address if not apparent and telephone)

APPENDIX B Petition for Relief

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To: *(person issuing notice of violation)*

Date: *(served within 45 days of notice)*

(I)(we) (accept)(take issue with the Notice of Assessment dated ____) for the following reasons: *(I am not the violator, explain)(I did not create the damage as indicated, explain) (I did not use the vehicle or tools now in your possession, explain) (the damage is overstated, explain)*. The factual and legal reasons that I feel that I should not be assessed a penalty are:

Signed by the recipient of the notice or an officer of a corporate respondent

Date

APPENDIX C Notice of Assessment

To: *(respondent)(s)*

Date:

After an investigation *(and after considering the facts you brought forth in the informal hearing and/or the petition for relief)* it has been determined that you are responsible for damage to an archeological site *(describe)* on the *(site location)*. The damage occurred when you took action without a permit or contract, or in excess of your permit or contract authority, that is: *(describe)*.

During the course of the investigation *(brief statement of the facts that indicate there was a violation of ARPA, that the respondent was the violator, and that vehicles or tools were used in the commission of the offense)*.

During the meeting you requested on *(date)* you indicated *(pertinent discussed facts and land manager's response thereto)*. Therefore you acted without authority and damaged the archeological site.

I have determined the amount of the penalty to be *(\$)*, which includes the *(archeological value of the resource or the commercial value of the items, plus the cost of restoration and repair in either case)*. *(In the case of a contractor with a receivable pending)* if the awarded contract is more than the penalty amount, the remaining monies will be refunded. If the penalty amount exceeds the amount of the contract, the *(agency)* will *(absorb the remainder and/or request collection of the balance)*. The administrative costs will be *(billed or absorbed by the agency)*.

In accordance with a Memorandum of Agreement between the *(petitioning agency)* and the Department of the Interior for implementing administrative procedures under the Archaeological Resources Protection Act, you may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954, within 45 days of service of this Notice of Assessment. You should enclose a copy of the Notice of Violation previously sent to you and a copy of this Notice of Assessment. Your request will

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state the relief requested and your basis for challenging the facts alleged by (*agency*). You also should include your preferences as to the place and date for a hearing.

A copy of the request for a hearing should be served upon (*agency counsel*) personally or by registered or certified mail, return receipt requested, at (*address of counsel*).

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

Signature and Title

(may attach a copy of the site damage assessment)

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