

Chapter 11

Protecting the Past for the Future: Federal Archaeology in the United States

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'To care for the earth, think seven generations in the future' (Native American saying)

Nine out of every ten known archaeological sites in some regions of the United States have been disturbed. Congress heard testimony to that effect during 1988 investigative hearings in Albuquerque, New Mexico, on the proposed amendments to the Archaeological Resources Protection Act (Subcommittee on General Oversight and Investigations 1988; Downer 1992). Available information is substantial, though largely anecdotal (e.g. Brinkley-Rogers 1987; Draper 1993; Early 1989; articles in Ehrenhard 1990; Goodwin 1986; Harrington 1991; Landers 1991; Nickens 1991; Seward-Trumann 1987; Wilkinson 1991) — but also backed up by national statistics (see Table 11.1; also, King 1991; McAllister 1991; McManamon & Morton 2000).

The nature and scope of the difficulties encountered in documenting the destruction of the archaeological record can best be explained by the illicit and secret manner in which archaeological looting and dealing occurs. However, another set of statistics also helps explain the difficulty of documentation. The area of the United States is over 3.7 million square miles (9.7 million square kilometres), about 5 per cent of which is underwater. It encompasses arctic, temperate, and tropical environments and ranges in altitude from 282 feet (86 metres) below sea level in Death Valley National Park to the 20,320-foot (6200 metres) peak of Mt McKinley in Denali National Park and Preserve. The US government has stewardship responsibility for cultural resources on approximately 750 million acres (1.2 million square miles; 3.1 million square kilometres) or little over 30 per cent of the country (1997 estimate). Lands owned by states and local municipalities increase public acreage to well over 40 per cent.

Archaeologists estimate the number of sites on federal and Indian public lands at between six and seven million (Haas 1997, 20). The largest land managing agencies responsible for these acres are the Bureau of Land Management (40 per cent), Forest Service (14 per cent), and the Fish and Wildlife Service and National Park Service (about 12.5 per cent each). The data used in this article are from these and 30 other land managing and licensing agencies of the federal government which must comply with a dozen federal historic preservation laws in their daily operation (National Park Service 1993; McManamon 1992, 26–32; 2000, 41–5). The office of the Departmental Consulting Archaeologist, National Park Service has leadership responsibilities for the federal archaeology programme, and through the Secretary of the Interior has been delegated oversight authority for the Archaeological Resources Protection Act of 1979, as amended in 1988 (ARPA) and for archaeological aspects of several other statutes government-wide.

The office of the Departmental Consulting Archaeologist also collects data from the agencies and submits the Secretary of the Interior's report on the effectiveness of the programme to the US Congress (e.g. Haas 1997; 1998; 1999; Keel *et al.* 1989; McManamon *et al.* 1993). The data that the federal government collects on looting on state-owned, municipal, or private property are those involving interstate transport or trafficking of artefacts and Native American human remains. But all states do have laws protecting archaeological sites on state-owned lands, many extend protection through permits and zoning to private lands. Almost all of the states have passed laws to protect aboriginal burials, especially since the passage of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), and many protect submerged or underwater archaeo-



Figure 11.1. Map of the United States showing locations mentioned in the text.

logical resources (Carnett 1991; 1995).

All states with submerged lands are responsible for administering the provisions of the Abandoned Shipwreck Act of 1987 (Aubry 1997; Halsey 1996; McManamon 2000; Tarler *et al.* 1995; Varana 1995). In the Act, the United States asserts title to historic shipwrecks, but transfers title to the 'State in or on whose submerged lands the shipwreck is located'. Instances of non-federal occurrences of looting and state and local responses will be cited in the discussion, as appropriate.

Archaeological sites have been protected on public lands since 1906 under the American Antiquities Act (Lee 2001; McManamon 1996). Data on looting and vandalism of these sites have been reported by the National Park Service beginning in the 1980s (e.g. Haas 1997; 1998; 1999; Keel *et al.* 1989; McManamon *et al.* 1993). But illegal collecting and excavations continued on public lands after 1906, despite the new protection law (Judd *et al.* 1924). In 1929, Jesse Nusbaum, who was the first Departmental Consulting Archaeologist, reported to the Secretary of the interior that

Only drastic methods can stop the unlicensed 'pot-hunter,' and, I may add, the majority of tourists are potential 'pothunters.' One lone field representative with the responsibility of administering and operating a national park can not protect an area that extends over the major portion of the southwestern States. *Help is needed.* [emphasis added] (Nusbaum 1929)

And in the *Christian Science Monitor* (1929) he is quoted with regard to the selling of artefacts.

Indian traders and others operating stores and trading posts and accommodations on lands of the department under permit should be prohibited from purchasing archeological materials from private holdings or public domain under penalty of revocation on the part of Indians and others so engaged.

Nearly 700,000 known sites have been recorded on public lands, but less than 5 per cent have been evaluated for significance according to the criteria for listing on the National Register of Historic Places (enabling legislation, the National Historic Preservation Act of 1966, as amended 1992). Only 22,000 archaeological properties — some of which may have several contributing sites — are currently listed, and the number drops dramatically when the higher threshold of significance is applied for listing as a National Historic Landmark (224 listed archaeological properties as of 1999). But with only 11 per cent of federal lands surveyed (1997 estimate), agencies

face major challenges in site discovery and site evaluation.

Protecting these sites is a daunting task. Some estimates suggest that there is only one public agency official per one million acres (405,000 hectares) who has some responsibility for protecting cultural resources on public lands. Although the federal government employs a number of archaeologists and trains, for example, National Park Service (NPS) and Forest Service rangers to help protect cultural resources, the sheer number of acres that would need to be patrolled illustrates the problem. For example, the National Park Service, which employs the most cultural resource specialists per acre because of its explicit mission to protect cultural resources, has less than 400 professional archaeologists to care for archaeological resources in the 85 million acres under its stewardship.

What information has been lost in regard to ancient civilizations?

Activities that disturb and destroy sites run along a continuum from land development and resource extraction to commercial looting and intentional vandalism. Documenting the extent of any one type of activity occurring on an archaeological site, the location of which may have been known for a 100 years, for example, is difficult at best. Complicating the picture are individual and professional views of what is moral and ethical behaviour with regard to the treatment of archaeological sites, including professional codes of ethics. Many of those apprehended for illegal digging claim to be unaware that unauthorized collecting or excavating on public lands is illegal when they cheerfully move their activities from private lands to public lands. Often defendants facing trial argue that without their intervention, the archaeological artefacts would have been lost. The data used in this chapter reflect illegal activities as defined by federal or other governmental statutes on public lands. Private lands may also be protected by federal statutes that apply when state laws are broken (e.g. see Munson *et al.* 1995).

In order to place the data in context, we would like to make some observations about the nature of the archaeological record in the United States. Certain types of sites and certain areas have been differentially impacted by development and collecting, whether illegal or not. For example, the surfaces of sites in the arid American Southwest and the Great Basin have over the years been denuded of artefacts because of lack of surface vegetation, such that with-

out standing architecture it is sometimes difficult to determine their presence. Thus non-site archaeology which has been advocated as a non-traditional method for analyzing traces of past behaviour in a regional context would seem to be an ideal survey strategy in this area of greater visibility, but instead has less and less applicability.

Petroglyphs and pictographs are very susceptible to vandalism. Several studies have been made about the human propensity to leave their marks, whether graffiti or art, on rock surfaces, with examples noted from the pioneers along the Oregon trail, Spanish inscriptions at El Morro National Monument, and contemporary scratchings on Native American rock art. One of the premier rock art occurrences is found adjacent to the city of Albuquerque at Petroglyph National Monument. The entire east outcrop, running for several miles has pictographs and petroglyphs that are still important to Native Americans residing in the area. With close to a half a million residents, the park is under constant siege for road construction and other urban invasion. Before the park was established, many people used the area for recreation and target practice, as chips and nicks in the rock faces attest.

Earthen mounds built by American Indians for 5000 years are also in jeopardy. Not only are they the target of 'pot-hunters', they also suffer because modern farmers, like their prehistoric brethren, till the same rich soils. Modern farm equipment, however, is much more destructive, and archaeologists have conducted many experimental studies to understand patterns of artefact displacement relative to sub-surface features. For these studies to have any validity, artefacts must be left on the surface. Amateur archaeologists and land owners, however, have been collecting 'arrowheads' and other artefacts that become highly visible on tilled, as yet unseeded fields. Although many of these collections are stored in old shoe or cigar boxes and thrown out by heirs, numerous collections, sometimes mounted, find their way to artefact shows where they are admired and purchased by other collectors. To give an idea of the wealth of data held in these collections, an archaeologist from the South Carolina Institute of Archaeology and Anthropology visited and analyzed lithic collections held by farmers in the state counties (Charles 1983; 1986). He was able to identify distribution patterns from known local quarry sources, as well as date the patterns using point typology.

A more rigorous study has been completed recently by the NPS Southeast Archaeological Center (SEAC). Legislation riding on the California Desert

Protection Act targeted economic development in the lower Mississippi Delta Valley, especially heritage tourism. The archaeologists from SEAC collected site records from four states (all of Louisiana and Mississippi, almost all of Arkansas and the southwestern corner of Tennessee, approximately 360,000 square kilometres) to inventory and assess the status of the mounds in the lower valley and to provide information about them to the public. The completed data base contained 2970 known sites with 5483 mounds ranging in age from 4500 BC to AD 1700 (Prentice 1996). The three most common destructive impacts were erosion, agriculture, and pot-hunting, in order of magnitude. Of the total number of sites, approximately 10 per cent have been destroyed, 21 per cent have major impacts, and 12 per cent have little or no impacts. The condition of the remaining 57 per cent is unknown. Without regular monitoring programmes, the physical condition of known sites, even their very existence, is usually unknown. For example, in the national parks, which now has a master data base of over 43,000 records, only about 12,000 (28 per cent) sites have condition information and of these sites only 4000 (33 per cent) are in good condition. Much of NPS condition information is legacy data captured from other information management systems.

The lower Mississippi mound study also correlated the number and mounds and type of impacts. Looting and unscientific excavation were second to agriculture in causing most of the destruction by a factor of almost 2 to 1, that is, 2282 mounds to 1198, respectively. Construction, earthmoving, and natural causes were cited as other causes. Breaking down the mounds by cultural period resulted in the following level of overall impacts: Archaic hunting societies at 90 per cent, Woodland horticultural societies at 62 per cent, and Mississippian agricultural societies at 50 per cent. Although these results are highly biased because of the quality of the original data, and the magnitude of the unknowns, such percentages are the first approximation of what is a rapidly vanishing archaeological phenomenon. Only about 5 per cent (or 273 mounds at 102 sites) of the mounds are protected under federal, state, county, city, or tribal ownership. Some of these mounds are heritage tourist sites maintained by state programmes, which have done more than the national parks to interpret the mound builders of the lower valley.

A grassroots effort by National Park Service staff illustrates the condition of ancient and historic ruins in the American Southwest. Prompted by loss of fabric and faced with the retirement of mainte-

nance personnel, the 'Vanishing Treasures' initiative points out the impact of tourism and time on the pueblo ruins. Current signage to alert visitors about the protected status of archaeological sites and artefacts comes almost too late, as there are virtually no artefacts visible on the surface. Signs warning people not to sit or stand on the walls are helping, but the deterioration continues. The initiative identifies a total of 12,714 Vanishing Treasures structures — site and structure are distinct — in 35 of the 41 Vanishing Treasures national parks (National Park Service 1998; 2000). As inventories have not been completed, the total estimate is nearer 75,000. One of the threats to the known structures is tourism. Of the known structures again the condition of 61 per cent is unknown. The expected degree of impact projected for the remainder of the structures is based on no action being taken. Thus, in two years without maintenance, 15 per cent of the known structures will be so damaged as to result in irretrievable loss. It is important to note that this rate of destruction is occurring in national parks.

The architectural sites of the Southwest have yielded artefacts that have caught the imagination of tourists and dealers worldwide, and back dirt from unlawful excavations marks the intensity of the search for whole, unbroken vessels, turquoise and other exotics that can be sold on the art market. Besides the Southwest, there are two other areas of popularity that have a tremendous impact on the archaeological record: underwater salvage of shipwrecks, for instance Spanish galleons, and Civil War memorabilia. Visits to Civil War battlefields have become popular in recent years. Families follow troop movements from battleground to battleground and re-enactments of military engagements are popular events. There is a large market for the sale of Civil War artefacts, and metal detectors, particularly suited for discovery of historic artefacts, are used by looters to locate find spots. Metal detecting in the national parks is prohibited, but restriction on their use on other public and private land is highly variable. The underwater situation is more problematic. There is no protection of underwater archaeological resources between three and twelve miles in the territorial sea claimed by the United States. States have jurisdiction for underwater recreation, conservation, and programmes out to three miles. Al-

though there are federal guidelines for managing such programmes, there are no regulations, and states differ in their permitting requirements.

In summary, although the types of sites and artefacts targeted by looters may be anticipated, which sites and the number of sites involved are not readily determined. The rapid loss of archaeological sites suggests that an analysis of existing archaeological data similar to the gap analysis studies for biodiversity would help point out gaps in the archaeological record that result from development and looting. In the absence of such regional studies, the only data available are actual case studies. These case studies of arrests and convictions suggest trends, but the very nature of clandestine behaviour means that the number of cases build slowly and reflect a small percentage of looters who are caught in the act.

Listing of Outlaw Treachery (LOOT), the National Park Service data base

The LOOT data base, initially a clearinghouse, has been maintained by the Archaeology and Ethnography programme since 1986 (Knoll 1991). There are currently 453 case records on legal prosecutions of 781 looters. Altogether 428 sites have been impacted. The federal Uniform Crime Reporting programme, revised in 1988 to incorporate a new incident-based national crime reporting system, includes violations of the Archaeological Resources Protection Act (ARPA), which federal agencies are required to report to the Federal Bureau of Investigation. Information on ARPA and other permitting violations is also collected by our programme for the Secretary of the Interior's report to Congress on the federal archaeol-

Table 11.1. *Looting and prosecution information from federal lands in the United States.*

Year	Reported incidents	Arrests or citations	%	Prosecutions	%	Felonies	%
1985	436	72	16.5	48	11	9	2.1
1986	627	43	6.9	61	9.7	2	0.3
1987	657	68	10.4	62	9.4	6	0.9
1988	564	152	27	53	9.4	2	0.4
1989	475	69	14.5	23	4.8	3	0.6
1990	664	87	13.1	52	7.8	1	0.2
1991	306	69	22.5	35	11.4	2	0.7
1992	524	92	17.6	58	11.1	8	1.5
1993	770	127	16.5	80	10.4	13	1.7
1994	672	211	31.4	65	9.7	17	2.5
1995	674	86	12.8	48	7.1	23	3.4
1996	1181	145	12.3	68	5.8	0	0
1997	1372	121	8.8	88	6.4	20	1.5
Total	8922	1342	15	741	8.3	106	1.2

ogy programme. Table 11.1 presents data collected between 1985 and 1997.

Other federal statutes, such as the theft of government property are often cited in prosecutions for archaeological looting. Between 1994 and 1997, there were 674 non-ARPA convictions. In the past few years, more violators (255) have been assessed penalties under the civil penalty provisions in ARPA.

Financial information relating to the costs of law enforcement and fines levied to mitigate the destructive behaviour has also been collected, but again these numbers should be viewed as first approximations. The data in Table 11.2 are limited to those received in 1994–97.

The data do show that the costs of law enforcement and mitigation of impacts to looted sites the site far exceed the fines imposed. Despite the reluctance of archaeologists to appraise artefacts commercially, believing that economic values cannot be assigned to the loss of non-renewable resources, this information is readily obtainable from trade shows, auctions, appraisers, and insurance firms which do keep such data. Archaeologists are more apt to evaluate the cost of data recovery, which entails not only the estimated costs of excavations conducted according to scientific standards, but also the costs of stabilizing — for example, through back filling — so that a site is no longer subject to erosion or further looting and the cost of curating the recovered artefacts and other data.

Criminal fines for federal offences have, in the past, gone into the general Treasury and were not available for furthering the protection of archaeological sites. ARPA, however, does allow informants to receive payment equal to one-half of the fine or penalty but not more than \$500, and within the past two years, upon conviction of the defendants, some individuals have been rewarded using this authority. Another federal law that applies only to the National Park Service — the National Park Resource Protection Act, as amended in 1996 — allows parks to apply to a central fund (the Department of the Interior's Natural Resource Assets Fund) to take whatever measures are necessary to restore pillaged sites. The money goes to the park where the incident occurred and is recovered from the personal assets of the

individual or companies who committed the violation. However, the assessment is separate from criminally imposed fines or penalties. Although cultural resources are covered by the amendment, the initial intent in 1990 was to protect natural resources on federal lands, managed by the National Park Service, from disasters such as oil spills. The benefits for cultural resources have yet to be realized and more education of cultural resource specialists in the field is needed.

The criminal provisions under the Native American Graves Protection and Repatriation Act (NAGPRA) parallel ARPA's criminal provisions, but the civil penalties affect repatriation of collections already in existence and under the control of or museums, educational institutions, or other organizations that receive federal funds. There have been several incidents of illegal excavations on public lands, involving Native American human remains, and 11 successful prosecutions and convictions from 1992–99; others are still under administrative review or in court.

Case studies

It is not difficult to provide case examples of seriously damaged sites in the United States. Therefore, the choice of examples presented here reflects what we consider to be important issues in protecting sites in the United States. Although many regard the United States as an art market country whose entrepreneurs have helped create the demand for illicitly acquired artefacts abroad, archaeological resources in the United States are also the target of illegal excavators. Artefacts from US archaeological sites are sold locally and on the international market. The 1992 amendments to the National Historic Preservation Act called for the Secretary of the Department of Interior (ultimately the Departmental Consulting Archaeologist, National Park Service) to report on options for '... controlling illegal interstate and international traffic in antiquities' (16 USC 470h-5). The

Table 11.2. Law enforcement costs, fines, commercial value and estimated costs of mitigation.

Year	Law enforcement costs \$ million	ARPA criminal penalties \$	ARPA civil penalties \$	Restore and repair costs \$	Artefact commercial value \$	Property commercial value \$
1994	4.8	20,350	82,692	585,594	2,683,752	82,350
1995	3	25,015	131,896	1,466,910	64,230	1000
1996	3.1	8180	19,638	3,356,090	289,717	12,600
1997	2.1	83,744	126,272	501,918	366,167	64,850
Total	13	137,289	360,498	5,910,512	3,403,866	160,800

study which was to have been conducted in consultation with the preservation community and federal agencies, ultimately was not funded. However, some initial information was gathered from case studies, press coverage, law enforcement investigations and sting operations, informants, and various other sources (see McManamon & Morton 2000).

Perhaps the most neglected issue in the discussion of vandalism is how to measure it. Objective assessments will be necessary for comparative purposes, locally, regionally, and nationally. They are also necessary for deriving alternative protection and preservation strategies, and for providing information to the courts on measurable costs that are used in levying fines. It is surprising that guidance for estimating data recovery costs, which archaeologists advocate, is based on but one or two published studies (Carnes *et al.* 1986). There will be further discussion on loss in the following section.

San Juan Country, Utah: a study of site vulnerability

New techniques in information management were instrumental in yielding more accurate information about the impact of looting on regional basis. In 1987, data on 5452 sites from a test area within San Juan County, Utah (13,000 sites representing 1000 projects), were integrated into a GIS system to study site vulnerability to looters (Wylie & Nagel 1989). The records were pulled from the Intermountain Antiquities Computer System (IMACS) — the first regional archaeological sites data base. The study was based on information from the site records only, as there was no field verification. Description of site condition used parameters derived from a sample of 1884 looted site records from the entire county.

Site condition is encoded as excellent (which equals no disturbance), good (equals 75 per cent undisturbed), fair (50–75 per cent undisturbed), and poor (greater than 50 per cent disturbed). Based on these categories, 40 per cent were in good condition and another 27 per cent in fair condition, or two-thirds of the sites. These favourable numbers probably reflect baseline conditions because there are few monitoring programmes in existence that track the rate of vandalism. The researchers selected site access and attractiveness as indicators of potential looting. A 60-point scale was used for each factor with sites having more accessibility and greater attractiveness receiving higher points. Overall site vulnerability was measured as a factor of these two measures. Since site type was assumed to be more important, it was accorded three times the weight of access. Points assigned to access were also based on

an assumption that looters would not want to be discovered and therefore if a paved road was present near the site, points were subtracted.

The regional study involved federal state and private lands. Although jurisdiction was not an initial factor, the results show that the Bureau of Land Management (BLM) has a greater rate of looting than could be explained by the number of sites alone. In fact when BLM is compared to private and state the percentages are relatively similar, 17 per cent, 15 per cent, and 15 per cent respectively. The other federal agencies, the US Forest Service and the National Park Service fall well below BLM's percentage at 4 per cent and 7 per cent respectively, suggesting that land use and staffing need to be considered. The remaining results show a correlation between access and looting, with sites that are easily accessible exhibiting less looting. Relative to attractiveness based on site type, by far the largest number of site types are storage features, middens, artefact scatters and so on, which have been assigned the lowest numbers. There is an inverse relationship between this large pool of sites and those targeted by looters; that is, looting increases on sites with the highest attractiveness values. As these sites are the least represented in the archaeological records, their contextual information is at the highest risk. The question is whether large, multi-room structures have enough rooms or features left undisturbed to yield 'important information' or whether there will soon be an unbridgeable gap in the archaeological record.

The mean value for site vulnerability, as modelled, is lower than the plot of known, looted sites, which reinforces the interpretation that more attractive and accessible sites (that is, those that are near unimproved, less-travelled, and remote trails or roads) are more susceptible. A steady increase over mid-range values suggests that looters are employing a mini-max strategy, *when sites are plentiful* (emphasis in original).

Perry Mesa: looting over time

A complementary study to analyze site vandalism was sponsored by Tonto National Forest on Perry Mesa in central Arizona in 1990 (Ahlstrom *et al.* 1992). There are more than 200 recorded sites located on this relatively small (less than 50 km²) mesa and the sites are well-known to the local population. Tonto Forest managers were interested in finding answers to questions about site vulnerability: what, if any, patterns in the rate of destruction were apparent over time; how effective were the previously used protective deterrents; and what kind of monitoring

plan could be developed to help protect the sites? The study methods included field visits, 'repeat' photography, interviews with forest staff and pot hunters, and geospatial mapping.

A total of 56 sites, selected in a stratified random sample of sites surveyed in a comparative assessment of site condition found that 25 sites were in overall excellent condition, 20 in poor, 5 fair, and 6 good. The site condition categories are based on the degree of vandalism assessed along a single dimension, that is, the surface area that had been subject to pot hunting: less than 25 per cent was a good score and more than 50 per cent poor. Because of the subjective nature of the assessment and to reduce individual bias, the same observer categorized all sites. Several independent, essentially passive, causal factors, cited in the archaeological literature, were correlated with site condition. These variables included site type, size, frequency of sites in the area, density of artefacts/architecture, visibility, accessibility, extent to which evidence of digging still existed.

The results of the study reveal that site type is the single most predictive variable. The data also suggest that size and visibility are influential, as is travel time, with a threshold of about two hours. As the mesa is small, improved as opposed to unimproved roads may not have been a significant factor in getting to the site. A multivariate analysis of the interaction of these variables to better predict site condition was unsuccessful. Apparently, good-sized sites, no matter where they are located are targeted, and high site density is also an attraction. As in the Wylie study (1989), looters seem to behave according to a cost-benefit model. The researchers do point out the need for more refined analyses of looters' behaviour — the way in which excavations are carried out, for example. There is a qualitative difference between excavations where vandals have "blown through" walls' as opposed to carefully following the outline of the walls (Ahlstrom *et al.* 1992, 30). Such differences may relate to the time given to excavation if vandals fear getting caught, or may relate to differences between commercial looting and local interest. Unfortunately, studies like these have been slow to appear.

The rate of vandalism over time was assessed by interview, environmental condition (degree of weathering of soils and bone and the extent of re-vegetation) and serration of pop-top cans. Here, littering has its advantages, as the introduction of steel and aluminium cans and their pop-tops can be dated accurately. Based on these data, the rate of vandalism has declined from the 1950s and 1980s. Archae-

ologists attribute much of the decline to convictions under ARPA and state law, although only one or two prosecutions for looting on Perry Mesa have taken place. Whereas pot hunters used to camp out and shovel for days — during which time they discarded their pop-top cans — visits are now more clandestine. It appears that much of the damage was done by people who, at the time they were digging, believed they were doing nothing wrong. Most of them probably still feel that way today, even if they know that digging in Indian sites is illegal. Pot hunting and surface collection was generally looked upon as an admirable thing in the 1950s. Various families built up huge collections and 'ribbons' were given at the Yavapai county fair for the best (Ahlstrom *et al.* 1992, 5).

Shumway: a repeat ARPA violator

Federal agencies, US assistant district attorneys, and judges have been reluctant to prosecute looters. Early decisions based on the Antiquities Act were disappointing. The cost of prosecution and the inability of many attorneys and judges to see the harm in 'collecting' have proven to be effective deterrents. When pursued, cases were most often negotiated or bargained to a lesser, misdemeanour charge. But this response is declining.

Every year the number of cases increases. Although the data do not as yet reflect a steady increase in the number of prosecutions and convictions, recent changes in ARPA and training programmes have made a difference. Improvements to ARPA, made by the 1988 amendments, lower the threshold of damage to a site necessary to prove a felony offence and make the 'attempt' to loot also a felony offence. A co-operative training programme by the National Park Service and the Department of Justice is focusing attention on heritage preservation law, just as earlier training in law enforcement has improved the number of arrests and produced better evidence for the courts to consider (see Hutt *et al.* 1992).

A new attitude may be inferred from a recent, landmark case. The Tenth Circuit Court of Appeals sentenced Earl Shumway, a previously convicted looter of sites on federal land, to six and one-half years in federal prison for looting of Indian burial sites in Utah from 1991–94. Obviously, his previous convictions had not proved a deterrent. His behaviour sent a message to the courts: Shumway's father and his father were looters, and Shumway has bragged about being an 'outlaw'. First arrested in 1988 for stealing 34 prehistoric baskets, Shumway

was placed on probation. But in 1991, he entered federal lands in Canyon Lands National Park and Mani-LaSal National Forest to loot. Court testimony revealed that he paid little attention to human remains, tossing them aside to get at the burial goods, and that he used a helicopter to access remote areas. Apparently, the entire family made a regular living from the sale of the artefacts. He was caught, according to BLM special agent Bart Fitzgerald, because he threw away a cigarette butt at a looted site in Whiskers Canyon. The cigarette was under a back dirt pile and saliva testing proved that the saliva was Shumway's.

The court's response sent a message to other looters about the seriousness of their activities. News coverage in widely circulated, popular magazines (like *People*, see Howe & Free 1996) and airline in-flight magazines) and newspaper articles have reinforced that message, expressing Native American and public outrage about such behaviour. It is also pertinent to note that the introduction of new, high tech scientific instrumentation analysis in US courts is encouraging, but archaeologists need to know the scientific assumptions underlying the analysis and interpretation. Recently, investigators contacted an expert in instrumental neutron activation analysis (INAA) to help link a looter's collection with what the investigators believed was the original site. In this instance, the investigators were able to find two halves of broken pottery in the collection and at the site which were a perfect fit. This is better, irrefutable evidence of the event than an INAA analysis that is based on probability statistics.

General Electric mound: state and federal violations

Many states and some tribes do have specific laws to protect archaeological sites (Carnett 1995) and some state and local laws, such as prohibitions against trespass can be invoked against looters. When state, tribal, or local laws are violated as part of archaeological looting and interstate transport of the looted objects is involved, a violation of ARPA has occurred also and federal authorities can become involved in investigations and prosecutions.

One recent case in the mid-west United States exemplifies such a situation. In 1988, archaeologists in Indiana became alarmed that a Hopewell Indian mound site located on private land owned by the General Electric Company was being looted. It was determined that the collection of looted artefacts dated to about 2000 years ago. The site turned out to be one of the five largest Hopewell sites in North America. Nothing of its size or complexity had been

found in Indiana. Local and state law enforcement agencies began an investigation; when it became clear the interstate trafficking prohibition of ARPA was at issue, the Federal Bureau of Investigation entered the case.

The investigation revealed that a heavy equipment operator had uncovered Hopewell-style artefacts while working on a state highway project that included part of the site area. The construction worker concealed the presence of artefacts, in violation of provisions of the state contract his company had signed. He took the artefacts that he had found to his home in Illinois and contacted a well-known antiquities collector and dealer. The dealer, Art Gerber, promotes one of the largest artefact shows in the United States in Owensboro, Kentucky. Gerber paid the worker \$6000 in cash for artefacts and for information about the location of the site. Gerber and three associates then attacked the site, trespassing on General Electric Company property several times in July and August, 1988. They removed artefacts until a security guard caught them and ordered them to leave. Gerber and the others sold some of the looted artefacts at the artefact show in Owensboro, Kentucky, show in 1988. Because the men transported the looted artefacts across the state line, they violated ARPA's trafficking provisions, which is a federal offence.

The US Attorney's Office for the Southern District of Indiana learned of this activity and organized a complex intergovernmental investigation and prosecution. In 1992, the men pled guilty to violations of ARPA for interstate trafficking in archaeological resources obtained in violation of state trespass and conversion laws. Gerber was sentenced to one year in federal prison, three years of supervised release, ordered to pay a \$5000 fine, further ordered to pay \$4750 in lieu of forfeiting vehicles used in committing the crimes, prohibited from engaging in artefact trading for three years except when the proceeds from sales of legally obtained artefacts would be used to pay fines, prohibited from attending artefact shows or exhibitions during that period and ordered to return the stolen artefacts. Gerber appealed his conviction and sentence.

On 22 July 1993, the United States Court of Appeals for the Seventh Circuit affirmed Gerber's conviction (*United States v. Gerber*, 999 F. 2d 1112 (7th Cir. 1993)), and held that ARPA is not limited to objects removed from federal and Indian lands. Instead, the ruling interpreted ARPA as a provision designed to support state and local laws protecting archaeological resources. As such it resembles other

United States statutes that affix federal criminal penalties to state crimes when they are committed in interstate commerce. Gerber then sought United States Supreme Court review of the Appellate Court opinion. The Supreme Court denied his petition on 18 January 1994. Gerber subsequently served his time in a federal jail and is carrying out the other aspects of his sentence. This case provided important support for the prohibition of archaeological looting by publicizing another legal tool to fight those in the illegal commercial network who cross state and national boundaries to conceal their activities or to flee from law enforcement authorities. It also demonstrated how national laws in the United States that apply broadly to archaeological protection on federal and tribal lands also assist in archaeological protection at the state and local levels.

Slack Farm: impetus for legislation

In the late 1980s, news coverage of looting at Slack Farm in Kentucky, carried by the *Los Angeles Times* and *National Geographic*, for example, provided the impetus for new state legislation in Kentucky and Indiana. Charles Bennett of Florida, who introduced a Native American Burial Site Preservation Act cited the *National Geographic* article (Arden 1989) as part of his justification for the legislation. Bennett's was one of several bills introduced into the Congress and one year after Slack Farm, the Smithsonian repatriation bill (the National Museum of the American Indian Act of 1989) was passed, and in 1990, Congress passed the Native American Graves Protection and Repatriation Act.

Slack Farm became a focal point in 1987, when the farm changed ownership. Pot hunters from Kentucky, Illinois, and Indiana paid \$100,000 for permission to dig the site, a Late Mississippian settlement dating from AD 1450–1650, which contained several hundred Native American graves (Fagan 1988). The pot hunters dug uninterrupted for about two months until neighbours called the Kentucky State Police. The men were arrested and charged under a state statute that protected 'venerated objects' — in this case, human remains. The charge was a misdemeanour to which the defendants pled not guilty.

The looters were only interested in the objects, and human bones were shown in disarray on nightly news broadcasts. Native Americans protested the desecration of their dead. Archaeologists bemoaned the fact that the last undisturbed Cabom-Welbom phase site had been looted. Neither objection swayed the market, as traffic in Mississippian grave goods continues to flourish with stone axes selling for \$1000,

pipes for up to \$5000, and whole pots and copper plates for whatever the market will bear.

A full investigation of the disturbances required the assistance of archaeologists. The archaeologists were assisted by a large number of volunteers. Even visitors to the site took away a lasting impression of the damage done by looters. There was some contention and charges that archaeologists were also damaging the site, but because of the free exchange of information with the news media on the part of the archaeologists, the charges were not reported in depth. Because of public concern, Kentucky raised the penalty for disturbing graves from a misdemeanour to a felony, revised the state's preservation legislation, passed laws to protect sites in caves, and set about reviewing the need for additional legislation. Indiana legislators unanimously passed a law in the 1988 session making it a felony to excavate without a permit. These changes would not have happened without the public outcry made visible through the media. Archaeologists, who know well the power of the press, can still be amazed at the public's response, and in this case had not anticipated the degree of interest they encountered. However, public appreciation and Native American support was obtained at a great price — more than 450 holes were dug by the looters and 300 burials exposed.

Submerged cultural resources: legal or illegal salvage?

Nowhere are the problems of multi-jurisdictions, different courts (in this case the admiralty court), multiple laws and US ownership more in disarray than in the protection of submerged cultural resources. The United States has issued an executive order recently affirming its stewardship responsibilities from the territorial sea (3–12 miles) and the contiguous zone (12–24 miles) paving the way for future legislation to protect submerged cultural resources. Much of the current activity arises out of salvors' investigations that have had more to do with searching for treasure than with scientific recording. A landmark case involving Melvin Fisher's company, *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), was a setback to the claim of ownership put forth by the United States for a seventeenth century Spanish galleon (the *Atocha*) on the basis of both the Outer Continental Shelf Act (OCSLA) and the 1906 Antiquities Act (Zander & Varmer 1996). The Fifth Circuit court rejected both US arguments, finding that the United States had no control over the Outer Continental Shelf Act for purposes other than 'exploration and exploitation of its natural resources' and without

this control the United States therefore had no standing under the Antiquities Act. In fact, the court stated that the treaty upon which the OCSLA was based excluded abandoned historic shipwrecks. The court also stated that while the US had the authority to claim the ownership of the shipwreck, it had not done so under the statutes it had cited, namely the Antiquities Act. This case, along with the setback in the decision on the *Deep Sea Research, Inc. v. Brother Jonathan*, which did not recognize the State of California's claim to the *Brother Jonathan*, has resulted in programme review and current discussions with Justice and the National Oceanic and Atmospheric Administration (Petkofer 1996).

The crisis facing archaeology?

In the 1970s Hester Davis, a pioneer in the area of public archaeology, wrote that archaeology was facing a crisis and unless immediate action was taken there would be few, undisturbed archaeological resources still in existence by the year 2000 (Davis 1972). However, at the beginning of the new millennium, we are able to say — quite thankfully — that the rate of wanton destruction has slowed. This does not mean that the archaeological record is not at risk; continued development, environmental degradation, and human agents of vandalism suggest that a major portion of the archaeological record will ultimately reside only in protected preserves, museums, and libraries. But what happened in the 25-year interval between Hester Davis' alarm and where we are now that helped to slow the attrition? The answer is improved legislation, improved training of law enforcement personnel, attorneys, and the courts, and most importantly, public outreach. Casual looting associated with collecting as a hobby and the thoughtless picking up of artefacts as souvenirs is diminishing as public agencies increase their public education and outreach efforts (United States Government Accounting Office 1987; Subcommittee 1988; King 1991). Serious collectors and commercial looters, however, still pose a problem. It is somehow ironic that with increasing protection of sites at the federal, state, and local level, and even private lands, the demand for US cultural objects is increasing. At the beginning of the nineteenth century, big museums in the east built up their collections. At centennial celebrations, local historical societies in the eastern states renewed their collections. Indian tribes are now building museums on the reservations. What all of these activities have in common is that most of the collections remain in the United States, the majority in

public or non-profit museums where they are accessible for research. Thus, the demand in this and other countries for like items cannot be satisfied easily except through additional excavations, which are prohibited on public lands. Unfortunately, the Slack Farm incident is not an isolated occurrence. There are more known instances where sites on private lands are being mined by individuals who pay land-owners to dig. On the other hand, looters have become more circumspect on public lands. The assessment of what is being lost is directly dependent on the measures used. Whether research or monetary, such measures to date are but crude approximations. For the sake of argument, assume a rate of 12 per cent for incidents of looting on known sites (which is undoubtedly in the very tail of a bell-shaped curve). Given that there are around 700,000 known sites on federal land the number of looted sites would be 84,000. If one artefact from each of these sites was sold on the market for \$100, the commercial gain for private individuals at the expense of the United States would be \$8 million. If there are on the order of six to seven million sites in all, the cost to the United States would be \$78 million. While this is a highly speculative exercise, it is still sobering. Using another set of figures, if it costs the government approximately \$3334 for each arrest (1994–97 estimate) and if an arrest were made for one looting event per known site then that figure is also staggering: \$280 million.

But most archaeologists would agree that these figures are spurious, that nothing can replace the contextual value that is lost when artefacts are ripped from their context. But how do we measure contextual value? To date it has been the cost of restoring a site to its original condition, still a monetary measure, but more meaningful archaeologically. At the beginning of the paper, we suggested that analyses, similar to gap analyses, might also be productive. They would consist of categorizing site diversity and estimating the ratio of the original frequency of occurrence to their present-day occurrence. Using research domains or research designs to estimate lost knowledge is problematical. Archaeologists are especially adept at uncovering patterned data at even the most disturbed sites. For example, the group of sites at Homolovi State Park in Arizona, when viewed from the air prior to professional excavation, looked bombed out. Yet, the Arizona State Museum has spent several successful seasons excavating them. Even the archaeological investigation to obtain evidence for court at what remained at Stack Farm resulted in important information about the site. From

Table 11.3. Commercial value of US artefacts. (Sources: *American Indian Art*, newspaper articles, Internet sites.)

Category	Type	Cultural period/ site/geographic area	Purchase price \$
Prehistoric	Slate birdstone	Michigan	3410
	Black-on-white pottery olla	Socorro, AD 1050-1275.	7150
	Otter effigy platform pipe	Hopewell, Ohio pipestone	29,150
	Copper-covered ear spoons	Spiro	5060
	Shell-engraved gorget	?	3080
	Polychrome wood totem pole	Haida	2750
Eskimo	Ivory figurine	Alaska	90,000
	Eskimo wood mask fragment	Aleut, c. AD 1510-1660	46,000
Civil War	20 lbs. Confederate Read shell, lathe-turned, sleeved	?	250
	CS Read Shell, 10 lb, lathe-turned	Dug in Winchester (VA)	425
Nautical	\$10 gold coin	S.S. <i>Brother Jonathan</i> (1865)	100,000
	Mark V Dive Helmet	Reproduction	850
	Ship wheel	?	140

a stewardship and management perspective, federal agencies are trying to improve the condition of the resources. Improving the condition of an archaeological site may at first seem to be an oxymoron, but measures taken to monitor sites and reduce impacts such as looting, keep the sites' original or baseline research values intact. Because site integrity and archaeological value were combined in the National Park Service assessment criteria for archaeological site condition, and because the objective of one of the National Park Service's strategic goals is that 50 per cent of the sites (that have condition recorded) should be in good condition, the definitions of sites condition have been revised to focus on the physical condition. Further refinement of descriptions of physical condition relative to diverse impacts, especially looting, is the next obvious step to better assessments of site condition.

The commercial value of artefacts

Auction houses, trade shows, and now the Internet provide comparative data for sale of US artefacts. Prices for Indian 'relics' are easy to document, whereas historic artefacts are often obfuscated by the use of the term antiques. Civil War artefacts and nautical artefacts are exceptions. The newest phenomenon is trading and selling by individuals, businesses, and on-line equivalents of open air markets on the Internet. Due diligence and *buyer beware* are left unstated although in one case the company's advertisement said that they bought only 'authentic, legally obtained relics'. Table 11.3 is an abbreviated list.

In Alaska, a recent US Fish and Wildlife Service undercover investigation into the illicit trade in walrus ivory and drugs revealed a strong connection to

the antiquities trade. Hundreds of pounds of prehistoric ivory and bone artefacts were found in the homes of the defendants during the execution of the search warrants. The arrests were broadcast on the major television stations, and viewers saw the looters slaughtering walrus to harvest the ivory. The ivory trade in Alaska is such big business that publication of the National Parks Service brochure called 'Save Alaska's Heritage' resulted in threatening calls to the NPS office and heavy political pressure to stop publication. At least one site listed on the US National Register of Historic Places has been removed because of excavation for ivory artefacts.

There are more rumours than supporting data when it comes to who is buying US archaeological material. Artefacts from the Southwest are being purchased by Europeans and supposedly, Japanese collectors. The director of the Hopi heritage centre spoke about a sting operation during which a German apparently offered \$15,000 for a looted Hopi vessel. An early sting operation carried out by the since disbanded Southwest Interagency Task Force revealed reciprocal exchanges of artefacts from the American Southwest and from Latin America. In addition, Harmer Johnson (1996, 20) indicated that the 'forms and colors of lithic material have attracted a new audience' in Europe, as well as the United States.

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Robert D. Hicks

Time Crime

Anti-Looting Efforts in Virginia

Since enactment of the Archeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act, Virginia has featured prominently in federal prosecutions. "Virginia is the showcase state for archeological resources theft cases," a federal prosecutor said. At the state and local level, however, law-enforcement officers, as recently as the early 1990s, knew nothing of the criminal provisions of these laws and had not been taught many of the Virginia laws that pertain to archeological resources. While federal prosecutions were occurring in Virginia, no comparable state cases had taken place.

With assistance from the National Park Service Archeology and Ethnography Program, the Virginia Department of Criminal Justice Services (DCJS), an agency that oversees the standards for hiring and training law-enforcement officers and administers millions of federal and state dollars for criminal justice programs, in 1995 began a collaboration with the Virginia Department of Historic Resources (DHR) in creating a training program for local law-enforcement officers in what has become known as "time crime," a term for theft of and vandalism to historic resources. The training program uses the word "historic" to encompass archeological resources, the term meant to focus on the victim when archeological resources are destroyed: our collective history. Further, unlike ARPA, Virginia attaches no time requirement for a resource to be protected under law. In Virginia law, an "object of antiquity" could be an artifact of very recent manufacture that receives protection because of its context.

Virginia law allows almost any excavation to occur on private property with the consent of the owner, with only a few exceptions. Underwater cultural resources are generally state protected, and a permit is required for their excavation and retrieval. Artifacts in caves or rock shelters also require a state permit for their removal, even if on private property. Human

burials, the disturbance or illegal excavation of which incurs the most severe penalties of all protection laws, receive absolute protection. Any human burial, no matter where located, cannot be disturbed or excavated without a permit or a court order.

Teaching officers these laws is an important step; prosecuting offenses is the test of the laws' viability. Most applicable laws have been under-enforced, if enforced at all, but it would have required considerable self-confidence for a sheriff's deputy, say, to be willing to testify in court to the theft of Middle Woodland projectile points without the requisite archeological knowledge. Based on the investigative protocol taught at the Archeological Resources Protection Training Program at the Federal Law Enforcement Training Center in Glynco, Georgia, a strategy was devised. ARPA requires the involvement of an archeologist to perform a damage assessment at a crime scene. With help from the Department of Historic Resources, professional archeologists throughout the state were asked to participate in the time crime program. The archeologist volunteers attended a training session to better understand how to collaborate with law-enforcement officers in analyzing a crime scene, collecting evidence, and testifying as experts in court. With

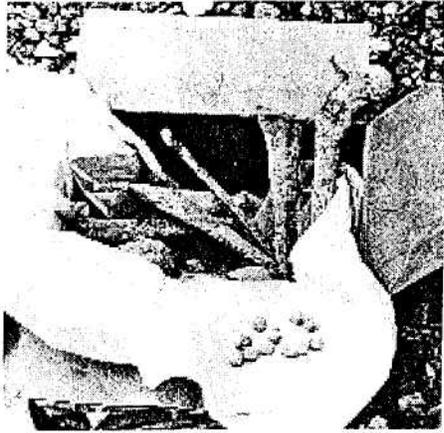
Vandalism to and theft of archeological resources goes largely unchecked in Virginia. Some local governments have promoted anti-looting messages and have passed local ordinances against it. Photo courtesy Fairfax County Park Authority.



DON'T POCKET THE PAST

Protect Historic and Archaeological Sites

Metal detecting, relic hunting and vandalism are illegal on Fairfax County Park Authority property



Publicity surrounding the convictions of two men for violating the Archeological Resources Protection Act in Petersburg, Virginia, frightened a looter into presenting a Richmond funeral home with this box of human remains, a Civil War soldier who was buried near the Cold Harbor Battlefield, with associated artifacts. The precise location of the original burial remains unknown. Photo by the author.

the indispensable volunteer help of professional archeologists, classes were offered to regional criminal justice academies for law-enforcement in-service training credit.

Each class is co-taught by an archeologist who works in the region where the training occurs and a law-enforcement specialist. The four-hour

classes offer an overview of the looting problem in Virginia, nationally, and internationally; a description of pertinent laws and case studies; plus an outline of suggested investigative strategies. An eight-hour variant of the course includes a half-day practicum in which a crime is enacted, requiring the officers to halt the offense, interview and arrest the suspect, and collect evidence and diagram the scene. To date, hundreds of law-enforcement officers have attended the training through almost 80 classes and presentations. Of particular importance, attendees receive a call-out list of professional archeologists who can provide the requisite technical expertise.

Almost as soon as classes became available in time crime, the program began to acquire notoriety, especially among relic hunters. Within months of the first training classes, two looters were caught illegally excavating a sunken Civil War munitions barge, and both were convicted of multiple offenses. The investigation featured the placement of archeologists on search warrant teams. The supervising officer complimented the training program as instrumental in the recognition of the offense-in-progress and its subsequent investigation. *

During the five years of the program, additional investigations have occurred as a result of the training, and far more consultations have taken place between law-enforcement officers and archeologists. Virtually all of the consultations have involved the disposition of human remains. Skeletal material is inadvertently discovered through construction and sometimes deliberately excavated through looting. Native American graves are looted for burial goods; graves of Civil War soldiers are pilfered for military uniform paraphernalia. The consultations have revealed

ambiguities in the law but more often serve to instruct relic hunters and citizens. Abandoned or disused cemeteries are imperiled because of development and vandalism, and their disturbance or destruction can unexpectedly ignite community concern. One incident involved the inadvertent destruction of a few grave markers in what is believed to be a Quaker cemetery from a Caroline County community that was closed in the 1850s. While the investigation, conducted jointly by a sheriff's deputy and an archeologist, revealed no criminality, the community was nevertheless left with an exposed and disturbed cemetery, hitherto unknown. Funds were located through the state-run Threatened Sites Program to conduct a survey to locate burials, which was duly carried out. Quaker descendants who now wish to preserve the site have in hand an archeological survey plus a site number as the basis for their further work.

On the other hand, the Virginia program has met with obstacles. One attorney refused to prosecute a man who bulldozed the architecture of a derelict cemetery, asserting that the true vandals were Union soldiers who carried off and re-used tombstones during the Civil War. In Richmond, a school teacher (a relic hunter) and some of his students excavated the remains of a Confederate soldier without the requisite permit. An organization of descendants of Confederate veterans had arranged for a reburial with an honor guard of re-enactors. Although it was too late for a prosecution, the teacher and his school received admonishing letters from the appropriate state authorities. When publicized events such as the reburial occur where ignorance of the law appears evident, both DHR and DCJS contact the principals involved to educate them about the law respecting antiquities.

The time crime program has evolved in unexpected directions. One historic site that features a summer school for middle school students on archeology has incorporated a looting component in which students role-play investigators, crime scene technicians, and even journalists. The role-play involves an enacted crime in progress featuring an illegal excavation for Civil War artifacts. Mimicking the practicum that teaches officers and archeologists how to process a crime scene in the federal training course, the students must likewise interview the perpetrator, take notes, collect evidence, and make an arrest. Sometimes the time crime investigations them-

selves can involve the unexpected. An internal investigation in a state-run maximum security prison examined the possibility that a staff member had collected artifacts from the prison farm, which happened to be located in an archeologically rich area featuring a continuum of habitation from Paleoindians to the arrival of Europeans.

Recently, a major success was achieved in securing the first conviction of relic hunters in southwest Virginia for looting Native American graves. Although the case began as an ARPA investigation, events required that the case be handled as a local prosecution. Thanks to the time crime program, the necessary resources were in place to help and encourage the prosecuting attorney. During the five years of the program, federal prosecutorial successes have multiplied in Virginia. In one of the most important ARPA cases to date, in October 1997, two men from Petersburg entered guilty pleas in federal court for illegally excavating artifacts from the Petersburg National Battlefield. Both men served prison sentences in this widely publicized case.

This case and other federal prosecutions have helped to legitimize the state effort.

Note

* The case was described in "Virginia Sends Message to Civil War Buffs," *Common Ground*, spring, 1997.

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DCJS is willing to share information on the time crime program, including a sample standard operating order for a law-enforcement agency on the topic, a checklist for archeologists who help process crime scenes, and more. For further information contact Robert Hicks, Crime Prevention and Law Enforcement Services Section, Department of Criminal Justice Services, 805 E. Broad Street, Richmond, Virginia 23219, 804-786-8421, or email <rhicks@dcjs.state.va.us>.

Fire Fight at Hembrillo Basin

Buffalo Soldiers hold their ground in a nighttime skirmish with the Apache.

by KARL W. LAUMBACH

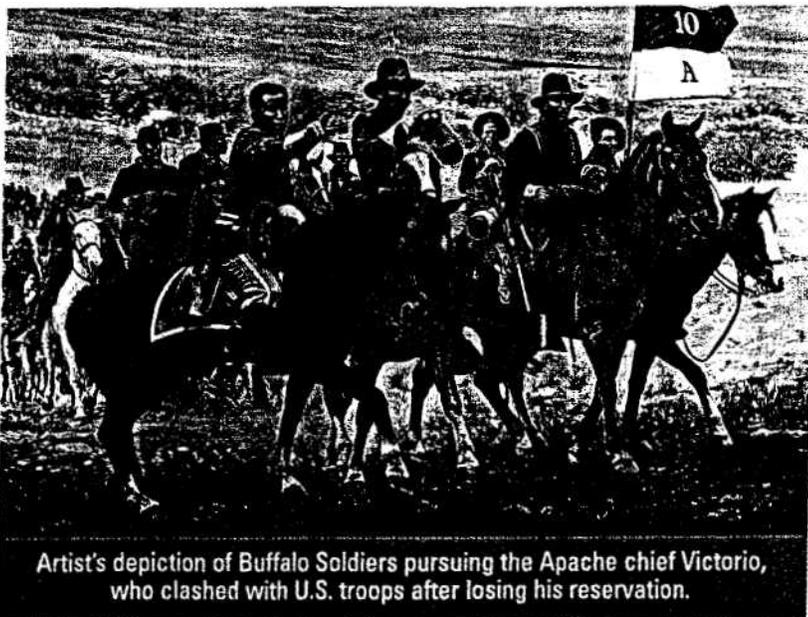
ON APRIL 6, 1880, just four years after Custer's defeat on the Little Big Horn, Captain Henry Carroll of the Ninth Cavalry cautiously led 71 cavalymen toward an Apache camp in the Hembrillo Basin of south-central New Mexico. Suddenly, volleys of gunfire rang out from the surrounding ridgetops and puffs of smoke marked the discharge of black-powder cartridges. Rushing to the top of a low ridge, the troops dismounted, every fourth man holding horses. Forming skirmish lines, they returned fire until the sun went down. Then they held their ground and waited for reinforcements.

The Ninth was one of six black regiments formed after the Civil War to help keep the peace on the frontier. Its members were called Buffalo Soldiers by the Cheyenne

because their curly hair reminded the Native Americans of buffalo hides. At Hembrillo, two companies of the Ninth Cavalry pursuing the Apache war chief Victorio had been surrounded by a superior force of 150 Chiricahua and Mescalero Apache. Unlike the Battle of the Little Big Horn, the Buffalo Soldiers' nightlong battle against two-to-one odds was largely forgotten. Until recently, the record of the fight was based on reports of white Sixth Cavalry officers who credited themselves with saving Carroll's soldiers from "a condition of helplessness." Recent battlefield archaeology and historical research tell a different story, one of bravery in the face of a highly organized Apache force.

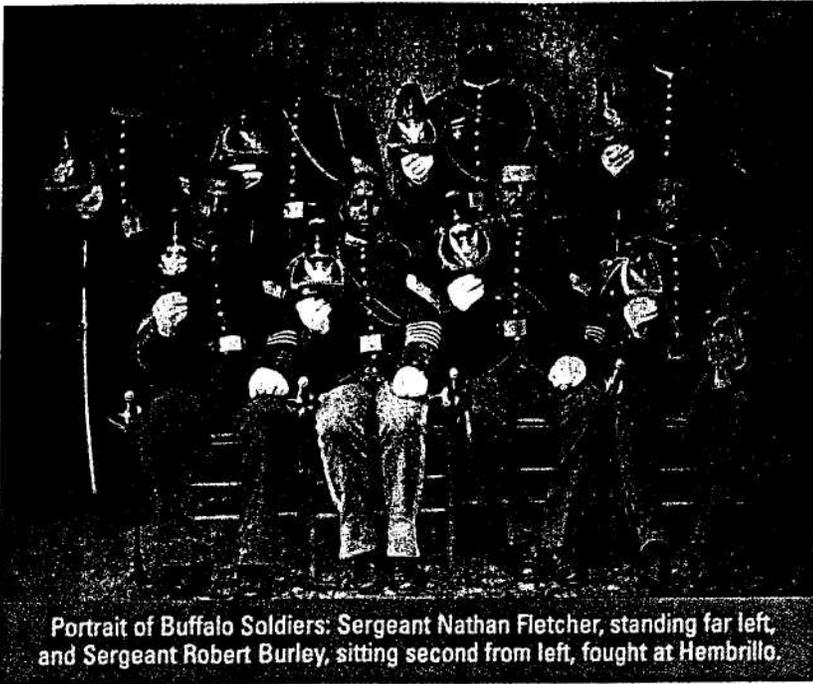
In 1987, an archaeological crew from Human Systems Research, Inc. (HSR), returned from a field survey in the White Sands Missile Range with stories of amazing panels of Apache rock art. The crew had found the art near a spring in the Hembrillo Canyon, which drains the high walled Hembrillo Basin of the San Andres Mountains. On a follow-up trip, White Sands Missile Range archaeologist Robert Burton and I visited the painted images of mounted warriors and miniature depictions of cougar, javelina, deer, and dragonflies. The rock art indicated the area had long been a sacred Native American site.

In reviewing the literature on the local Apache, we discovered General Thomas Cruse's Indian War memoir, *Apache Days and After*, which noted that a major battle of the Victorio War had taken place in the canyon. The two-year war began when Victorio's Chiricahua Apache band lost their promised reservation and were forced by the Indian Bureau to share land with several other Apache bands. In his account of the ensuing war, Cruse described a desperate



Artist's depiction of Buffalo Soldiers pursuing the Apache chief Victorio, who clashed with U.S. troops after losing his reservation.

Courtesy Don Stivers



Portrait of Buffalo Soldiers: Sergeant Nathan Fletcher, standing far left, and Sergeant Robert Burley, sitting second from left, fought at Hembrillo.

battle around a spring, with troopers surrounded by Apache positioned on a semicircle of higher ridges and rock breastworks where there was no natural cover. Excited by the prospect of finding the battleground, we surveyed around the Hembrillo Canyon spring for evidence, only to come up empty-handed. Oddly enough, it would ultimately take a treasure hunt to find the battlefield.

The best known feature of Hembrillo Basin is Victorio Peak, a 400-foot-high hill named after the Apache chief and allegedly the site of a fabulous treasure. An itinerant foot doctor named Milton "Doc" Noss is said to have discovered stacks of gold bars in a crevice there in 1937; the gold was subsequently lost in a cave-in. Stories about the treasure's origins attribute the cache to the Aztecs, Spanish bandits, or Victorio's Apache. Descendants of Doc Noss' wife made an attempt to retrieve the treasure. Hoping to find evidence of the battle, Burton accompanied them and found a couple of cartridges ejected from Springfield .45 caliber carbines on a low ridge well within the basin. Then Harold Mounce, a volunteer who had been a 16-year-old participant in a 1949 hunt for Noss' gold, led us to more cartridges and one of the rock breastworks mentioned in military reports.

The interior ridges of the basin are formed by a series of limestone uplifts, each capped with gray outcroppings that provided cover for the combatants. We found our first cartridges in a pack rat nest below an impressive breastwork that looked down on a series of lower uplifts. On one of these we found clusters of cartridges fired from the .45-55 caliber carbines used by the Buffalo Soldiers; those with head stamps (numbers and letters on the head of the cartridges) had been manufactured in 1877 and 1878.

Since we assumed that the clusters of cartridges marked the defensive position of Carroll's besieged soldiers, volunteers with metal detectors swept the area, paying particular attention to positions that could have provided cover for the attacking Apache. As we moved farther up the ridge, we found clusters of .44 caliber Henry cartridges mixed with other non-military ones (Apache used whatever arms they could buy or capture), suggesting that the Apache had fired from this protected position. More Apache breastworks were discovered, some along the edges of arroyos, others on the limestone outcroppings of adjacent ridges.

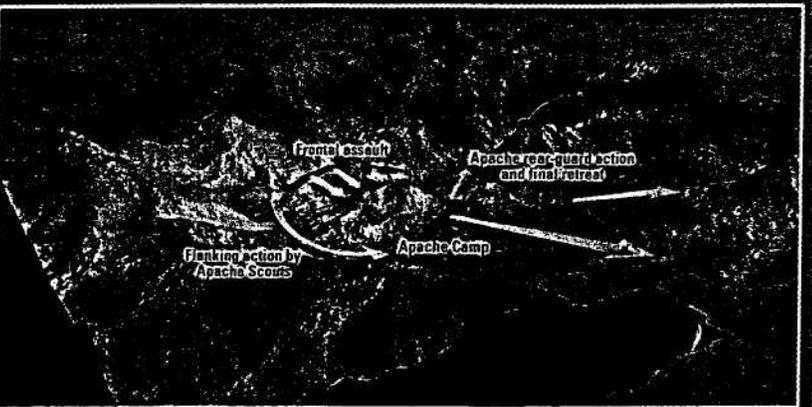
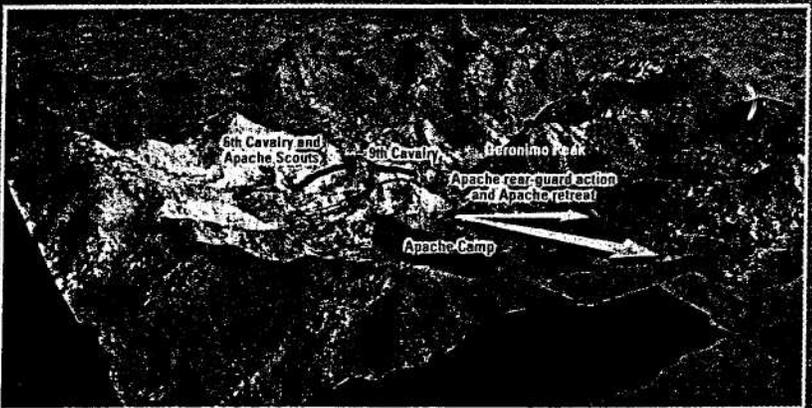
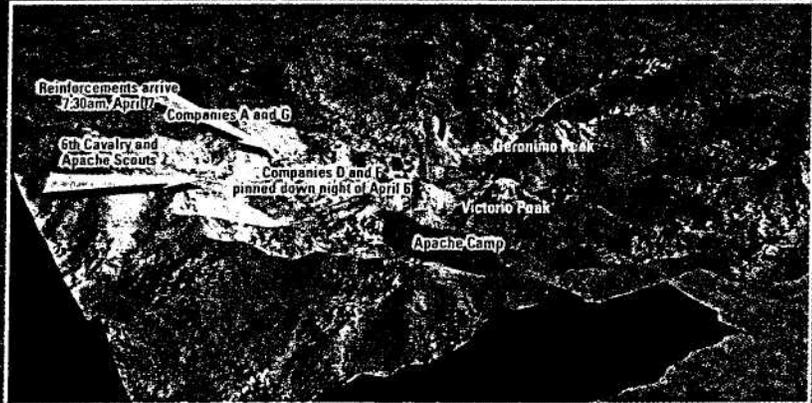
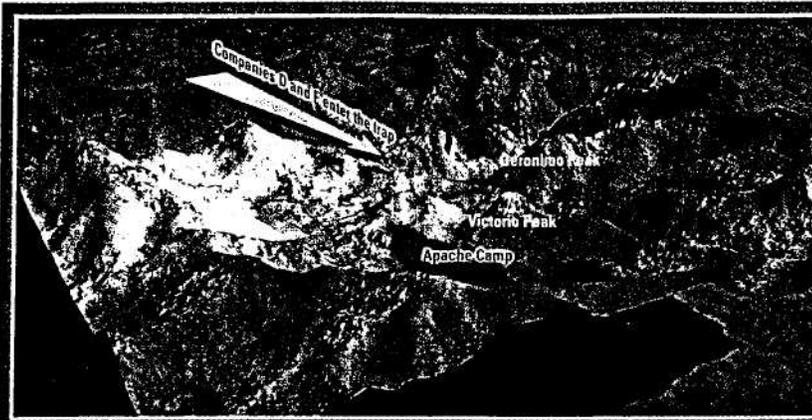
The metal-detector reconnaissance took more than two years, and with the help of 59 volunteers we covered 900 acres of the battlefield. Each artifact, including every cartridge, was carefully mapped and replaced in the ground by a numbered tag. Jim Wakeman, then an associate professor of surveying at New Mexico State University, used a global positioning

system and sophisticated software to produce a map that faithfully reflected the undulating topography. Wakeman's high resolution map and the artifact data base were then entered into a Geographic Information Systems (GIS) program, that plotted each artifact on the computerized map.

Douglas Scott, an archaeologist for the National Park Service's Midwest Archaeological Center in Lincoln, Nebraska, helped us analyze our finds. In the mid-1980s, Scott pioneered the use of police-style forensic analysis of artifacts recovered from the Custer Battlefield. His analysis resulted in a significant reinterpretation of Custer's tactics during the battle (March/April 1990). After comparing firing pin and ejector marks on the cartridges under a microscope, Scott reported that the 800 cartridges col-

Captain Henry Carroll, left, rose through the ranks to become a Brigadier General. Victorio, right, led a two-year Apache uprising against the U.S.





The Ninth Cavalry's D and F companies entered the Hembrillo Basin in the late afternoon of April 6. Surrounded by Apache, the troopers held their ground until the next morning, when they were reinforced by companies A and G, the Sixth Cavalry, and 100 White Mountain Apache scouts. The combined force then drove the Apache chief Victorio and his followers out of the basin.

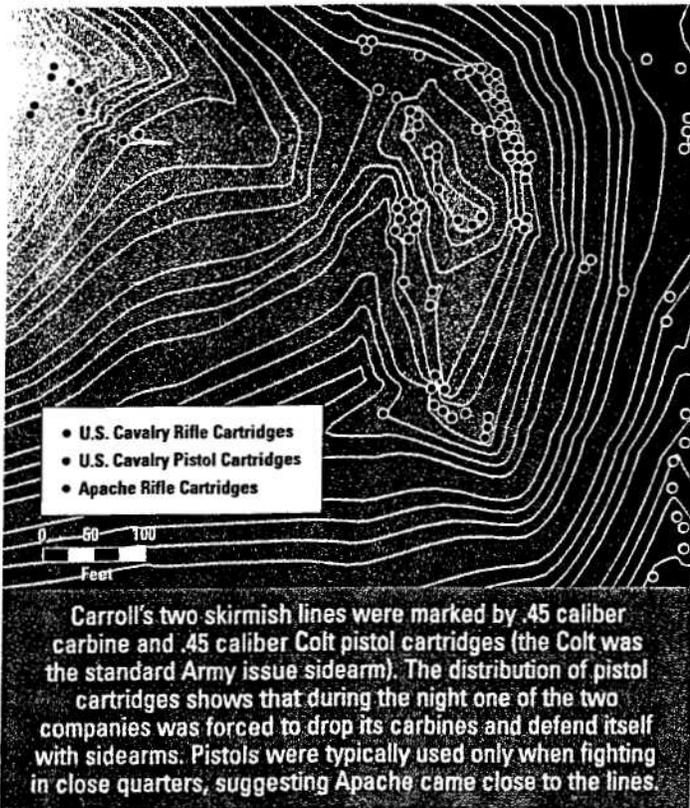
lected from Hembrillo were fired from 145 different rifles or carbines and 39 different pistols. Because marks on the cartridges vary with the ejector mechanism of the weapon, he could even identify the make and model of the guns that fired them. When this analysis was added to the GIS program, we could track individual weapons across the landscape and watch the battle unfold on the computer screen.

As the archaeological information became more complete, the historical record began to expand as well. The oft-quoted Sixth Cavalry accounts portrayed the Buffalo Soldiers as incompetents who, sick on bad water from nearby Malpais Springs, had wandered helplessly into Hembrillo looking for good water, only to find the springs guarded by Victorio's Apache.

There are no Ninth Cavalry accounts of the battle of Hembrillo in the published literature, and for 115 years history provided the Buffalo Soldiers no defense against the bigoted reports of the Sixth Cavalry. In 1995, Charles Kenner, noted Buffalo Soldier historian, drew attention to an unusual 1903 article on the Victorio War published in an obscure military pamphlet *The Order of Palestine Bulletin*. The article was written by John Conline, a First Lieutenant who had commanded Company A of Carroll's Ninth Cavalry during the army's pursuit of Victorio.

Conline's report tells of watering with the Ninth's other three companies at Malpais Springs on April 4, 1880. The next morning he led two scouts and 29 troopers south to Hembrillo Canyon, where he found tracks of Apache driving cattle up the canyon. Cautiously following the tracks, Conline soon found himself embroiled in a two-hour skirmish with about 50 Apache. One of Conline's scouts, fluent in Apache, heard Victorio shouting orders. Withdrawing after dark, Conline rejoined Carroll's command, bivouacking on the old Salt Trail, a wagon path used by southern New Mexico communities to access salt beds in the Tularosa Basin.

Now that Victorio was aware of their presence, it was imperative for the Ninth to act quickly lest the Apache melt away in front of them. The next morning, according to Conline, Carroll took Companies D and F into the San Andres by a northern route, sending Companies A and G south to find an alternate route into the mountains. The Ninth was moving aggressively to engage Victorio until help could arrive. But once in the mountain canyons, Carroll had second



thoughts about his strategy. A courier was sent to Companies A and G with instructions to follow Carroll's trail into the mountains.

Carroll entered the Hembrillo Basin sometime between 4:30 and 6:00 P.M. on April 6. He did it with the knowledge that Victorio was in front of him and that he had two companies following his trail into Hembrillo. These were hardly soldiers sick on bad water, stumbling blindly into Victorio's camp, as portrayed in Sixth Cavalry accounts. Furthermore, the Ninth had been carrying their own water, according to a previously overlooked letter from one of the Ninth's officers to his mother.

To avoid an ambush, the Ninth approached Victorio's camp across the mountains from the north rather than the

more obvious eastern route through Hembrillo Canyon. The distribution of Apache cartridges on the western side of the basin, previously unexplained, suddenly made sense to us. Victorio recognized the tactical advantage of occupying the combined ridgelines on the north side of his camp. When Carroll's Buffalo Soldiers came down the northern rim of the basin, those ridges became Victorio's first line of defense.

The Apache waited as Carroll's command moved deep into a V formed by two ridgelines on the north side of Hembrillo Basin. When they opened fire, the range was still several hundred yards, too far for an effective ambush. Carroll took the prescribed action for dealing with an attack on both flanks and the front. He led his troops forward, driving some Apache from the central uplift of what is now called Carroll's Ridge. Cartridges from those Apache guns were found along the U.S. skirmish lines.

The Apache encircled the Buffalo Soldiers, but night-fall came to the troopers' rescue. Records indicate that the moon did not rise until 4:30 A.M. and was then only a thin sliver. Despite the dark, some Apache managed to creep close. At least three of them, firing either 1866 Winchester or Henry rifles, reached a low uplift just 150 yards from the skirmish line. Their rifles, utilizing a double firing pin, easily jammed. The cartridges often did not fire when first struck and had to be carefully rotated in the chamber and re-struck. Scott's analysis showed some had been struck as many as 23 times. It was obvious that the Apache riflemen had spent some time in one location, patiently forcing each precious cartridge to fire.

The distribution of the cartridges across the battlefield reflects Victorio's superb control over his fighters. Just as the Henry ammunition was found together, cartridges from 15 .44-40 caliber 1873 Winchesters were clustered by a nearby spring. Victorio probably concentrated those short-ranged repeating rifles to keep soldiers from reach-

Two .45-55 caliber cartridges, below left, have identical firing pin marks. Stamps indicate they were manufactured at Pennsylvania's Frankford Arsenal in 1877 and 1878. Metal tags, below, record where ammunition was found on the battlefield.



Steve Northrup

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ing water during the night. Cartridges from certain .45-70 and .50-70 caliber Springfields were also consistently associated, suggesting that the Apache were fighting as highly organized units.

Unaware their comrades were pinned down, Companies A and G camped north of Hembrillo Basin, waiting until morning to join Carroll. From the west came one company of the white Sixth Cavalry, together with 100 White Mountain Apache scouts, the Chiricahuas' bitter enemies. After stumbling toward Hembrillo through the brush and the rocks of the Jornada del Muerto (Dead Man's Journey, a desert basin aptly named for the many travelers who had perished there), they arrived early the next morning. At the same time Companies A and G also descended into the Hembrillo Basin.

Victorio was quickly aware of both groups of reinforcements. His Apache withdrew from their tightening circle around Carroll and took positions on Victorio Ridge, a natural fortress formed by a group of four consecutive limestone uplifts overlooking the troopers from the south. From that vantage, Victorio's rearguard stymied the cavalry for several hours as Apache women and children fled the basin. At this point, the battle involved 300 U.S. troops and 150 Apache, the largest number of combatants of any battle during the Victorio War.

The Apache guns on Victorio Ridge were not the short-ranged Winchesters, but rather long-range .50 or .45 caliber Springfields, Remingtons, and Sharps, all capable of keeping the attackers at bay some 600 yards away. Cartridges indicate that when the frontal assault on Victorio Ridge finally began, the Apache moved to the west to meet the attack on the westernmost uplift. When flanked by the White Mountain Apache scouts, Victorio abandoned the ridge, moving south to confront the scouts.

Victorio's Apache were doing what they did best, fighting a defensive battle with a mountain at their backs. A trail of cartridges marks the Apache route and their successive defensive positions as they fought their way out of the Hembrillo Basin, always keeping the pursuing troops below and in front of them. According to Conline, the Apache front was as much as two miles wide at this point.

Once the Apache disengaged from their final position on Victorio Peak, the Battle of Hembrillo was over. Scouts reported the bodies of three Apache in the vicinity of the Apache camp. Carroll had been hit twice and seven Buffalo Soldiers were wounded. Two would later die at nearby Fort Stanton, an army outpost near the Mescalero Reservation.

That night 400 U.S. troops and more than 300 horses and mules tried to make do with the limited spring water available in the basin. The next morning, a combined force of Buffalo Soldiers and White Mountain Apache Scouts reconnoitered the south rim only to find a rear guard of



Steve Norbup

Author Laumbach on Victorio Ridge with his metal detector. Victorio Peak is visible over his left shoulder.

Apache waiting to see what would happen next. A brief skirmish ensued and again the Apache rear guard retreated. Late in the evening of April 8, the troops marched east across the White Sands desert to meet the 10th Cavalry (also Buffalo Soldiers) at the Mescalero Reservation, where Apache sympathetic to Victorio were disarmed and a significant part of Victorio's support base was lost to him.

The battle in Hembrillo was the largest confrontation of the Victorio War. The pressure broke up Victorio's large camp, forcing him west to the Black Range and finally into Mexico. In October 1880, his band was surrounded by Mexican troops at Tres Castillos, an isolated range of low desert mountains in northeastern Chihuahua. In an ensuing massacre (the Apache were out of ammunition), Victorio was killed and his men almost totally wiped out. The few who remained joined the rest of the Chiricahuas in their exile in Oklahoma after the surrender of Geronimo in 1886.

The archaeology of the Hembrillo Battlefield has given us new insight into Victorio's tactical abilities, particularly his control and disposition of available firepower. Archaeology has also stripped the veil from Carroll's long night, revealing an aggressive strategy and defensive positioning in the face of an attack from established positions. It is now possible to walk the ground the Buffalo Soldiers held, and look out on the basin from the ridges Victorio defended. Standing behind the stacked rock breastworks, visitors can grasp the tactical situation and understand the Apache style of defensive warfare and mobility that became a standard lesson plan for future West Point officers. Today, the U.S. Army uses the battlefield as a "walk around," a place where junior officers can study and analyze the U.S. and Apache battlefield strategies. ■

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CULTURAL RESOURCES AND PROTECTION UNDER UNITED STATES LAW

Francis P. McManamon*

I. CULTURAL RESOURCES DEFINED

"Cultural resource" and "heritage resource" are general terms informally, but frequently, used to refer to a wide range of archeological sites and collections, historic structures, museum objects, historic shipwrecks, documents, and traditional cultural places. In the United States, use of "cultural resource" as a term in the professional literature dates to the early 1970s when it began to be used by archeologists and historians in the National Park Service to denote a wide range of resource types.¹ More recently, the term "heritage resources" also has gained popularity as a general referent for this wide range of resources.² The goal of this article is to summarize the federal legal and regulatory framework for cultural resources in the United States. As a summary, the information here will only introduce many of the issues related to cultural resources which are dealt with in more detail in various references cited in the footnotes.

Usually included under the terms "cultural resources" or "heritage resources" are "archaeological resources," as defined by the Archaeological Resources Protection Act and its regulations;³ "historic properties," as defined by the National Historic Preservation Act and its regulations;⁴ "abandoned historic shipwrecks", as defined in the Abandoned Shipwreck Act and its guidelines;⁵ and, "cultural items" as defined in the Native American Graves Protection and Repatriation Act and its regulations.⁶ Some may consider other properties, organic or inorganic resources, or even individuals with special attachments to American history, prehistory, or traditional cultures, as "cultural resources," even though these are not defined in statute or regulation. These terms, "cultural resources" or "heritage resources" may

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1. Don D. Fowler, *Conserving American Archaeological Resources*, in AMERICAN ARCHAEOLOGY PAST AND FUTURE, 135, 135-62 (David J. Meltzer et al. eds., 1986); Francis P. McManamon, *The Protection of Archaeological Resources in the United States: Reconciling Preservation with Contemporary Society*, in CULTURAL RESOURCE MANAGEMENT IN CONTEMPORARY SOCIETY: PERSPECTIVES ON MANAGING AND PRESENTING THE PAST 40, 45 (Francis P. McManamon & Alf Hatton eds., 2000)[hereinafter CULTURAL RESOURCE MANAGEMENT].

2. See generally SHERRY HUTT ET AL., HERITAGE RESOURCES LAW (1999).

3. 16 U.S.C. § 470a(a)-470mm (1994); 43 C.F.R. § 7 (2000).

4. 16 U.S.C. §§ 470-470x; 36 C.F.R. §§ 61, 63, 67, 73, 78, 79, 800.

5. 43 U.S.C. § 2101; ABANDONED SHIPWRECK ACT GUIDELINES, PT. I (Nat'l Park Serv., Dept. of the Interior) at <http://www.cr.nps.gov/> (last visited Apr. 2, 2001).

6. 25 U.S.C. §§ 3001-3013 (1994); 43 § C.F.R. 10.

be convenient general terms, but for specific protections and appropriate treatments, the more specific statutory and regulatory terms and definitions are essential.

II. ARCHEOLOGICAL RESOURCES

The legal definition of "archaeological resources" is found in Section 3(1) of the Archaeological Resources Protection Act (ARPA) and in Section 7.3 of the uniform regulations implementing the statute.⁷ For purposes of ARPA, archaeological resources include any material remains of human life or activities that are at least 100 years of age and of archeological interest. The definitions section of the regulations is extensive, and contains illustrative examples of "material remains" and "archaeological interest." Essentially, material remains are "of archaeological interest" if they are "capable of providing scientific or humanistic understandings of past human behavior . . . through the application of scientific or scholarly techniques . . ."⁸ Material remains are "physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated."⁹ The latter definition is followed by nearly an entire text column of small print listing examples of "material remains," such as domestic structures, baskets, and earthworks.¹⁰

Archeological resources under ARPA also include collections and records from investigations and studies. This aspect of archeological resources is receiving increasing professional attention.

Much attention was given to development of the definition of "archaeological resource" in the statute and regulations. This focus was intended to prevent interpretive problems such as had called into question the term "object of antiquity," used in the Antiquities Act.¹¹ In 1974, the Ninth Circuit Court of Appeals had found the Antiquities Act term to be unconstitutionally vague in the *Diaz* case.¹² This case and other circumstances, including the historical problem of effective enforcement of the Antiquities Act to prevent archeological looting and prosecuting those who looted, were central causes to the enactment of ARPA in 1979. ARPA was designed to improve the enforcement of archeological protection and the regulation of archeological investigations on public lands. It underscores,

7. 16 U.S.C. § 470bb(1); 43 C.F.R. § 7.3(a). Federal departments and agencies covered by ARPA are required by section 10 of the statute to develop and utilize uniform regulations. These uniform regulations are found at different places in the Code of Federal Regulations for each of the departments: 43 C.F.R. § 7 (Interior); 36 C.F.R. § 296 (Agriculture); 18 C.F.R. § 1312 (2000) (Tennessee Valley Authority); 32 C.F.R. § 299 (2000) (Defense). In the following footnotes, the Department of the Interior regulations citation will be used as a reference for all four sets of uniform regulations.

8. 43 C.F.R. § 7.3(a)(1).

9. *Id.* § 7.3(a)(2).

10. *Id.* § 7.3(a)(3)(i).

11. 16 U.S.C. §§ 431-433; 43 C.F.R. § 3.

12. *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113, 115 (9th Cir. 1974); SHERRY HUTT ET AL., ARCHEOLOGICAL RESOURCE PROTECTION 23-25 (1992) [hereinafter ARCHEOLOGICAL RESOURCE PROTECTION].

rather than replaces the Antiquities Act as a foundation for archeological and historic preservation in the United States.¹³

III. HISTORIC PROPERTIES

The National Historic Preservation Act was enacted in 1966 "to establish a program for the preservation of . . . historic properties throughout the nation . . ."¹⁴ The act contains two introductory sections, one declaring the purpose of the act, for example:

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or subsequently altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans . . .¹⁵

The second section of the NHPA contains a "Declaration of Policy" describing the policy of the federal government regarding historic properties. Throughout this section, historic properties are referred to as "prehistoric and historic resources" making it very clear that archeological sites are included among the variety of historic properties.¹⁶

Title I of the National Historic Preservation Act establishes the National Register of Historic Places as a national listing of "historic properties" comprising districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.¹⁷ The statute and the regulations and procedures that govern the National Register of Historic Places have been written to include historic and prehistoric archeological sites within the definition of "historic properties." This inclusive approach and broad definition have enabled

13. R.B. Collins & Mark P. Michel, *Preserving the Past: Origins of the Archaeological Resources Protection Act of 1979*, 5 AM. ARCHEOLOGY 84, 84-89 (1985); ARCHEOLOGICAL RESOURCE PROTECTION, *supra* note 12, at 25-28; Francis P. McManamon, *The Antiquities Act—Setting Basic Preservation Policies*, in 19 CRM 18, 21-22 (1996) [hereinafter *The Antiquities Act*].

14. The statute is introduced as: "An act to establish a program for the preservation of additional historic properties throughout the nation, and for other purposes." 16 U.S.C. § 470.

15. *Id.* § 470(b)(1)-(4).

16. *Id.* § 470-1.

17. *Id.* § 470(a)(a).

professionals working in public archeology and archeological preservation to operate under the umbrella of the national historic preservation program. Title I also expanded the level of federal concern beyond nationally significant resources, as expressed in the 1935 Historic Sites Act,¹⁸ to include the preservation of historic properties of local or state significance.

IV. ABANDONED SHIPWRECKS

In 1987, the United States enacted the Abandoned Shipwreck Act in order to provide for the treatment of abandoned shipwrecks as cultural resources rather than as commercial property under the law of salvage and finds and admiralty courts.¹⁹ The definition of an abandoned shipwreck and appropriate treatment, however, continue to be debated.²⁰

Under the Abandoned Shipwreck Act, "abandoned shipwrecks" are those that have been deserted and to which owners have relinquished ownership rights with no retention.²¹ Part I of the guidelines published to implement the statute provide a more detailed definition of the term:

abandoned shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel or its cargo or to provide legal notice of abandonment . . . an owner shows intent to give up title. Such shipwrecks ordinarily are treated as being abandoned after the expiration of 30 days from sinking.²²

There are two important distinctions regarding shipwreck abandonment described in the guidelines:

(a) when the owner of a sunken vessel is paid the full value of the vessel, such as receiving payment from an insurance underwriter, the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner; [and]

18. 49 U.S.C. § 303 (1994).

19. Michele C. Aubry, *The Abandoned Shipwreck Act*, in ENCYCLOPEDIA OF UNDERWATER AND MARINE ARCHAEOLOGY 16, 16-17 (James P. Delgado ed., 1997); Francis P. McManamon, *The Abandoned Shipwreck Act*, in ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA 1, 1-2 (L. Ellis ed., 2000) [hereinafter McManamon, *The Abandoned Shipwreck Act*].

20. Francis P. McManamon, *Abandoned Shipwrecks: Historic Property or Just Property?*, in 1 COMMON GROUND 2, 2 (1996) [hereinafter *Historic Property*]; Peter Pelkofer, *A Question of Abandonment*, in 1 COMMON GROUND 64, 64-65 (1996); Caroline M. Zander & Ole Varmer, *Closing the Gap in Domestic and International Law: Achieving Comprehensive Protection of Submerged Cultural Resources*, in 1 COMMON GROUND 60, 60-63, 66-70 (1996).

21. 43 U.S.C. § 2101(b) (1994).

22. ABANDONED SHIPWRECK ACT GUIDELINES, PT. I (Nat'l Park Serv., Dept. of the Interior) at <http://www.cr.nps.gov/> (last visited Apr. 2, 2001).

(b) although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, it remains the property of the nation to which it belonged at the time of sinking unless the nation has taken formal action to abandon it or to transfer title to another party . . . Shipwrecks [and generally their cargo] entitled to sovereign immunity are wrecks of warships and other vessels . . . used only on government non-commercial service at the time of sinking.²³

The statutory direction given to the Park Service for the preparation of the guidelines reflect the wide range of interests that the statute and guidelines try to satisfy and illustrate the compromise nature of the statute. The guidelines are supposed to:

- (1) maximize the enhancement of cultural resources;
- (2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;
- (3) facilitate access and utilization by recreational interests; [and]
- (4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.²⁴

The guidelines are advisory rather than regulatory. The appropriate uses and management of historic shipwrecks continue to be subjects of debate among archeologists, historic preservationists, salvors, artifact dealers, and sport divers.²⁵ State underwater archeology programs exist in a number of states, including Florida, Michigan, and Texas, for the management of historic shipwrecks.²⁶

V. CULTURAL ITEMS

The Native American Graves Protection and Repatriation Act identifies five kinds of remains and the artifacts covered by provisions of the statute, they are: (1)

23. *Id.* at 50, 120-21.

24. 43 U.S.C. § 2104(a)(1)-(4).

25. See Paul Forsythe Johnston, *Treasure Salvage, Archaeological Ethics and Maritime Museums*, 22.1 INT'L J. NAUTICAL ARCHAEOLOGY 53, 53-60 (1993); Ricardo J. Elia, *United States Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects*, 29.1 INT'L J. NAUTICAL ARCHAEOLOGY 43-56 (2000).

26. See e.g., David Tarter et al., *The National Park Service Archeological Assistance Program and Submerged Cultural Resources Protection*, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 165, 165-75 (Paul Forsythe Johnston ed., 1995); Kenneth J. Vrana & John R. Halsey, *Shipwreck Allocation and Management in Michigan: A Review of Theory and Practice*, 26 HISTORICAL ARCHAEOLOGY 81, 81-96 (1992).

Native American human remains; (2) associated funerary objects; (3) unassociated funerary objects; (4) sacred objects; and (5) objects of cultural patrimony.²⁷

"Human remains" are not defined in the statute, but are in the implementing regulations. All kinds of Native American human remains are covered. This means isolated human bones, teeth, or other kinds of bodily remains that may have been disturbed from a burial site are still subject to the provisions of this statute. Naturally shed or freely given parts of the body, for example, hair, are excluded from this definition.²⁸

"Associated funerary objects" are objects reasonably believed to have been placed with human remains as part of a death rite or ceremony. The use of the adjective "associated" refers to the fact that these items retain their association with the human remains with which they were found and that these human remains can be located. It applies to all objects that are stored together as well as objects for which adequate records exist permitting a reasonable reassociation between the funerary objects and the human remains that they were buried with.

It frequently occurs in archeological sites that artifacts seemingly from burials were not placed with the human remains as part of a death rite, rather they have been introduced into the burial later by natural processes or cultural activities unrelated to death rites or ceremonies. These latter objects would not be considered funerary objects.²⁹

"Unassociated funerary objects" are items that "... as a part of a death rite or ceremony of a culture are reasonably believed to have been placed with individual human remains either at the time of death or later . . .", but for which the human remains are not in the possession or control of the museum or Federal agency. These objects also must meet one of two further conditions. They must be identified by a preponderance of the evidence as either "... related to specific individuals or families or to known human remains . . ." or "... as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe."³⁰

"Sacred objects" are defined in the statute as "... specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents . . ."³¹ Further discussion of this term is supplied by the Senate Committee report:

There has been some concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result. The primary purpose of the object is that the object must be used in a Native

27. 25 U.S.C. § 3001 (1994); Francis P. McManamon, *The Native American Grave Protection and Repatriation Act*, in *ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA* 387-389 (L. Ellis ed. 2000) [hereinafter *Native American Grave*].

28. 43 C.F.R. § 10 (d)(1).

29. 25 U.S.C. § 3001(3)(A).

30. 25 U.S.C. § 3001(3)(B); see also 43 C.F.R. § 10.2(d)(2)(i)-(ii).

31. 25 U.S.C. § 3001(3)(C); see also 43 C.F.R. § 10.2(d)(3).

American religious ceremony in order to fall within the protection afforded by the bill.³²

"Objects of cultural patrimony" are defined in the statute as having "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual . . . (Sec. 2(3)(D))". The key provision in this definition is whether the property was of such central importance to the Tribe or group that it was owned communally. The potential vagueness of this term again produced comment by the Senate Committee:

The Committee intends this term to refer to only those items that have such great importance to an Indian Tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member. Objects of Native American cultural patrimony would include items such as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian Tribe as a whole.³³

Many objects in archeological or ethnographic collections are not subject to the statute, because they never had a burial, funerary, religious, or cultural patrimonial context in the culture that they were part of. Such objects would be retained in existing repositories with appropriate treatments and care.³⁴ When archeological investigations or unanticipated discoveries on Federal or Tribal land result in the recovery of such items, they are to be treated and disposed of according to the requirements of the appropriate archeological or historic preservation laws.

VI. THE VALUES WE ASSOCIATE WITH CULTURAL RESOURCES

Cultural resources are the physical remains of our diverse national culture. They exist throughout the country and relate to ancient, historic, and even modern time. In describing the purpose of the National Historic Preservation Act, Congress found that historic properties are an irreplaceable heritage. The Congress described them as a vital legacy of cultural, educational, aesthetic, inspirational, economic,

32. SELECT COMM. ON INDIAN AFFAIRS, PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP. NO. 101-473, at 7 (1990).

33. See *id.* at 7-8.

34. For example, Federal agency archeological collections are to be cared for according to regulations at 36 C.F.R. § 79 (2000). See generally S. Terry Childs, *The Curation Crisis*, 7 *FED. ARCHAEOLOGY* 11, 15 (1995); S. Terry Childs & Eileen Concoran, *Managing Archeological Collections—Technical Assistance*, Archeology and Ethnography Program, National Park Service, Department of the Interior at <http://www.cr.nps.gov/nad/collections/index.htm> (last modified Jan. 3, 2001); LYNNE P. SULLIVAN, *MANAGING ARCHAEOLOGICAL RESOURCES FROM THE MUSEUM PERSPECTIVE*, (Nat'l Park Serv., Dept. of the Interior, Technical Brief No. 13, 1992); SUSAN PEARCE, *ARCHAEOLOGICAL CURATORSHIP* (1990).

000256

and energy benefits for current and future generations of Americans. Current preservation of cultural resources extends "beyond entities of national historical significance to include those of state and local importance and architectural value . . . legal guidelines [exist] for the preservation of cultural artifacts on many levels, encompassing prime examples of buildings and sites important for their time and place . . ."³⁵

Since material cultural remains existed even before written records, they are often the only remnants of people, historical processes, or traditional events of that era, but archeological resources they also amplify the record in historical times. Scientific archeological investigations have provided information about such diverse important historical events as the early settlement of Santa Fe and Jamestown, the Little Bighorn battle and the American Revolution, as well as the daily events in ancient Cahokia, Chaco Canyon, Ozette, and historic New York City and San Francisco. Cultural resources possess the potential to transmit even greater knowledge, as future discoveries are made and new scientific and analytical techniques are developed.³⁶

The benefits to be derived from cultural resources include increased opportunities for education and a strengthened sense of community identity, cohesion, and pride. Information derived from investigations of these resources or visits to the resources themselves, impart knowledge of the past that can fascinate visitors to national, state, and local sites and historic structures. Visitors may, in turn, fuel a local economy and help to sustain communities. By imparting a sense of belonging and personal association with a place, site, or structure and its ancient and historical associations, the greatest benefit bestowed by cultural resources, although harder to quantify is the enhancement of our environment and way of life.³⁷

VII. THE DEVELOPMENT OF PUBLIC CONCERN AND PROTECTION MEASURES FOR CULTURAL RESOURCES³⁸

Since the birth of the United States as a nation, there has been an interest in the cultural resources of America. In the eighteenth and early nineteenth centuries, Thomas Jefferson and others began to record systematically information about ancient earthen architectural monuments found in the Midwestern and Southeastern

35. WILLIAM J. MURTAGH, *KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA* 66 (1988).

36. See generally, GORDON R. WILLEY & JEREMY A. SABLOFF, *A HISTORY OF AMERICAN ARCHAEOLOGY* (3rd ed. 1993); BRIAN M. FAGAN, *ANCIENT NORTH AMERICA* (3rd ed. 2000); MARK P. LEONE & NEIL ASHER SILBERMAN, *INVISIBLE AMERICA: UNEARTHING OUR HIDDEN HISTORY* (1996).

37. Francis P. McManamon, *Archaeological Messages and Messengers*, 1 *PUBLIC ARCHAEOLOGY* 5, 7-11 (2000).

38. Readers may also wish to consult two other legal sources on the history of cultural resource management and protection in the United States. See generally Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 *B.U. L. REV.* 559 (1995); Marilyn Phelan, *A Synopsis of the Laws Protecting our Cultural Heritage*, 28 *NEW ENG. L. REV.* 63 (1993).

United States.³⁹ In 1784, Jefferson, himself, undertook what has been labeled the first scientific archeological excavation, examining an ancient burial mound in Virginia.⁴⁰

Other early attention to cultural resources was directed at the first United States' national icon, George Washington, who as commander of the Revolutionary Army and first president of the United States, came to symbolize the young nation. By the beginning of the nineteenth century, buildings, sites, artifacts, and documents associated with Washington became the objects of special commemoration and study.⁴¹ Public interest in ancient monuments and sites that were encountered by westering explorers and settlers continued through the nineteenth century. Debates regarding the relationship between the visible and recognized ancient structures and sites and American Indians ebbed and flowed.⁴² By the late nineteenth century, however, the national government was being petitioned by concerned citizens and newly activist politicians to move into the arena of archeology and historic preservation out of concern for the protection and appropriate treatment of archeological resources on public lands in the western states.⁴³

As the final quarter of the 1800s began, much of the interest in American archeological sites was focused on the Southwest. Some of the interest came from people who had, themselves, plundered the prehistoric ruins there, and had taken ancient artifacts, including ancient building stone and roof beams, for personal use or commercial sale. Other interest came from investigators belonging to museums or archeological organizations, who wanted to examine and study ancient sites, and assemble collections for their institutions and the public they served.⁴⁴

As investigators visited and documented prominent ruins, they noted the destruction that was occurring. Their descriptions impelled early advocates of government action to protect the archeological sites. Thus, for example, when the issue of government action to protect archeological sites was debated in the United States Senate, Adolph Bandelier's 1881 report on the looting and destruction of ruins and archeological deposits at the site of Pecos, New Mexico, was quoted. One

39. BRUCE G. TRIGGER, *A HISTORY OF ARCHAEOLOGICAL THOUGHT* 68-69, 104-106 (1989). See generally WILLEY & SABLOFF, *supra* note 36.

40. WILLEY & SABLOFF, *supra* note 36, at 31; Jeffery L. Hantman and Gary Dunham, *The Enlightened Archaeologist*, 46 *ARCHAEOLOGY* 3, 44-49 (1993).

41. MURTAGH, *supra* note 35, at 28; CHARLES B. HOSMER, *PRESENCE OF THE PAST* 46ff (1965).

42. See generally ROBERT SILVERBERG, *MOUND BUILDERS OF ANCIENT AMERICA: THE ARCHAEOLOGY OF A MYTH* (1968); David J. Meltzer, *Introduction: Ephraim Squier, Edwin Davis, and the Making of an American Archaeological Classic*, in EPHRAIM G. SQUIER & EDWIN H. DAVIS, *ANCIENT MONUMENTS OF THE MISSISSIPPI VALLEY* 1-95 (David J. Meltzer ed., 1998).

43. Ronald F. Lee, *The Antiquities Act of 1906*, at <http://www.cr.nps.gov/aad/pubs>, reprinted in Raymond Harris Thompson, *An Old And Reliable Authority*, 42 *JOURNAL OF THE SOUTHWEST* 198 (2000) (updating the *Antiquities Act of 1906*). See generally HAL ROTHMAN, *PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS* (1989).

44. See generally FRANK MCNITT, RICHARD WETHERILL: ANASAZI (1966); GUSTOF E. NORDENSKIOLD, *THE CLIFF DWELLERS OF THE MESA VERDE, SOUTHWESTERN COLORADO* (D. Lloyd Morgan, trans., AMS Press 1973) (1893); DON D. FOWLER, *A LABORATORY FOR ANTHROPOLOGY: SCIENCE AND ROMANTICISM IN THE AMERICAN SOUTHWEST, 1846-1930* (2000).

notable success along the path to legislation was the setting aside of Casa Grande Ruin as the first national archeological reservation in 1892.⁴⁵

During the 1890s, major public exhibitions, such as the World's Colombian Exposition in Chicago and the Louisiana Purchase Exposition in St. Louis, exposed even more of the American public to the antiquities of the United States, and municipal and university museums in large cities throughout the country featured American Indian antiquities in their displays.⁴⁶ At the same time, explorers who had reached the Southwest's ruins, and archeological sites in other parts of the country and the hemisphere, published popular accounts of their exploits recalling the ancient sites they had visited. The growing popular appeal of American archeology was accompanied by a commercial demand for authentic prehistoric antiquities. Consequently, the unsystematic removal of artifacts from archeological sites for private use increased, especially in the Southwest, where the advancing railroads had facilitated accessibility to antiquities.

VIII. THE ANTIQUITIES ACT OF 1906

The legislative and political history of the Antiquities Act shows that the issue of protecting and managing archeological resources was first raised in the United States Senate by Massachusetts Senator George F. Hoar in 1882.⁴⁷ Then, and subsequently, debates between the advocates of preservation and the advocates of commercial use of the public lands laced the issue. Interestingly, objections to conservation and preservation did not include statements that such efforts were unnecessary. There was general acknowledgment that looting and vandalism were occurring with increasing frequency. Instead, detractors of the protection and preservation effort argued that the government could not possibly protect all resources. Some of these people already were alarmed by the creation of the federal forest reserves, which by 1901 totaled forty six million acres, and they objected to creating another means by which the president could set aside large areas of the public domain for conservation or preservation, thereby further reducing the public land available for economic activity. Eventually, public sentiment in favor of remedying the problem of increased archeological site destruction in the Southwest, and the wholesale removal of artifacts, overcame these objections. After frequent and widespread efforts to protect specific archeological sites, such as Mesa Verde and Chaco Canyon, the twenty five year effort to protect places and objects of antiquity culminated in the Antiquities Act.⁴⁸

45. Lee, *supra* note 43, at ch. 1.

46. Lee, *supra* note 43, at chs. 1, 3-4; C.M. Hinsley, *The World as Marketplace: Commodification of the Exotic at the World's Colombian Exposition, Chicago, 1893*, in EXHIBITING CULTURES: THE POETICS AND POLITICS OF MUSEUM DISPLAY 344-65 (I. Karp & S.D. Lavine, eds., 1991).

47. Lee, *supra* note 43, at ch. 1.

48. Lee, *supra* note 43, at ch. 5; ROTHMAN, *supra* note 43; Raymond Harris Thompson, *Edgar Lee Hewett and the Political Process*, in Raymond Harris Thompson, *An Old And Reliable Authority*, 42 JOURNAL OF THE SOUTHWEST 198, 273-318 (2000).

On June 8, 1906, President Theodore Roosevelt signed the Antiquities Act into law. The law was intended to protect archeological sites on the public lands of the United States as resources of significance and value to every American, and to preserve historic, scientific, commemorative, and cultural values embodied in archeological sites for present and future generations of citizens. The law established the regulation of archeological investigations on federal and Indian land and established the standards of how archeological resources on these lands would be treated. Institutions that received permits had to care for the collections and provide for public education programs and exhibits for public benefit based on their investigations. It also provided for more rigorous, preservation and protection of sites set aside as National Monuments by the president.

The Antiquities Act served, and continues to serve, three important functions. First, it established basic public policies dealing with archeological resources in the United States. Through subsequent statutes and regulations, these policies have been extended to cover other kinds of heritage resources. Second, the Act also provided the president with the means of setting aside particularly important places for special preservation, commemoration, and interpretation. This function has been used by presidents throughout the twentieth century to establish National Monuments that preserve nationally important archeological, historic, and natural areas. Third, the Antiquities Act established the requirement of professionalism and a scientific approach to excavation, removal, or other investigation of archeological resources on the public lands. In so doing, the government of the United States endorsed the young discipline of archeology and the careful examination and recording of archeological sites. This professional and scientific approach to archeology now is accepted widely as the appropriate treatment of archeological resources, but in 1906, it was only beginning.⁴⁹

A. Proclaiming National Monuments

Prior to the Antiquities Act, specific areas had been set aside as parks or reserves, such as Hot Springs, Arkansas (1832), Yellowstone National Park (1872), and Casa Grande Ruin, Arizona (1892). However, creation of each of these parks or reserves required an Act of Congress, as well as presidential approval. The Antiquities Act made the establishment of National Monuments into administrative actions that were quicker and far more simple to execute. Section 2 of the Act gives the president the authority to set aside for protection "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States . . ."⁵⁰ These protected areas were then designated as "National Monuments," and the federal agencies assigned to oversee them were required to afford them proper care and management. This section of the statute provided Progressive politicians

49. *The Antiquities Act*, *supra* note 13, at 21-22; Francis P. McManamon, *The Antiquities Act, in ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA*, 33-35 (L. Ellis ed. 2000); Bruce Babbitt, *Introduction to THE ANTIQUITIES ACT OF 1906*, at <http://www.cr.nps.gov/> (last visited Apr. 9, 2001).

50. 16 U.S.C. § 431(1994).

and their supporters with an additional tool for determining the uses of public lands and resources in the rational, conservation-oriented manner they favored.⁵¹

Between 1906 and 1909, President Roosevelt proclaimed as National Monuments El Morro, Montezuma's Castle, Chaco Canyon, Gila Cliff Dwellings, Tonto, Tumacacori, Devil's Tower, Petrified Forest, Lassen Peak, Cinder Cone, Muir Woods, Grand Canyon, Pinnacles, Jewel Cave, Natural Bridges, Lewis and Clark, and Olympic. Since then, this authority has been used to protect dozens of other archeological sites and places of outstanding scientific or natural importance. Many National Monuments, in turn, have been designated as units of the National Park system or have been entrusted for special care to other land managing agencies. Presidents Taft, Wilson, Harding, Coolidge, Franklin D. Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Carter all established National Monuments by presidential proclamations. President Clinton between 1996 and 2001 exercised this authority to create nineteen new National Monuments and to enlarge three existing ones.

B. Increasing Reliance on Scientific Methods and Techniques for American Archeology

An additional broad policy established by the Antiquities Act was that investigation and removal of archeological resources must be conducted by appropriately qualified and trained experts using the best contemporary methods and techniques. This policy has made professional and scientific approaches the standard practice for the examination and treatment of other cultural resources, for example historic structures, museum objects, and cultural landscapes.

The Act prohibited individuals from digging haphazardly into ancient or historic sites, disturbing whatever caught their fancy, and removing artifacts for personal use or commerce. Section 3 of the Antiquities Act required that "the examination of ruins, the excavation of archaeological sites, or the gathering of objects of antiquity"⁵² on lands administered by the Departments of Interior, Agriculture, or War be carried out only after a permit to do so had been issued by the secretary of the department responsible for the land in question. Permits were to be issued only to institutions "properly qualified to conduct such examinations, excavations, or gatherings . . ."⁵³ Any excavation, collection, or removal of artifacts or other archeological remains had to be directed by qualified specialists using up-to-date archeological methods and techniques. Only organizations with appropriate expertise, equipment, commitment, and proper facilities to care for the recovered artifacts and information were permitted to undertake these studies. In emphasizing those specific requirements, the federal government supported the professionalization of the young discipline of archeology. Careful excavation and removal of artifacts required by Antiquities Act permits also were necessary for the

51. Lee, *supra* note 43, at ch. 7; Thompson, *supra* note 43, at 247-265; ROTHMAN, *supra* note 43, at 52-71.

52. 16 U.S.C. § 432; 43 C.F.R. § 3 (2000).

53. 16 U.S.C. § 432.

development of typological and stratigraphic description and analysis that would become the methodological and technical standards for professional archeology in the United States in the last decade of the nineteenth century and the first decades of the twentieth century.⁵⁴

In requiring that approved investigations of antiquities result in public education and benefit, the Antiquities Act permitting system strove to ensure "the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects . . ."⁵⁵ As one means of ensuring these public benefits, the Act also required that the materials collected from investigations be deposited in public museums for preservation.⁵⁶

C. Subsequent Cultural Resource Statutes

The Antiquities Act is recognized widely as the first general statute addressing archeological and historic preservation concerns in the United States.⁵⁷ The increased role for the federal government created by the Act is characteristic of the laws and programs enacted at the turn of the twentieth century as part of the political and legislative developments associated with the Progressive Movement.⁵⁸ Progressive politicians championed new ways of looking after the public good within a federal system staffed by professional civil servants who were able to provide technical assistance to the public and support for the public resources.

The Act established basic public policies for archeological preservation that would, during the course of the twentieth century, expand to include other types of historic properties and cultural resources. Also, during this century, the application of these policies would grow to encompass archeological and historic resources beyond those found on federal and American Indian lands.⁵⁹

Enactment of the Antiquities Act constituted a recognition that archeological sites and their artifacts are most valuable as sources of historic and scientific information about the past, and as commemorative places; that careful archeological excavation, analysis, and interpretation reveal ancient events and long-term cultural, economic, and social developments; that antiquities tell the unwritten stories of people and places; and that these benefits must be shared through schools, parks, museums, and other public venues and programs, and through books, articles, videos, and other interpretive media. Implicit in the Act was also a general policy

54. See WILLEY & SABLOFF, *supra* note 36, at 38-95.

55. 16 U.S.C. § 432.

56. *Id.*; 43 C.F.R. §§ 3.1-3.17.

57. See, e.g., Fowler, *supra* note 1, at 140-43; HUTT ET AL., *supra* note 2, at 154-55; MURTAGH, *supra* note 35, at 12; CAROL CARNETT, LEGAL BACKGROUND OF ARCHAEOLOGICAL RESOURCES PROTECTION 2 (Nat'l Park Serv., Dept. of the Interior, Technical Brief No. 11, 1991); John M. Fowler, *Protection of the Cultural Environment in Federal Law*, in FEDERAL ENVIRONMENTAL LAW 1473-74 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974) [hereinafter *Protection of the Cultural Environment*]; THOMAS F. KING, CULTURAL RESOURCE LAWS AND PRACTICE: AN INTRODUCTORY GUIDE 3-32 (1998); CHARLES R. MCGIMSEY, PUBLIC ARCHAEOLOGY 111 (1972).

58. See generally, RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955).

59. See generally, McManamon, *supra* note 49.

that digging archeological sites for a few commercially valuable artifacts was improper and wasteful.

Approaching archeological resources as noncommercial was the most basic public policy established by the Antiquities Act. A second aspect of national preservation policy initiated by the Antiquities Act was nearly as fundamental. By placing special requirements on who may excavate or remove archeological remains, how the excavation or removal will be accomplished, and what will happen to the objects excavated or removed, the statute acknowledged that archeological sites have a sufficiently important public value to be treated in a special way, and merit special consideration and protection. Like clean water and air, preserving these resources and learning from the information they contain contribute to the public good.

The policies of the Antiquities Act regarding protection and preservation of archeological resources apply to lands owned or controlled by the government of the United States. During the twentieth century, the policies of noncommercial and public value and benefit have been extended to additional types of historic properties and cultural resources and, in certain circumstances, to nonfederal land. The broader application of these policies came in two increments.

Nearly thirty years after the Antiquities Act, the Historic Sites Act of 1935 asserted a responsibility of the national government to recognize and provide technical assistance for the preservation of important historic American sites, buildings, objects, and antiquities of national significance, no matter where they were located within the United States.⁶⁰ In testifying on behalf of the bill that served as the basis for the Historic Sites Act, then Secretary of the Interior Harold L. Ickes noted that the Antiquities Act provided protection for archeological and historic resources on publicly owned land, but that "we have never faced squarely the whole great problem of a definite governmental policy for the preservation of historic sites and buildings of transcendent national significance . . . the need for governmental action along these lines is urgent and immediate . . ."⁶¹

The policy expressed in the 1935 Historic Sites Act flows from the noncommercial and public value policies established by the Antiquities Act. The declaration of policy in the first section of the 1935 Historic Sites law states that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."⁶²

The first expansion of national public policy toward cultural resources following the Antiquities Act thus extended to additional kinds of historic properties without regard to federal ownership or control, as long as they were nationally significant. The law does not, however, assert a regulatory or ownership interest of the federal government in these properties. Rather, it authorizes technical

assistance, education, and interpretive services for them. The 1935 act recognized a national public interest in important historic structures, as well as archeological sites. Historic preservationists concerned mainly with historic structures have long recognized this important authority:

[The law] heralded the real coming of age of American preservation. Its greatest achievement was the wide latitude it gave the secretary of the interior to act in three ways: first, to establish an information base for preservation by conducting surveys and engaging in research; second, to implement preservation by acquiring, restoring, maintaining, and operating historic properties and by entering into cooperative agreements with like-minded private organizations; and third, to interpret the heritage thus identified with historic markers or other educational means. With the Historic Sites Act the federal government finally possessed enabling legislation that could lead to coherent planning. Available at last was a coordinated policy that recognized the documentary value of buildings and sites which often combined patriotic, associative, and aesthetic content.⁶³

The 1930s witnessed the development of both private and public programs for the interpretation, preservation, and protection of various kinds of cultural resources. Some of these public programs were associated with the mass employment efforts by the Roosevelt administration. Although the main function of these programs was to provide gainful employment, many of them also added to our understanding of American archeology, architecture, and history through investigations of sites, structures, and documents.⁶⁴

D. Postwar Developments to the Present

Beginning in the late 1940s, a flood of postwar development swept the United States in the 1950s, 60s, and 70s. While making enormous and valuable improvements in communications, economic development, public health, and transportation, these major infrastructure developments also caused substantial destruction of archeological sites, historic structures, and other cultural resources that, at the time, were seen by many mainly as obstructions to modern progress. Concerned archeologists and historic preservationists fought to mitigate this destruction in a variety of ways. Salvage or rescue archeology grew into a major public archeological program from the late 1940s into the 1970s in response to, and then as part of federal dam, reservoir, highway, and pipeline construction

63. MURTAGH, *supra* note 35, at 58.

64. See, e.g., EDWIN A. LYON, A NEW DEAL FOR SOUTHEASTERN ARCHAEOLOGY 63-210 (1996); JOHN C. PAIGE, THE CIVILIAN CONSERVATION CORPS AND THE NATIONAL PARK SERVICE, 1933-1942, at 110-16 (1985); James B. Griffin, *A Commentary on Some Archaeological Activities in the Mid-continent 1925-1975*, 1 MIDCONTINENTAL J. ARCHAEOLOGY 4, at 6-7, 27 (1976); 1 CHARLES B. HOSMER, PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926-1949, at 469-716 (1981).

60. See 16 U.S.C. §§ 461-67.

61. *Preservation of Historic American Sites, Buildings, Objects, and Antiquities of National Significance: Hearing on H.R. 6670 and H.R. 6734 Before the House Comm. on Public Lands*, 74th Cong. 4 (1935) (statement of Harold L. Ickes, Sec. of the Interior).

62. 16 U.S.C. § 461.

000260

programs.⁶⁵ Highway construction and urban renewal, especially in old, historic sections of American cities caused widespread obliteration of historic building complexes and neighborhoods, as well as individual historic structures.⁶⁶

All of this activity eventually developed a national focus on the importance of cultural resources and the need to consider them in a serious, consistent, and coherent manner as part of public projects. This national attention became focused in the mid-1960s, and led to the enactment of the National Historic Preservation Act of 1966.⁶⁷ This landmark statute also is the third expansion of the basic policies set forth in the Antiquities Act.

The National Historic Preservation Act (NHPA) is a very broadly written statute that has been expanded through major amendments in 1980 and 1992.⁶⁸ It embraces a wider range of historic property types than either the Antiquities Act or the Historic Sites Act, and is more inclusive than the Historic Sites Act in that it considers historic properties that are of local or state significance. The extent to which the NHPA applies, however, varies with the extent of ownership and federal involvement in an undertaking that may affect specific resources.

Like the Antiquities Act and the Historic Sites Act, the NHPA adheres to the public policy that historic properties have a value to all members of the public. In the statutory preamble, Congress declares that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, education, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."⁶⁹ Congress recognizes a compelling need for contemporary action:

[I]n the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation.⁷⁰

65. See Jesse D. Jennings, *River Basin Surveys: Origins, Operations, and Results, 1945-1969*, 50 AM. ANTIQUITY 281, 281-96 (1985); Frederick Johnson, *Archeology in an Emergency*, 152 SCIENCE 1592, 1592-97 (1966); JEROME E. PETSCH, BIBLIOGRAPHY OF SALVAGE ARCHEOLOGY IN THE UNITED STATES, (1968); Fred Wendorf, *Archaeology and Private Enterprise: A Need for Action*, 28 AM. ANTIQUITY 286, 286-88 (1963).

66. See MURTAGH, *supra* note 35, at 62-63; ALBERT RAINS & LAURANCE G. HENDERSON, WITH HERITAGE SO RICH: A REPORT OF A SPECIAL COMMITTEE ON HISTORIC PRESERVATION UNDER THE AUSPICES OF THE UNITED STATES CONFERENCE OF MAYORS WITH A GRANT FROM THE FORD FOUNDATION 32-33 (1966).

67. See MURTAGH, *supra* note 35, at 62-77; *Protection of the Cultural Environment*, *supra* note 57, at 1481; JAMES A. GLASS, THE BEGINNINGS OF A NEW NATIONAL HISTORIC PRESERVATION PROGRAM, 1957 TO 1969, 17-21 (1990); see generally Francis P. McManamon, *The National Historic Preservation Act*, in ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA (Linda Ellis ed., 2000).

68. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470-470x-6 (2) (1994)).

69. 16 U.S.C. § 470(b)(4).

70. *Id.* § 470(b)(5).

The policy espoused by the NHPA calls for the consideration of historic properties within the context of our modern development and economy, instructing the federal government to work "in partnership with the States, local governments, Indian tribes, and private organizations and individuals," and "to use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."⁷¹

This subsection highlights two important aspects of historic preservation policy in the United States. First, historic preservation, including public archeology and archeological preservation, is an activity that occurs at all levels of government federal, state, and local—and involves private organizations and individuals. It is not the province of a single national government agency or national museum. Although the involvement of a multitude of public and private parties sometimes makes a comprehensive description of archeological and historic preservation in the United States abstruse, its value lies in giving many organizations and individuals some responsibility for preserving archeological and historic sites, structures, and historic properties. Another key aspect of preservation in the United States embodied in this subsection is that, as a component of contemporary development and economic activity, preservation is considered an aspect of modern life, even if it is not an assured outcome of these activities.

The NHPA establishes State Historic Preservation Officers (SHPO) as partners in the national historic preservation program. It also describes how the SHPO function, or portions of it, can be assumed by local governments or Indian tribes in certain circumstances.

Although only one paragraph long, section 106 of the Act has had a major impact on the structure and function of archeology and archeological preservation in the United States. This section requires that all federal agencies provide the Advisory Council on Historic Preservation—established in Title II of the statute—an opportunity to comment on any undertaking for which an agency has direct or indirect jurisdiction, when that undertaking has an effect on a historic property listed, or eligible for listing, in the National Register of Historic Places.⁷² In practice, Section 106 means that federal agencies, or state, local, and private organizations that are involved in federal undertakings, are required to identify archeological and other historic properties and assess the effect of their planned actions on them. This requirement has resulted in tens of thousands of archeological, architectural, and historical investigations since the mid-1970s, when the procedures for implementing Section 106 were established as federal regulations.⁷³

In some cases, federal agencies responsible for complying with the NHPA have hired archeologists, architectural historians, historians and other cultural resource

71. *Id.* § 470-1.

72. *Id.* § 470(f).

73. See THOMAS F. KING, CULTURAL RESOURCE LAWS AND PRACTICES: AN INTRODUCTORY GUIDE 59-147 (1998).

experts to create their own professional staffs to comply with the law. In other cases, federal agencies have contracted with consulting firms or universities to undertake studies necessary for Section 106 compliance. Over the past twenty years, many professional archeologists, architects, curators, and historians have come to be employed by public agencies or private consulting and engineering firms, in some cases, as frequently as they have been employed by academic institutions.⁷⁴ Hundreds of millions of dollars in government funds have paid for tens of thousands of archeological and historical investigations, including general archeological overviews, architectural recording, documentary research, historical studies, archeological site discovery and evaluation studies, and extensive excavation of individual or multiple sites that were subject to destruction by public undertakings.⁷⁵

The NHPA envisions that all federal agencies should develop their own programs to care for historic resources under their jurisdiction or control, or affected by their undertakings. Section 110, which was expanded and enhanced by the 1992 amendments, includes the identification, evaluation, nomination to the National Register of Historic Places, and protection of historic resources as federal responsibilities.⁷⁶ Although agencies generally have been far more active in complying with Section 106 than with Section 110, the amended text of Section 110 perhaps will provoke greater attention to the responsibilities it describes.

Title II of the NHPA established the Advisory Council on Historic Preservation, an independent federal agency composed of twenty members, including the secretaries of the interior and agriculture, and four other departments.⁷⁷ Also on the Council are elected officials and citizens appointed by the President.⁷⁸ The Council and its staff play an important role in the national historic preservation program, especially in the day-to-day implementation of Section 106, but also by providing both programmatic advice to federal agencies and training in historic preservation methods, techniques, and procedures.

Title IV of the statute, added in the 1992 amendments, established the National Center for Preservation Technology and Training. In so doing, Congress recognized "the complexity of technical problems encountered in preserving historic properties and the lack of adequate distribution of technical information to preserve such properties."⁷⁹ The Center was established to "coordinate and

74. Francis P. McManamon, *Cultural Resource Management, in* ARCHAEOLOGICAL METHOD AND THEORY, AN ENCYCLOPEDIA (Linda Ellis ed., 2000). See generally MELINDA ZEDER, *THE AMERICAN ARCHAEOLOGIST: A PROFILE* (AltaMira Press 1997).

75. See D. HASS, *FEDERAL ARCHEOLOGY PROGRAM: SECRETARY OF THE INTERIOR'S REPORT TO CONGRESS, 1994-95* (1998); Francis P. McManamon, *Managing America's Archaeological Resources, in* QUANDARIES AND QUESTS: VISIONS OF ARCHAEOLOGY'S FUTURE 26-33 (LuAnn Wandsnider ed., 1992); see generally FRANCIS P. MCMANAMON et al., *FEDERAL ARCHAEOLOGICAL PROGRAMS AND ACTIVITIES: THE SECRETARY OF THE INTERIOR'S REPORT TO CONGRESS* (1993).

76. 16 U.S.C. § 470h-2.

77. *Id.* §§ 470i-470m.

78. *Id.*

79. See *id.* § 470x.

promote research [in historic preservation], distribute information, and provide training about preservation skills and technologies."⁸⁰

The closing decades of the 20th century witnessed an increase in disputes concerning the appropriate treatment of the archeological record. These were not new conflicts and tension about the proper use of archeological resources, but they have become more widespread or more widely recognized than in the past. These disputes were part of the general conflict and debate in modern society about the proper uses of history and science, sometimes referred to as the "culture wars" or "science wars", and summarized by cultural commentators in various formats from books, to talk show programs, to weekly magazines.⁸¹ In 1979, archeologists and preservationists joined with supportive political leaders to expand and strengthen the protection of archeological resources that had been afforded by Antiquities Act in 1906. In 1987, a series of compromises among archeologists, historic preservationists, and treasure salvors resulted in an attempt by legal and regulatory means to improve the protection of underwater archeological resources while still allowing for a wide range of uses and treatments of these resources. Finally, in 1990, Native Americans and their advocates assembled sufficient political support to require that their views be more directly addressed in the treatment of Native American human remains and related kinds of artifacts contained in museum collections or found or excavated on federal lands. These recent developments in United States' laws dealing with cultural resources are summarized in the following sections.

IX. IMPROVING ARCHEOLOGICAL PROTECTION

In the 1970s, the threats to American archeological resources from looting had reached notorious proportions, especially in the Southwest. In response, the Archeological Resources Protection Act (ARPA)⁸² was drafted, debated, and enacted relatively quickly in the late 1970s, when difficulties in enforcing the Antiquities Act, and weaknesses in the penalties provided by that law, became critical.⁸³ ARPA affirmed the basic policies of the Antiquities Act and, at the same time, provided a more effective law enforcement tool to prosecute looters of public archeological resources. Provisions for effective law enforcement and careful, detailed definitions, the two most apparent weaknesses of the Antiquities Act, were the aspects of ARPA that received the greatest amount of attention during its enactment and early years of enforcement. ARPA provides a very strong basis for

80. See *id.*

81. See, generally DAVID LOWENTHAL, *POSSESSED BY THE PAST: THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY* (1996); Susan Begley & A. Rogers, *The Science Wars*, NEWSWEEK, Apr. 21, 1997, at 54; DAVID HURST THOMAS, *SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY* (1999).

82. Archeological Resources Protection Act, Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa-470mm (1994)).

83. HUTT ET AL., *supra* note 2, at 188-91; see also ARCHAEOLOGICAL RESOURCE PROTECTION, *supra* note 12, at 23-25; Janet L. Friedman, *A History of the Archeological Resources Protection Act: Laws and Regulations*, 5 AM. ARCHAEOLOGY 82, 82-119 (1985).

archeological protection on public and American Indian lands, and its anti-trafficking provision also makes it an effective tool for discouraging illegal excavation or removal of archeological resources from state, local, or private lands throughout the United States.⁸⁴ Several sections of the law, including the 1988 amendments, also make ARPA an important part of the overall statutory basis for effective archeological resources management.⁸⁵

ARPA was enacted "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands," and "to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data"⁸⁶

Thus, the law recognizes that archeological resources are an irreplaceable part of America's heritage, and that, increasingly, they are endangered because of the escalating commercial value of a small component of archeological sites. At the same time, ARPA also notes that in order to better protect and learn about the archeological record of the United States, cooperation is needed among government authorities, professional archeologists and organizations, and interested individuals. Section 4 of ARPA, and Sections 5 through 12 of the ARPA uniform regulations describe the requirements that applicants must meet before federal authorities can issue a permit to excavate or remove any archeological resource on federal or American Indian lands.⁸⁷ The curation requirements for artifacts and other materials excavated or removed, and the records related them, are described in Section 5 of the Act. Section 5 also authorizes the Secretary of the Interior to issue regulations describing in more detail the management and curation of collections. These regulations, which affect all federally owned or administered archeological collections, were issued in 1990.⁸⁸

The primary impetus behind ARPA was the need to provide more effective law enforcement to protect public archeological sites. ARPA improved on the Antiquities Act by providing a definition of the resources covered by the law, a list of the prohibited activities, monetary penalties up to the value of the resources in question, and both felony and misdemeanor sanctions. Section 6 of the statute describes the prohibited actions, which include damage or defacement; unpermitted excavation or removal; and selling, purchasing, and other trafficking activities in either the United States or internationally.⁸⁹ Section 6(c) prohibits interstate or international sale, purchase, or transport of any archeological resource excavated or

84. See HUTT ET AL., *supra* note 2, at 190-91; see also Cheryl Ann Munson et al., *The GE Mound: An ARPA Case Study*, 60 AM. ANTIQUITY 131, 131-59 (1995).

85. See Francis P. McManamon, *The Federal Government's Recent Response to Archaeological Looting*, in *PROTECTING THE PAST 261-69* (G.S. Smith & J.E. Ehrenhard eds., 1991).

86. 16 U.S.C. § 470aa(b).

87. See *id.* § 470cc; 43 C.F.R. §§ 7.5-7.12 (2000); 36 C.F.R. §§ 296.5-296.12 (2000); 18 C.F.R. §§ 1312.5-1312.12 (2000); 32 C.F.R. §§ 229.5-229.12 (2000).

88. See 36 C.F.R. §§ 79.1-79.11.

89. 16 U.S.C. § 470ee.

removed in violation of a state or local law, ordinance, or regulation.⁹⁰ It was used as the basis for the successful prosecution of an artifact dealer and collector in Indiana, Arthur Gerber. Gerber was convicted in Kentucky of transporting and selling artifacts obtained from a site on private land, but in violation of Indiana's trespass and conversion law.⁹¹ The conviction was upheld by the United States Court of Appeals for the Seventh Circuit.⁹² It is an important case because it shows that ARPA can be used to protect archeological resources located on private land if they are obtained illegally and moved across state lines.⁹³

The main focus of ARPA is on the regulation of legitimate archeological investigation on public lands, and the enforcement of penalties against looters and vandals of archeological resources. However, the statute has provided federal officials with the authority to better manage archeological sites on public land. Section 9, for example, requires managers who are responsible for protecting archeological resources to keep information concerning the locations and nature of these resources confidential, unless, by providing the information, they would further the purpose of the statute and not create a risk of harm to the resources.⁹⁴ The statute also authorizes the Secretary of the Interior to cooperate with avocational and professional archeologists and organizations in exchanging information about archeological resources, in order to improve knowledge about the United States' archeological record. The statute, in relevant part, states that "the Secretary [of the Interior] shall . . . make efforts to expand the archaeological data base for archaeological resources of the United States through increased cooperation between private individuals . . . and professional archaeologists and organizations."⁹⁵

The 1988 amendments to ARPA focused more attention on management actions to improve the protection of archeological resources.⁹⁶ Section 10(c) required each federal land manager to "establish a program to increase public awareness of the significance of the archaeological resources located on public lands and Indian lands and the need to protect such resources."⁹⁷

The objective in adding this section to the law was to develop public programs and messages that would notify visitors using public lands information about the value of archeological resources to everyone.⁹⁸ Such information also would stress the requirement that archeological sites be investigated properly, professionally, and carefully.⁹⁹ It also would be important to notify visitors that, when they are located on public lands, they are protected under law.¹⁰⁰

90. Archeological Resources Protection Act of 1979, Pub. L. No. 96-95, § 6(c), 93 Stat. 721 (codified as amended at 16 U.S.C. § 470ee).

91. *United States v. Gerber*, 999 F.2d 1112, 1113 (7th cir. 1993).

92. *Id.* at 1117.

93. HUTT ET AL., *supra* note 2, at 191; see also Munson et al., *supra* note 84, 131-59.

94. Archeological Resources Protection Act § 9 (codified as amended at 16 U.S.C. § 470hh).

95. 16 U.S.C. § 470jj.

96. HUTT ET AL., *supra* note 2, at 13.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

Anecdotal evidence from federal officials in the field indicates that public education and outreach have been effective, and that casual or unknowing destruction and vandalism have been reduced substantially. Section 14, also added by the 1988 amendments, requires the major federal land managing departments (Interior, Agriculture, Defense, and the Tennessee Valley Authority) to plan and schedule archeological surveys of the lands under their control. The aim of this section is to emphasize the need for better knowledge of the locations and nature of archeological resources so they can be better protected.¹⁰¹

Archeological resources in the United States also are protected by a variety of state and local laws. Increasingly governments at these levels are recognizing the importance of this part of their communities' cultural resources and establishing public programs to ensure their care.¹⁰²

X. THE CHALLENGE OF PROTECTING HISTORIC SHIPWRECKS

The Abandoned Shipwreck Act (ASA)¹⁰³ was enacted to provide a consistent national approach for the management of historic shipwrecks in the United States. The statute reflects an attempt by archeologists and historic preservationists to move historic shipwrecks and their contents out from under the regime of admiralty and maritime law, and to have these cultural resources treated primarily for their historic and scientific values. The compromises involved in enacting this statute spanned nearly a decade between archeologists and historic preservationists on one hand, and those interested in the salvaging shipwrecks for treasure on the other. The need for a national law became apparent to those who were concerned about the protection of historic shipwrecks when several Federal court decisions nullified the rights of State governments that had enacted state laws protecting historic shipwrecks to control access to and use of these resources. The basis of these court decisions was that Federal admiralty law superceded state laws.¹⁰⁴ These decisions raised severe problems for those who wanted to protect and preserve historic shipwrecks. Admiralty law provided for means of establishing the rights of individuals to salvage shipwrecks and had been used for many years by salvors to protect their claims to specific shipwrecks. Without Federal law addressing the preservation or management historic shipwrecks directly, treatment of shipwrecks as salvageable resources under admiralty law was the only alternative.¹⁰⁵

101. *Id.*

102. See, e.g., CAROL L. CARNETT, A SURVEY OF STATE STATUTES PROTECTING ARCHAEOLOGICAL RESOURCES (Nat'l Park Serv., Dept. of the Interior, Archeological Assistance Study, 1995); CAROL L. CARNETT, LEGAL BACKGROUND OF ARCHAEOLOGICAL RESOURCES PROTECTION (Nat'l Park Serv., Dept. of the Interior, Technical Brief No. 11, 1991).

103. Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (current version at 43 U.S.C. §§ 2101-2106 (1994)).

104. HUTT ET AL., *supra* note 2, at 400-01, 447.

105. HUTT ET AL., *supra* note 2, at 393; see also *Abandoned Shipwreck Act of 1987 Enacted*, 7 PRES. L. REP. 1001 (1988); Michele C. Aubry, *Federal and State Shipwreck Management in the United States of America*, 16 BULL. AUSTRALIAN INST. FOR MAR. ARCHAEOLOGY 19-22 (1992); Ricardo J.

The ASA was signed by President Reagan on April 29, 1988. It is introduced by a finding in Section 2 which asserts that State governments have a responsibility for the management of a broad range of resources in State waters and submerged lands, including abandoned shipwrecks. Abandoned shipwrecks under this statute are those that have been deserted and to which owners have relinquished ownership rights with no retention.¹⁰⁶ The ASA asserts federal ownership of most kinds of historic shipwrecks, then transfers the title to these shipwrecks to the individual states in whose waters these shipwrecks lie.¹⁰⁷ Excluded from state ownership are those historic shipwrecks in submerged lands that are the property of the United States government or any Indian tribe. Sunken warships or other vessels entitled to sovereign immunity also are not transferred to state ownership by the ASA.¹⁰⁸ Generally, states can enforce their laws relating to historic shipwrecks out to a distance of three miles from their shorelines. This area is considered to be "state submerged lands."¹⁰⁹ In United States law, shipwrecks and other cultural resources beyond three miles potentially are subject to any of a variety of statutes or legal regimes, including admiralty and maritime law, depending upon their location and the circumstances.¹¹⁰

Shipwrecks and their cargo commonly have been regarded as property. The first recorded efforts to recover material from sunken ships were commercial ventures. The Greek historian, Herodotus, described such efforts in the fifth century B.C. Sunken cargoes, weapons, fittings, even major ship components, all were salvaged for future uses whenever technically feasible. For many centuries the recovery of remains from shipwrecks were considered only in commercial terms. For the most part, the earliest shipwreck recoveries of ancient artifacts that were of interest for archeology, art history, and history date to the nineteenth century. Then, salvors and sponge divers occasionally came across ancient objects while carrying out their work.¹¹¹

This is a strikingly different historical perspective than the one we have regarding terrestrial archeological sites. Even the early historic exploration and archeological excavation of terrestrial sites aimed to recover works of art and curiosities for aesthetic and educational goals. The intent of these initial efforts was not strictly to amass money or objects for sale, although the recovered objects that

Elia, *Diving for Diamonds*, ARCHAEOLOGY, Sept. 20, 2000, at <http://www.archaeology.org/online/features/titanic/index.html>; Aubry, *supra* note 19; at 16-17, McManamon, *The Abandoned Shipwreck Act*, *supra* note 19; at 1-2, *Historic Property*, *supra* note 20; at 2, Pelkofer, *supra* note 20; at 64-65; Zander & Varner, *supra* note 20, at 60-63, 66-70.

106. 43 U.S.C. § 2101(b); HUTT ET AL., *supra* note 2, at 448.

107. 43 U.S.C. § 2105; HUTT ET AL., *supra* note 2, at 447.

108. See ABANDONED SHIPWRECK ACT GUIDELINES, PT. I (Nat'l Park Serv., Dept. of the Interior) at <http://www.cr.nps.gov/> (last visited Apr. 2, 2001) for the definition of "abandoned shipwreck."

109. 43 U.S.C. § 2102(f)(1); *id.* § 1301(b).

110. HUTT ET AL., *supra* note 2, at 400-01; Zander & Varner, *supra* note 20, at 61. See Elia, *supra* note 25, at 44ff.

111. George F. Bass, *History Beneath the Sea: The Birth of Nautical Archaeology*, 51 ARCHAEOLOGY 49, 50-52 (1998); see generally KEITH MUCKELROY, MARITIME ARCHAEOLOGY (Cambridge Univ. Press 1978); SHIPWRECK ANTHROPOLOGY (Richard A. Gould, ed., Univ. of N.M. Press 1983).

were kept often also had inherent monetary value. In the United States, through the policies established by the Antiquities Act and expanded throughout the century by the Historic Sites Act and the National Historic Preservation Act and other statutes, archeological resources, and other kinds of historic properties, have come to be viewed as having mainly commemorative, educational, and scientific value.

The continued strong association of shipwrecks with treasure shows the difficulty of changing public perceptions and orientation. The fascination with shipwreck excavations—whether treasure hunting or scientific archeological investigation—feeds particularly on the mystique of adventure, danger, and derring-do that many associate with archeology. The swash-buckling, treasure-seeking, havoc-spreading dark side of Indiana Jones is most persistent in the image of underwater archeology. Submerged shipwreck sites are as exotic and remote as ancient sites were at first discovery by Europeans. Typically they are difficult to find and require elaborate logistics to investigate.

Due to their relative inaccessibility, treasure salvors may be perceived as the only source for artifacts from shipwreck sites by museums, collectors, and even certain governments. Fame, tourist attraction, or other kinds of financial gain may motivate some governments to promote or allow treasure hunting or salvage.

All of these factors make the development and imposition of modern cultural resource management programs covering submerged resources particularly challenging. This is a challenge encountered by a variety of individuals and organizations, in private and public sectors, and at national, state, and local levels. The ASA envisions an approach to caring for and determining proper uses of a shipwreck that attempts to balance a wide range of interests. The statute declares that commemorative, educational, historic, and recreational benefits of shipwreck sites are of special importance and public interest.¹¹² A public interest is affirmed in having these kinds of resources protected and preserved for public education and enjoyment. The law recognizes state governments as the appropriate level of government at which programs should be developed to care for historic shipwrecks and to decide on the appropriate uses for them. Some states have active programs that deal with submerged cultural resources.¹¹³

The ASA also directed the National Park Service to prepare guidelines for the comprehensive management of historic shipwrecks that could be used by States to develop their programs. These guidelines were published in final form in 1990. These guidelines recognize the variety of interests and try to balance them.¹¹⁴ The guidelines provide advice and guidance on a wide range of topics including: the appropriate components of state and federal programs, possible sources of funding, how to survey for and document shipwreck sites, when and how it is appropriate to recover artifacts and objects from such sites, how to allow public access to such sites, interpretation and volunteer programs for such sites, and the establishment and management of underwater parks.

112. See 43 U.S.C. § 2103.

113. See, e.g., Vrana & Halsey, *supra* note 26, at 81-96.

114. See ABANDONED SHIPWRECK ACT GUIDELINES, INTRODUCTION (Nat'l Park Serv., Dept. of the Interior) available at <http://www.cr.nps.gov/> (last visited Apr. 2, 2001).

What can archeologists, preservation organizations, and others concerned with the conservation and public interpretation of historic shipwrecks do to support their perspective? Concerned individuals and organizations need to approach this challenge in the same way that similar challenges related to the preservation and interpretation of terrestrial archeological sites have been undertaken. Over the long term, education and public outreach activities are crucial. Working with students and teachers in formal educational settings, introducing students to archeology as a way of learning about the past and the stories that can be derived from proper archeological study are essential aspects of a long term approach. An important part of the message of the specific stories is that all of the public has an interest in the preservation of historic shipwrecks for commemoration, education, and recreation. These applications of archeology need to be incorporated into standard school curricula to have widespread applicability and impact. In addition to programs aimed at students, others with a wider outreach objective need to be aimed at adults. Public exhibits, general brochures, television shows, web sites, newspaper stories, and other nontechnical outreach are possible tools to use in sharing the results of appropriate archeological investigations. Part of the emphasis of these messages must stress the long-term educational and public enjoyment benefits possible from archeological preservation and appropriate investigations.

A recent national study of public attitudes and knowledge about archeology showed that Americans are quite interested in archeology and archeological resources.¹¹⁵ They have a generally correct understanding of what these terms mean. However, their knowledge about what constitutes an appropriate archeological investigation is less clear and not very detailed. This is fertile ground for archeological public outreach to provide the more specific information.

Effective law enforcement has a role to play in the long term approach to preserving historic shipwrecks. If individuals are convicted of looting and plundering historic shipwrecks that are protected by federal, state, or local law, punishment must be applied effectively and swiftly. Successful prosecutions of plunderers should be generally and widely publicized to secure as great a deterrent effect as possible among other individuals who might otherwise be tempted to try their hand at archeological looting. Publicity on successful prosecutions also provides a reference point for the general public about what constitutes inappropriate and illegal behavior related to historic shipwrecks.

Enforcement of laws isn't only about the protection of shipwrecks from looters. Federal, State, and local laws and regulations that require the consideration of effects upon historic shipwrecks caused by public or private activities or plans also are needed. Where these planning or zoning laws exist and cover historic shipwrecks, advocates need to ensure that they are effectively used to protect and properly interpret the resources.

115. MARIA RAMOS & DAVID DUGANNE, SOC'Y FOR AM. ARCHAEOLOGY, *EXPLORING PUBLIC PERCEPTIONS AND ATTITUDES ABOUT ARCHAEOLOGY* (Feb. 2000), at <http://www.saa.org/Pubedu/nrptdraf4.pdf>.

Historic shipwrecks have an exotic history and several characteristics that make their preservation and appropriate treatment difficult to achieve. However, at least some of the keys to long term preservation for commemoration, education, and recreation are not different from those that hold for their dry land counterparts.

XI. GREATER INVOLVEMENT FOR INDIAN TRIBES, NATIVE ALASKANS, AND NATIVE HAWAIIAN ORGANIZATIONS

Throughout the 1980s, Native Americans and their advocates spoke with increasing frequency for greater recognition of their rights. A wide range of economic, political, social, and religious topics were covered by their public actions.¹¹⁶ The actions taken were sometimes through the political process, sometimes in the courts, and other times in the media. In 1990, political action brought them a major victory in the form of the Native American Graves Protection and Repatriation Act (NAGPRA).¹¹⁷

NAGPRA describes the rights of Native American lineal descendants, Indian tribes, and Native Hawaiian organizations with respect to the treatment, repatriation, and disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, referred to collectively in the statute as cultural items, with which they can show a relationship of lineal descent or cultural affiliation. The law has two major purposes.¹¹⁸

First, Sections 5-7 require that Federal agencies and museums receiving federal funds inventory holdings of Native American human remains and funerary objects and provide written summaries of other cultural items. The agencies and museums must consult with Indian Tribes and Native Hawaiian organizations to attempt to reach agreements on the repatriation or other disposition of these remains and objects. Once lineal descent or cultural affiliation has been established, and in some cases the right of possession also has been demonstrated, lineal descendants, affiliated Indian Tribes, or affiliated Native Hawaiian organizations normally make the final determination about the disposition of cultural items. Disposition may take many forms from reburial to long term curation, according to the wishes of the lineal descendant(s) or culturally affiliated Tribe(s).¹¹⁹

The second major purpose of the statute is to provide greater protection for Native American burial sites and more careful control over the removal of Native American human remains, funerary objects, sacred objects, and items of cultural patrimony on Federal and tribal lands. Section 3 of NAGPRA requires that Indian tribes or Native Hawaiian organizations be consulted whenever archeological

116. See generally PETER MATTHIESSEN, *INDIAN COUNTRY* (Viking Press 1984); VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (Pantheon Books 1984).

117. 25 U.S.C. §§ 3001-3013 (1994).

118. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 35-77 (1992). See generally 24 ARIZ. ST. L.J., at xi-562 for articles concerning NAGPRA and similar state legislation.

119. 25 U.S.C. §§ 3003-3005.

investigations encounter, or are expected to encounter, Native American cultural items or when such items are unexpectedly discovered on federal or tribal lands. NAGPRA also requires that any excavation or removal of any such items also must be done under procedures required by the Archaeological Resources Protection Act.¹²⁰ This NAGPRA requirement is likely to encourage the *in situ* preservation of archaeological sites, or at least the portions of them that contain burials or other kinds of cultural items. In many situations, it will be advantageous for Federal agencies and Tribes undertaking land-modifying activities on their lands to undertake careful consultations with traditional users of the land and intensive archeological surveys to locate and then protect unmarked Native American graves, cemeteries, or other places where cultural items might be located. Under Section 3, remains and cultural items covered by the law may be handed over to Indian tribes under several circumstances, including if a relationship of cultural affiliation can be determined.¹²¹

Other provisions of NAGPRA: (1) stipulate that illegal trafficking in human remains and cultural items may result in criminal penalties;¹²² (2) authorize the Secretary of the Interior to administer a grants program to assist museums and Indian Tribes in complying with certain requirements of the statute;¹²³ (3) require the Secretary of the Interior to establish a Review Committee to provide advice and assistance in carrying out key provisions of the statute;¹²⁴ (4) authorize the Secretary of the Interior to penalize museums that fail to comply with the statute;¹²⁵ and, (5) direct the Secretary to develop regulations in consultation with this Review Committee.¹²⁶

Since the enactment of the NAGPRA in 1990, a set of procedures has been developed from scratch to deal with what often are difficult and emotional cases that place anthropologists, archeologists, curators, and other scientists in potential conflict with American Indians, Native Alaskans, and Native Hawaiians.¹²⁷ Perhaps the most striking aspect of what has happened regarding the implementation of the law is that thousands of government, museum, and academic professionals in hundreds of museums and agency offices have been able to arrive at acceptable resolutions to hundreds of NAGPRA cases with thousands of Native Americans. As of the end of 2000, almost 600 public notices had appeared in the Federal Register announcing the willingness or intent to repatriate from museums or federal

120. *Id.* § 3002(c)(1).

121. *Id.* § 3002.

122. 18 U.S.C. § 1170 (1994).

123. 25 U.S.C. § 3008.

124. *Id.* § 3006.

125. *Id.* § 3007.

126. *Id.* § 3006(g)(1); See *Native American Grave*, *supra* note 27, at 387-89; Francis P. McManamon & Larry V. Nordby, *Implementing the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 217, 217-52 (1992) for a general overview of the provisions of NAGPRA.

127. 43 C.F.R. § 10.1 (2000) (implementing the regulations of NAGPRA which apply to all federal agencies and museums that receive federal funds).

agency repositories human remains or cultural items covered by NAGPRA.¹²⁸ These notices cover over 22,000 sets of Native American human remains, over 500,000 funerary objects, and nearly 900 sacred objects.¹²⁹

One might ask whether or not it is a good thing that all these remains and artifacts move out of public control and stewardship. The answer one has to this question depends upon one's perspective on what appropriate treatments and uses are for Native American human remains, funerary objects, sacred objects, and objects of cultural property. Since individuals' perspectives on this matter range widely, answers to the question likewise vary widely from unqualified "yes" or "no" through qualified responses of all kinds.¹³⁰

NAGPRA has created a new relationship between Indian tribes, Native Alaskan groups, and Native Hawaiian organization and museums and federal agencies. The requirements for consultation under NAGPRA give the former greater opportunity to influence how the kinds of remains and cultural items covered by the law are dealt with by museums and federal agencies.¹³¹ Museums and agencies with collections containing Native American human remains and funerary objects have had to inventory these materials, determine whether they are linked to lineal descendents or culturally affiliated with Indian tribes, Native Alaskan groups, or Native Hawaiian organizations. As part of these efforts, the museums and agencies were required to consult with known or potential lineal descendents and culturally affiliated tribes. Consultation requires that federal agency and museum officials seek advice and recommendations from tribal representatives regarding the kinds of remains or objects being considered, how these remains or objects are to be treated, the interpretation of cultural affiliation regarding these remains or objects, and other relevant topics. Tribal representatives have the right to make recommendations about what the agency or museum officials should decide, but they cannot dictate the ultimate decision, nor is their consent required for a decision to be final. Tribes may disagree with agency or museum decisions. If they do, the law identifies avenues to pursue complaints or disagreements the tribes may have about them.

If there is a reasonably clear relationship of lineal descent or cultural affiliation, the museums or agencies must offer to repatriate these remains and funerary objects to the appropriate Indian tribe, Native Alaskan group, or Native Hawaiian organization. A similar set of steps holds for unassociated funerary objects, sacred objects, and objects of cultural patrimony, although agencies or museums may

retain such items if they can show a "right of possession."¹³² On federal land, the land managing agencies must consult with Indian tribes or Native Alaskan groups when they are planning archeological excavations or when Native American remains are unexpectedly discovered, often through natural erosion.

These requirements for action by federal agencies and museums and the new role of tribes and the other kinds of groups empowered by the law have substantially altered the relationships that formerly existed. Museums and agencies must pay more attention and, in some cases, are legally bound to follow the wishes of the tribes. The Indian tribes, Native Alaskan groups, and Native Hawaiian organizations have new rights of access to museum collections and federal repositories and records, as well as formal rights to be consulted and their views heard before museums and agencies make decisions about the kinds of remains and objects covered by NAGPRA. They also have rights to protest, administratively and judicially, decisions on these matters with which they disagree.¹³³

Executing the provisions of the NAGPRA involves three primary participants: Federal agencies, all museums receiving Federal funds (including State, local, and private institutions), and lineal descendents, Indian Tribes and Native Hawaiian organizations. Oversight of and directions for the activities required of these three types of organizations are to be provided by the Secretary of the Interior and the NAGPRA Review Committee established by the statute.¹³⁴

Federal agencies and museums with collections that include the kinds of human remains and other cultural items covered by NAGPRA were to have prepared summaries of the unassociated funerary objects, sacred objects, and objects of cultural patrimony by November, 1993, and to have sent these summary statements to affiliated or likely affiliated Indian Tribes.¹³⁵ By November, 1995, these same kinds of organizations were to have completed item-by-item inventories of Native American human remains and associated funerary objects that are in their collections. These inventories also were to have been sent to culturally affiliated Tribes or Tribes likely to be culturally affiliated.¹³⁶

Federal agencies and Indian Tribes that administer federal or tribal land are responsible for complying with NAGPRA regarding consultation with Tribes prior to new archeological excavations or following inadvertent discoveries and for determining and arranging for disposition of any Native American human remains or other cultural items recovered from excavations or inadvertent discoveries.¹³⁷

The Secretary of the Interior is responsible for a variety of implementation activities: administering a grants program; investigating and imposing, when appropriate, civil penalties for noncompliance by museums; appointing and supporting a seven member, citizen Review Committee to assist in overseeing several aspects of the law; and, issuing regulations to implement the law. Many of

132. 25 U.S.C. § 3005(c) (1994).

133. *Id.* § 3006; *id.* § 3013.

134. 43 C.F.R. § 10.2(a)-(c) (2000).

135. 25 U.S.C. § 3004; 43 C.F.R. § 10.8.

136. 25 U.S.C. § 3003(d); 43 C.F.R. § 10.9.

137. 25 U.S.C. § 3002.

128. Francis P. McManamon, *Striking a Balance with NAGPRA*, 39 ANTHROPOLOGY NEWSL. 20 (1998).

129. NAGPRA Review Committee, NAGPRA Updates compiled for Dec. 2000 meeting in Nashville, Tenn. (2000) (unpublished information from the National NAGPRA Office, National Center for Cultural Resources). The NAGPRA office can be contacted at www.cr.nps.gov/nagpra.

130. In fact, although the discussions, Congressional hearings, and negotiations that occurred as NAGPRA was being legislated were often tense and sometimes antagonistic between representatives of Indian tribes and museum officials and scientists, in the end, a series of compromises characterize the law. Officials of a number of major museum and scientific organizations, including the American Association of Museums and the Society for American Archaeology, endorsed the final passed legislation and urged President George Bush to sign it.

131. For a series of articles and reports on consultation related to NAGPRA and other laws, see C. Timothy McKeown, *Old Roads and New: Speaking Nation to Nation*, 2 COMMON GROUND 14 (1997).

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these responsibilities have been delegated to the Director, National Park Service, and carried out by the Assistant Director, Cultural Resources and the National NAGPRA program.¹³⁸

The NAGPRA Review Committee is responsible for a variety of activities: facilitating the resolution of disputes; making recommendations about "culturally unidentifiable;" monitoring compliance with the law.¹³⁹

Lineal descendants, Indian Tribes, including Native Alaskan corporations and villages, and Native Hawaiian organizations may make claims for cultural items with which they are linked by descent or cultural affiliation. They may challenge federal agency or museum determinations concerning individual cultural items, or lineal descent or cultural affiliation determinations.¹⁴⁰

The kinds of remains and cultural items covered by provisions of the statute are: (1) Native American human remains and associated funerary objects; (2) unassociated funerary objects; (3) sacred objects; and (4) objects of cultural patrimony.¹⁴¹ The specific definitions for these used in the statute have been described in an earlier section of this article.

In order for repatriation or disposition occur, individual sets of Native American or other cultural items must be linked to lineal descendants or to a present day tribe through a relationship of "cultural affiliation."¹⁴² Section 3 of the statute defines how decisions about disposition of newly recovered human remains or cultural items from federal or tribal lands are to be made.¹⁴³ This section applies to planned excavations or unanticipated discoveries, not to items and remains already in collections. For human remains and associated funerary objects, affiliation established by lineal descendants takes precedence over affiliation established by all other potential claimants. For human remains and associated funerary objects for which lineal descendants cannot be ascertained, as well as unassociated funerary objects, sacred objects, and items of cultural patrimony, the statute provides a context for judging among potentially competing affiliated tribes or other entities:

- (1) Indian tribes or Native Hawaiian organizations on whose tribal lands the cultural items are discovered;
- (2) Indian tribes or Native Hawaiian organizations that can show the closest cultural affiliation to the items; and
- (3) if cultural affiliation cannot reasonably be ascertained and if the items were recovered from Federal land formally recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as the

aboriginal land of some Indian tribe, proper recipients may be the Indian tribes recognized as aboriginally occupying the area from which the items were excavated.

Regarding (3), if a preponderance of the evidence shows that a different tribe than the one identified as aboriginally occupying the area has a stronger demonstrated cultural affiliation with the human remains or cultural items, they would be viewed as the culturally affiliated group for purposes of the statute.

Clearly, "cultural affiliation" is a key concept for implementing this statute; it is a cornerstone for most repatriation requests and for asserting claims related to new discoveries on Federal or Tribal land. The statute defines cultural affiliation as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian Tribe or Native Hawaiian organization and an identifiable earlier group."¹⁴⁴

There are three elements that must be considered when investigating whether or not a relationship of cultural affiliation can be determined. There must be:

- (1) a "present day Indian tribe or Native Hawaiian organization." Indian tribes are those tribes recognized as such through the Bureau of Indian Affairs recognition procedures. Also included are "... and Alaskan Native village or corporation defined in or established by the Alaska Native Claims Settlement Act."¹⁴⁵
- (2) "an identifiable earlier group", for example, a specific archeological site or a particular group of burials within a site; and,
- (3) "a relationship of shared group identity" between these two groups.

The statute and regulations do not establish a standard method or specific techniques for determining cultural affiliation. However, the statute lists the kinds of evidence that should be considered in making such determinations. The list includes "geographical, kinship, biological, archaeological, anthropological, linguistic . . . oral tradition," or historical evidence, "or other relevant information or expert opinion."¹⁴⁶ The reliability and relevance of evidence needs to be evaluated for each case. A reasonable determination that "a relationship of shared group identity" is required. Reasonable means: "fair, proper, just, moderate, [and] suitable under the circumstances."¹⁴⁷ The implementing regulations for NAGPRA provide some additional direction about how to make determinations of cultural affiliation.¹⁴⁸

138. *Id.* §§ 3002(b), 3002(d)(3), 3006(f)-(g), 3008. For information about the National NAGPRA program, see <http://www.cr.nps.gov/nagpra>.

139. *Id.* § 3006(c).

140. *Id.* § 3001(6), (7), (11), (12); 43 C.F.R. § 10.2(b).

141. 25 U.S.C. § 3001; 43 C.F.R. § 10.2(d).

142. 25 U.S.C. § 3001(2); 43 C.F.R. § 10.2(e).

143. 25 U.S.C. § 3002; 43 C.F.R. § 10.6.

144. 25 U.S.C. § 3001; 43 C.F.R. § 10.2(d).

145. 43 C.F.R. § 10.14(2) (i)-(iii).

146. 43 C.F.R. § 10.2(e); *id.* § 10.14(c)-(f).

147. BLACK'S LAW DICTIONARY 874 (6th ed. 1991).

148. See 43 C.F.R. § 10.14(c)-(f).

In its report on the legislation that was enacted as NAGPRA, the Senate Indian Affairs Committee discussed this matter:

The types of evidence which may be offered to show cultural affiliation may include, but are not limited to, geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or expert opinion. The requirement of continuity between present day Indian Tribes and materials from historic or prehistoric Indian Tribes is intended to ensure that the claimant has a reasonable connection with the materials. Where human remains and funerary objects are concerned, the Committee is aware that it may be extremely difficult, unfair, or even impossible in many instances for claimants to show an absolute continuity from present day Indian Tribes to older, prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of gaps in the record.¹⁴⁹

Whether new discoveries from Federal or Tribal land or existing collections are being considered, it is not necessary for the agency, museum, lineal descendent, Indian Tribe, or Native Hawaiian organization to establish beyond all doubt which descendent or Native American group is a proper claimant for purposes of repatriation. This is true in situations involving cultural items in collections as well as when dealing with newly discovered materials.¹⁵⁰

The cultural affiliation definition also indicates that federally recognized Indian tribes, Alaskan Native organizations, and Native Hawaiian organizations are the present day groups that are to be considered regarding cultural affiliation. Other contemporary groups of Native Americans of diverse backgrounds who voluntarily associate together for some purpose or purposes are not viewed as proper claimants under the provisions of the statute.¹⁵¹

In a recent formal finding, the NAGPRA Review Committee commented on their views about how cultural affiliation determinations should be made. Their recommendations were directed toward a particular case, however, the points can be generalized. The committee noted that:

- (1) Determination of cultural affiliation should be made on a site-by-site basis [rather than in larger units, such as an entire large district, forest, or park area], assessing each site based on the specific data available;

149. SELECT COMM. ON INDIAN AFFAIRS, PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP. NO. 101-473, at 7 (1990).

150. 25 U.S.C. § 3005(a)(4) (1994); 43 C.F.R. § 10.14(f).

151. 25 U.S.C. § 3001(7); 43 C.F.R. § 10.2(b)(1)-(2).

- (2) While collective consultation can be useful, it should not be used in lieu of individual tribal consultation when requested by an Indian tribe;
- (3) A proper determination of cultural affiliation necessarily requires the critical evaluation and careful weighing of all available evidence. This weighing should emphasize group identity, time period, specific cultural practices, and traceable cultural continuity;
- (4) [It is necessary] to ensure the objective character of the determinations of cultural affiliation of the human remains and other cultural items¹⁵²

Anthropological, archeological, biological, ethnohistorical, ethnological, forensic, and historical data, methods, and techniques are recognized in the law and its regulations as important sources of information and means of making decisions about appropriate actions. These scientific data, methods, and techniques have been and should continue to be used for the documentation and recording of items covered by NAGPRA in existing collections, as they have been in the inventories required by the statute.¹⁵³

Such information is essential for making informed and justified determinations of cultural affiliation regarding remains and objects in collections, as well as for remains and objects encountered in new excavations or inadvertently discovered. NAGPRA requires that any excavation or removal of Native American human remains is conducted using modern scientific procedures, methods, and techniques called for by the Archaeological Resources Protection Act and its implementing regulations.¹⁵⁴ Senator Daniel Inouye, when introducing the legislation that became NAGPRA on the floor of the Senate before the vote to pass it, noted the importance of scientific inquiry for our society:

we all recognize the value of the work carried out by museums. When we visit museums and look at the remnants of past civilizations, we are really learning about ourselves, and how our societies and civilizations have evolved As enlightened people, we welcome scientific inquiry and the opportunity to know more about ourselves. Accordingly, we welcome the preservation and scientific purposes that museums fulfill.¹⁵⁵

In some instances, individuals or organizations have rushed to implement NAGPRA, overlooking appropriate procedures or ignoring the need for careful gathering, recording, and sifting of various kinds of evidence. Sometimes these overly zealous efforts have been well intentioned, though misapplied, lunges at "doing the right thing." In other instances, they have been hasty attempts to quickly

152. Native American Graves Protection and Repatriation Act, 65 Fed. Reg. 28,6622 (Feb. 10, 2000).

153. Francis P. McManamon, *Native Americans Graves, Protection and Repatriation Act and First Americans Research, in WHO WERE THE FIRST AMERICANS? PROCEEDINGS OF THE 58TH ANNUAL BIOLOGY COLLOQUIUM*, 141-51 (Robson Bonnichsen ed., 1999).

154. 25 U.S.C. § 3002(c); 43 C.F.R. §§10.3-10.4.

155. 136 CONG. REC. S17,714 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

rid an official or organization of a seemingly intractable, complex problem. In either kind of case, the law has been misused or abused. It is unfortunately often true that such bad examples are used to incorrectly characterize all efforts to implement the statute.

What can be learned from such bad examples is that quick is not necessarily best, or even good. Issues related to determining whether remains or objects fit the definitions used in NAGPRA, determinations of lineal descent or cultural affiliation, or whether a museum has the "right of possession" for an object that otherwise would be subject to a repatriation claim, frequently can be complex and emotionally charged. Careful consideration by all parties is appropriate to work through such difficult situations and reach reasonable, well-based determinations called for by the law. Striking a balance that takes into account all the appropriate perspectives and rights under NAGPRA can be time-consuming, though following such a path should lead to a better common understanding in the end.

Senator John McCain reflected on the importance of balance in NAGPRA and the issues it attempts to deal with in his remarks about the legislation on the floor of the Senate:

I believe this bill represents a true compromise . . . In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues . . . I believe this legislation effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interest of our Nation's museums in maintaining our rich cultural heritage, the heritage of all American peoples.¹⁵⁶

Balance was key in the passage of NAGPRA; it remains important in its implementation.

CONCLUSION

During the twentieth century, the means of preserving and interpreting America's cultural resources have expanded and improved. From the Antiquities Act, through the Historic Sites Act, and to the National Historic Preservation Act consideration, recognition, and protection have broadened and increased. Although the Antiquities Act proved to be a means of overseeing and coordinating educational and scientific archeological investigations on federal and American Indian lands, it did not effectively prevent or deter looting of archeological sites on those lands. This problem became critical in the 1970s, when several attempts by federal land managing agencies and prosecutors in the Southwest to convict looters under the Antiquities Act resulted in judicial decisions holding that the terms of the Antiquities Act were unconstitutionally vague. The response to these cases was a concerted effort by archeologists and preservationists, their allies in the law

enforcement community, and several essential supporters in Congress to strengthen the legal protection of archeological resources, and the eventual outcome was a new statute, the Archeological Resources Protection Act of 1979.¹⁵⁷

The twentieth century saw the expansion of a national and public concern for a fuller range of cultural resources and the development of laws, regulations, and public policies to take this concern into account. The Antiquities Act blazed much of the subsequent trail. It asserted broad and general public interest in, and control over, archeological resources on federal and American Indian lands. This interest and concern continues today, and is the basis for public agency efforts to protect archeological sites from looting and vandalism. The Act also provided for the protection and preservation of specific areas of importance for their archeological, historical, and scientific resources. In addition, it remains an important achievement in the progress of conservation and preservation efforts in the United States. Its passage involved

a whole generation of dedicated effort by scholars, citizens, and members of Congress . . . More important, this generation, through its explorations, publications, exhibits, and other activities, awakened the American people to a lasting consciousness of the value of American antiquities, prehistoric and historic. This public understanding, achieved only after persistent effort in the face of much ignorance, vandalism, and indifference, was a necessary foundation for many subsequent conservation achievements. Among them were several of great importance to the future National Park Service, including the establishment of many National Monuments, development of a substantial educational program for visitors, and eventually the execution of a far-reaching nationwide program to salvage irreplaceable archeological objects threatened with inundation or destruction by dams and other public works and their preservation for the American people.¹⁵⁸

We perceive the world as a more complicated place than it was at the beginning of the twentieth century. As a nation, we continue to denounce, as did the Antiquities Act, those who pillage archeological sites or other kinds of cultural resources solely for personal or monetary gain.¹⁵⁹ Such behavior destroys the public benefit that can be derived from careful study of archeological sites and objects. At the same time, contemporary perspectives regarding the treatment of archeological resources exist which were not envisioned by the promoters and supporters of the Antiquities Act. For example, those of us who work at archeological protection,

157. Francis P. McManamon, *The Antiquities Act - Setting Basic Preservation Policies*, 7 CRM 18, 21-22 (1996).

158. Lee, *supra* note 43, at 86.

159. Catherine M. Cameron, *The Destruction of the Past: Nonrenewable Cultural Resources*, 3 NONRENEWABLE RESOURCES 1, 6-24 (1994); CULTURAL RESOURCE MANAGEMENT, *supra* note 1, at 45; Francis P. McManamon & Susan D. Morton, *Reducing the Illegal Trafficking in Antiquities*, in CULTURAL RESOURCE MANAGEMENT, *supra* note 1, at 247-75.

156. 136 CONG. REC. S17,173-74 (daily ed. Oct. 26, 1990) (statement of Sen. McCain).

preservation, and interpretation seek to develop consensus about appropriate treatments of our shared heritage that take into account a multitude of perspectives.

Our society has come to recognize the legitimate traditional uses of cultural and natural resources, and to value consultation about, and appropriate treatment of, these resources. Thus, the traditional uses and views of American Indians, Alaska Natives, Native Hawaiians, and other Pacific Islanders, as well as other ethnic groups with close associations to particular cultural resources, are to be taken into account through appropriate consultation and treatment. These are among the goals of contemporary cultural resource protection, preservation, and interpretation.¹⁶⁰

160. Francis P. McManamon & Alf Hatton, *Introduction: Considering Cultural Resource Management in Modern Society*, in *CULTURAL RESOURCE MANAGEMENT*, *supra* note 1 at 1-19.

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4 *The protection of archaeological resources in the United States: reconciling preservation with contemporary society*

FRANCIS P. MCMANAMON

INTRODUCTION

Public archaeology in the United States encompasses the activities of a wide range of agencies and organizations at the national, state and local levels. All share a central purpose: managing the nation's archaeological heritage in the best interests of the public. Federal archaeology is part of the larger national historical preservation programme, which operates by authority of various laws and is frequently referred to by the generic term, 'cultural resource management'.

Federal government departments or agencies either carry out or require of their clients professional archaeological investigations for many public undertakings. An agency's involvement depends on its function. Some, such as the Forest Service, oversee vast amounts of land. Others, like the Federal Highway Administration, help government departments or the private sector develop resources or facilities. Whether they manage land or not, agencies must ensure that the developments they facilitate, license or fund do not wantonly destroy the archaeological record (McManamon 1992).

Many agencies carry out a combination of the two functions. The resource management agencies, for example, also undertake or permit development activities. Some agencies that are primarily development-oriented, such as the Corps of Engineers, also administer lands for recreation. Large agencies, especially, perform a broad range of tasks for which archaeological investigations are needed. In a series of reports, the US National Park Service has collected, synthesized and summarized the range of federal archaeological activities and results (see Keel *et al.* 1989; McManamon *et al.* 1993; Knudson *et al.* 1995; Haas 1997).

As one might expect, agencies can take very different approaches to meeting their responsibilities. Some, such as the Bureau of Land Management, the Corps of Engineers, the Forest Service and the National Park Service, have extensive archaeological programmes with large professional staffs. Agencies that assist other levels of government, such as the Environmental Protection

Agency and the Federal Highway Administration, may pass along their responsibilities to state government agencies or project sponsors.

Each of the land management agencies has begun to assemble an inventory of the archaeological sites it administers. The degree of completeness varies widely; before the 1980s, several agencies had programmes to advance archaeological inventories, but many of these have been diminished and so eliminated in the recent 'downsizing' and budget cuts of the federal government in the US. Most current inventory efforts come from archaeological investigations associated with development or natural resource extract projects.

Many agencies have written overviews of the archaeology and history of the lands they manage. These overviews assist in assessing known sites, well as predicting where sites will likely be found in the future. Most of land-managing agencies have incorporated archaeological considerations into their guidelines for managers, and many provide training in how to manage cultural resources. Land units such as Bureau of Land Management districts and National Forests often have directives on how to deal with archaeological sites. Land-managing agencies also undertake archaeological projects themselves, which typically involve excavation, collection, analysis, reporting and curation of remains and associated records. On average, there are over 1,000 of these projects annually (see Keel *et al.* 1989; McManamon 1993; Knudson *et al.* 1995; Haas 1997).

Increasingly, all federal archaeological projects, whether funded, permitted or actually carried out by an agency, include public education and outreach components. These can include public lectures or slide shows, popular publications, brochures, newspaper articles, even public 'open house' days or 'archaeological fairs' (e.g. see chapters by Lerner and Hoffman, Moe and Jameson in this book; also see articles in Jameson 1997). Some agencies, especially those at the local government level, offer opportunities for volunteers to participate actively in archaeological excavations or other kinds of investigations.

PRESERVATION LAWS AND POLICIES

The preservation of archaeological remains became a concern of the federal government in the late 1800s. In 1879, Congress authorized the Bureau of Ethnology, later the Bureau of American Ethnology, within the Smithsonian Institution (Lee 1970; Hinsley 1981). Archaeology was among the Bureau's areas of focus. It wasn't until 1892, when President Benjamin Harrison issued an executive order preserving Casa Grande Ruins in Arizona, that the country had its first federally protected archaeological site (Lee 1970).

During the next decade and a half, concern for the preservation of American antiquities grew within and outside the government. Warnings from individuals and professional organizations, such as the American Association for

the Advancement of Science, the Anthropological Society of Washington (later renamed the American Anthropological Association) and the Archaeological Institute of America, increased public awareness of the destruction of archaeological ruins, especially in the Southwest, leading to the passage of the Antiquities Act (Lee 1970; Rothman 1989).

In 1906, the US government declared a national policy to protect American antiquities by prohibiting any excavation, removal, damage or destruction of

any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department . . . having jurisdiction over the lands on which said antiquities are situated

(16 U.S.C. 431-3)

The policy was articulated in the Antiquities Act of 1906, the first general application archaeological or historic preservation statute in the United States. This far-reaching statute, which prohibited looting and vandalism, made federal officials responsible for protecting archaeological sites on lands they administered. The law provided the President with the means to protect significant archaeological, historical and natural resources on federal lands by setting the land aside for special protection and conservation. Most chief executives since 1906 have used the authority to establish national monuments (McManamon 1996).

In 1935, this national policy was extended and generalized in the Historic Sites Act which declared 'a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States' (16 U.S.C. 461 *et seq.*). With the Antiquities Act as a mandate and public employment as a motivating objective, federal archaeological activities increased dramatically with the massive public works programmes of the 1930s. Archaeological projects conducted under one of these programmes, the Works Progress Administration, were the government's first large, public archaeological undertakings (Lyon 1996). In the late 1940s, the Corps of Engineers and the Bureau of Reclamation began a massive programme of dam and reservoir construction that was to have a major effect on archaeological sites. Professional and scholarly organizations banded together, raising concerns about the potential destruction of sites (Brew 1947; Johnson 1947; Roberts 1948). Together these organizations - in cooperation with the agencies constructing the dams and the National Park Service and Smithsonian Institution - created the River Basin Archaeological Salvage programme, to mitigate some of the destructive results of the proposed construction (Johnson 1947, 1951, 1966; Roberts 1952; Brew 1961; Roberts 1961; Brew 1968; Jennings 1985).

The concern for adverse impacts to all kinds of historic properties led to the National Historic Preservation Act in 1966. The basic statements of public policy articulated in the 1906 and 1935 laws, and in the River Basin

Archaeological Salvage programme, were broadened and described more specifically by sections of the National Historic Preservation Act of 1966 (NHPA). This law (16 U.S.C. 470 *et seq.*) expands the public policy of protection, preservation and use for the public benefit to include a wide range of cultural resource types, including those that have importance regionally or locally, but are not nationally significant. It extends the public policy to encompass cultural resources beyond those owned by the national government and it establishes a national concern for the protection, preservation and public use of cultural heritage sites by state, tribal and local governments in the US. The NHPA incorporates this variety of archaeological, historical and cultural resource under the encompassing term 'historic properties'.

Section 2 of the NHPA elaborates on the general, broad statement in the 1935 act by identifying six kinds of actions or activities that the nation government will undertake to provide for the preservation of US historic properties:

- 1 use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic and prehistoric resources can exist in productive harmony and fulfil the social, economic and other requirements of present and future generations;
- 2 provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations;
- 3 administer federally owned, administered or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;
- 4 contribute to the preservation of non-federal prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;
- 5 encourage the public and private preservation and utilization of usable elements of the nation's historic built environment; and
- 6 assist state and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programmes and activities.

In addition, the statute noted that these activities will be carried out by the federal government 'in cooperation with other nations and in partnership with the states, local governments, Indian tribes, and private organizations and individuals'. One of the important and distinctive aspects of cultural heritage management in the United States is that it is a partnership with several levels of government, educational and professional organizations, as well as private groups or individuals taking part.

Archaeological preservation benefited directly from the 1966 statute. In 1974, Congress paid special attention to the effects of federal construction amending the Reservoir Salvage Act to require that agencies fund archaeological activities necessitated by their projects. This action generalized t

archaeological activities that had developed in the River Basin Archaeological Salvage programme.

In 1979, in response to increased looting and problems with enforcing the Antiquities Act, Congress passed the Archaeological Resources Protection Act (ARPA). Although the statute mainly seeks to protect sites on federal lands, it also prohibits interstate and international commerce or transportation of archaeological remains obtained in violation of state or local statutes.

The Archaeological Resources Protection Act (16 U.S.C. 470aa-470mm) affirms and enhances the basic preservation and public benefit policy articulated by the Antiquities Act. It was enacted to improve the protection originally afforded archaeological resources by the Antiquities Act. As a matter of public policy, this statute notes that:

the purpose of this act is to secure for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act.

ARPA improves the means for enforcing prohibitions against looting and vandalism, stiffened penalties, and prohibited trafficking in illegally removed artefacts. The statute also addresses several areas of concern not dealt with before, such as the custody and disposition of collected or excavated material and the confidentiality of sites. ARPA emphasizes the importance of cooperation among federal authorities, professional organizations, private archaeologists and individuals, which fosters opportunities to preserve the nation's heritage. Today the federal programme brings together all these initiatives and more in the interest of serving the public. Amendments to ARPA in 1988 improved its law enforcement provisions and focused efforts on public education and resource inventory programmes, making the statute a resource management tool as well as a protection one.

The amendments in 1988 recognized that protection of US archaeological resources required two kinds of focus in addition to effective control of legitimate excavation and removal of remains from archaeological sites. Federal agencies were directed to obtain accurate information about the locations of sites through archaeological inventory programmes, so that their conditions could be monitored and their locations protected. This recognizes the simple fact that it is difficult to manage effectively or efficiently resources whose locations and characteristics are not known. The second requirement called for the establishment by federal agencies of public education and outreach programmes 'to increase public awareness of the significance of the archaeological resources located on public and Indian lands and the need to protect such resources' (Section 10(c)). This requirement recognized the fact that

public support for archaeological protection programmes and actions is needed to sustain the programmes. It also acknowledges that members of the public can serve as effective stewards of archaeological resources if they understand the importance of protecting these resources from wanton and illegal destruction (McManamon 1991).

In 1990, the Native American Graves Protection and Repatriation Act required more attention and consideration by archaeologists and federal officials to the concerns of American Indians, Alaskan Natives and Native Hawaiian Federal land-managing agencies were directed to consult with Indian tribes and Native Hawaiian organizations before undertaking archaeological investigations that might result in the excavation or removal of Native American human remains, funerary objects, sacred objects or objects of cultural patrimony. The kinds of remains and artefacts, if recovered from archaeological excavations, are required to be turned over to the appropriate Indian tribe after their scientific recovery and recording. This statute, which also includes similar provisions related to existing collections, signals a new relationship between Indian tribes and federal agencies, museums, archaeologists and other scientists interested in much of the archaeological record in the United States.

CONTEMPORARY CULTURAL RESOURCE MANAGEMENT IN THE UNITED STATES

The term cultural resource management (CRM) developed within the discipline of archaeology in the United States during the early 1970s. Fowl (1982: 1) attributes the first use of the term 'cultural resource' to specialists within the National Park Service in 1971 or 1972. Shortly after this the word 'management' was linked with cultural resources by the 1974 Cultural Resource Management Conference held in Denver (Lipe and Lindsay 1977). This conference was attended by many of the individuals working actively on the problems associated with preservation of archaeological sites in the United States.

Early proponents and developers of CRM recognized that, conceptually it was concerned with a wide range of resource types

including not only archaeological sites but historic buildings and districts, social institutions, folkways, arts, crafts, architecture, belief systems, the integrity of social groups, the ambiance of neighbourhoods, and so on . . . all constitute aspects of the National Environmental Policy Act, the historic preservation laws pertain directly to only some of them, and archaeologists are typically concerned with or knowledgeable about an even smaller subset.

(McGimsey and Davis 1977: 27)

Despite this early recognition of the properly broad nature of CRM, a continuing adherence to this wide definition by some (e.g. Knuds

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1986: 401), the term frequently has been, and still is, used as a synonym for archaeology done in conjunction with public agencies' actions or projects. Imprecise use and absence of rigorously adhered to definitions are common among a range of terms related to CRM, such as 'historic preservation', 'archaeological resource management' and 'heritage management'. This situation ought not to be too worrisome: the existence of all of these terms is relatively new, and in time their definitions and relationships will become more precise. However, to avoid misunderstanding, contemporary workers in these various fields must define the terms explicitly as they use them in their own work.

In the early 1970s in the United States, CRM developed from two related archaeological concerns. First, there was a continuing concern about the destruction of archaeological sites due to modern development such as road construction, large-scale agriculture and housing. Much of this development was sponsored, endorsed or funded by the federal government (Davis 1972). This concern was an extension of earlier concerns about large-scale federal construction projects, most notably the River Basin Archaeological Salvage programme of the Corps of Engineers and the Bureau of Reclamation, which developed in the late 1940s and early 1950s. The earlier concern had led to a reaction by archaeologists that was termed 'salvage archaeology', by some who viewed it as second-rate work, or, more positively, 'rescue archaeology' or 'emergency archaeology', by those who argued that it was necessary and generally successful at saving some of the archaeological data from sites that would otherwise be destroyed without any recording (e.g. Brew 1961; Jennings 1985). Emergency archaeology focused on saving archaeological data and remains through rapid excavation of sites prior to their destruction by modern construction projects.

The second concern that led to CRM was dissatisfaction with the emergency archaeology approach itself. Emergency archaeology resulted in the excavation of sites and the preservation of some data and remains; it was an essential response to the huge modifications to the earth's surface and the destruction of archaeological sites that resulted from it. Emergency, or salvage, archaeology did indeed collect and save archaeological data and collections that would otherwise have been lost (Jennings 1985). Yet, as critics justifiably pointed out, the excavations were often not followed by thorough description, analysis and synthesis of the investigation results. We also know now that the collections and records from many salvage projects were poorly cared for after the investigation ended, and, along with the lack of attention to curation associated with more recent work, these failings contributed to the contemporary problems of archaeological curation and collections management (e.g. see Childs 1996). Perhaps most problematic about the emergency archaeology approach was the fundamental failure to modify development projects so that sites could be conserved and protected rather than destroyed, even though the destruction was preceded by scientific excavation.

CRM: a new approach to preserving archaeological resources

One result of the heightened concern about environmental issues during late 1960s and the 1970s was the enactment of laws to protect important aspects of the cultural and natural environment. Prominent among these were the National Historic Preservation Act of 1966 (NHPA) and the National Environment Policy Act of 1969 (NEPA). Both of these statutes had important effects on the development of CRM in the United States. Both required that federal agencies take cultural resources, defined broadly including archaeological sites, into effect as agencies planned, reviewed and undertook projects or activities. These laws, plus Executive Order 115 signed in 1971, also required federal agencies to identify, evaluate and protect cultural resources on land for which they had jurisdiction or control. These new requirements and government activity had two immediate effects on development of CRM: (1) the employment of professional archaeologists in public agencies and private firms to do the archaeological work required by the new laws and regulations, and (2) the attention devoted to archaeological resources as part of the planning of public agency operations and projects.

A national network of public agency archaeologists

During the 1970s, federal agencies began to employ professional archaeologists in numbers never before seen and to place them in offices through their organizations. This was especially so among land-managing agencies such as the Bureau of Land Management and the Forest Service. Prior to this period, the relatively few professional archaeologists employed in federal service were located in the National Park Service and the Smithsonian Agencies such as the Federal Highway Administration and the Environmental Protection Agency, which did not manage land, but provided funding and licensing for development projects, such as highways, waste water treatment facilities and energy plants, tended not to employ many archaeologists on their staffs. More frequently, these agencies met their CRM responsibilities by requiring them of the state agencies or private firms that carried out development projects. This pattern eventually led to the hiring of professional archaeologists by state agencies and private firms that found themselves required by federal agencies to carry out necessary cultural resource studies. By the end of the 1970s, federal and state agencies had developed a network that included hundreds of professional archaeologists filling positions in headquarters, regional and local offices, undertaking a variety of activities to implement CRM laws, policy regulations and guidelines. At the state government level, State Historic Preservation Offices, established by the National Historic Preservation Act and its implementing regulations required that each state office had a professionally qualified archaeologist on its staff. This in particular helped in the establishment of a national network of professionally qualified archaeologists in the public sector.

In addition to the growth of professional archaeologists in the public sector, a similar growth of professional employment occurred in private firms. Such firms ranged in size from large national or international consulting firms that needed to comply with NHPA and NEPA requirements for many of the public projects they bid for, to small, newly organized firms set up to undertake specific CRM investigations needed by public agencies.

These rapid, substantial changes within the archaeological community in the proportions of professional employment, duties and responsibilities resulted in discussions, debates and disagreements regarding the benefits of CRM and the quality of archaeological work done as part of it. Not all of the issues raised in the professional turmoil over CRM have been resolved. However, in general, the debates and disagreements have moderated from vitriolic to collegial. Much of the contemporary archaeological field work done in the United States is tied to CRM. Many, perhaps most, professional archaeologists support a conservation approach to treatment of the archaeological record that has as one major goal the management of resources for long-term preservation. There is general agreement that it is important to maintain, and perhaps strengthen, the archaeological network among public agencies, and the statutes, policies, regulations and guidelines that protect archaeological resources.

Considering archaeological resources during the planning stages of programmes and projects

Both the NHPA and NEPA require that federal agencies take account of cultural resources in planning their own programmes or projects that they are undertaking with state or local agencies or with private firms. The term 'cultural resources' is not used in either statute. NHPA uses the term 'historic property' to cover a wide range of cultural resource types, explicitly referring to archaeological resources; NEPA uses the term 'human environment', which has been interpreted to include archaeological resources, but does not explicitly use this term. Both laws are important because they establish a national policy of considering the effect of public actions on the natural and historic environment during the planning stages of public projects. This consideration requires the identification, evaluation and determination of impacts to archaeological resources prior to decision making about proceeding on projects that will result in harm occurring to significant resources. The approach to planning required by NHPA and NEPA has moved archaeologists into the planning process. Although emergency situations still occur requiring archaeological investigations to take place during the construction phase of projects, immediately in front of the bulldozers, they are much less common than during the days of 'salvage archaeology'.

Essential aspects of the CRM approach

There are three general aspects to CRM when considering archaeological resources:

- 1 identification and evaluation of resources,
- 2 treatment of the resource, and
- 3 the long-term management of the resource.

Identification and evaluation

Identification and evaluation of cultural resources is an essential aspect of CRM and one that is particularly challenging for some kinds of archaeological resources. Discovery of archaeological resources that are unobtrusive and in areas where visibility is poor is usually difficult. For example, many archaeological resources do not contain architectural remains that help to signal their existence and location. Frequently, archaeological sites are buried below the surface or, if they are on the surface, are hidden by thick vegetation. Relatively costly, labour-intensive investigations are frequently necessary for the discovery of archaeological resources, much more so than for other kinds of cultural resources, for example historic structures.

The evaluation of archaeological sites involves the determination of the importance or significance of each site or of a group of sites. Most often such significance is based upon what can be learned about the past from the resource being evaluated. However, archaeological resources may also be important because they are associated with important individuals, events or historical patterns, or because they illustrate important aspects of architecture or design. In most cases, the information needed for archaeological evaluations to be made also requires labour-intensive investigations, in these cases at the site level.

In United States CRM law and regulations, archaeological resources must be determined to be significant enough to be listed on, or eligible for listing on, the National Register of Historic Places in order to be considered for preservation in the context of federal undertakings or programs. On federal lands, archaeological resources are also protected from deliberate damage by the provisions of the Archaeological Resources Protection Act (ARPA). The Act requires that the removal or excavation of archaeological resources be undertaken only as part of a scientifically based investigation, unless these resources have been determined to be no longer 'of archaeological interest'. Land managers may make a determination that resources have lost their significance under procedures established in the regulations implementing ARPA only after careful consideration of the facts of a case.

Treatment

After archaeological resources have been identified and evaluated as being important enough for some kind of further treatment, the exact kind of treatment must be decided upon. There are two possible treatments: excavation and data recovery prior to site destruction or *in situ* preservation of the site. Frequently, of course, sites are not destroyed totally by construction projects and a portion of the area of a site might be saved *in situ* whilst another

excavated prior to destruction. At present, archaeological resources that are discovered within the impact area of a public construction project and are evaluated as significant are most frequently excavated and their data recovered as an agreed upon means of mitigating the impact of the federal undertaking. There are moves afoot to use site avoidance and preservation more frequently in such situations, but the general pattern remains to condone data recovery as an acceptable means of impact mitigation. For archaeological resources on federal land that are not threatened with destruction by modern construction or agency operations, *in situ* preservation is the more common general treatment.

When *in situ* preservation is the selected treatment, the agency responsible for management of the resource must also decide if further intervention to stabilize or protect the resource is necessary and whether the agency wants to interpret the site actively. If any of these more detailed kinds of treatments are chosen or necessary, agency personnel must take further steps to implement them. For example, a site might be threatened by erosion by fluctuating lake levels and need shore line stabilization to protect its deposits. In other situations, an agency office might decide that a site's location near to a visitor centre or public reception area provides an opportunity for public interpretation of the site. In either case, the agency will need to take additional steps to accomplish the treatment decisions that it makes regarding the *in situ* preservation of the resource.

Long-term management

The long-term management of archaeological resources is a requirement placed upon every federal agency by the Antiquities Act, ARPA and Section 110 of the NHPA. For land-managing agencies, management focuses on three main duties:

- 1 carrying out programmes to identify and evaluate archaeological resources on the lands they are responsible for;
- 2 executing the treatments decided upon for *in situ* archaeological sites on agency lands; and
- 3 caring for the archaeological collections, reports and records related to the sites that were once on agency lands.

For public agencies that do not manage land, the first two aspects of long-term management may not apply or may apply only in a few instances. However, the third aspect of long-term responsibilities will apply for these agencies to the extent that their projects and programmes have resulted in the excavation of archaeological sites. All the public agencies that have undertaken archaeological investigations, or caused them to be undertaken, must see to it that the information resulting from these studies is properly distributed (Canouts 1992). This means ensuring that appropriate information is widely available and sensitive information is strictly controlled.

Goals and prospects of contemporary CRM

The focus here has been on how contemporary CRM developed and the nature of contemporary CRM as it relates to archaeological resources. However, as stated above, CRM can be used to refer to ways of managing a range of cultural resource types in addition to archaeological resources. Historic structures, cultural landscapes, museum collections and other kinds of cultural resources present similar challenges to those presented by archaeological resources in the areas of identification and evaluation, treatment and long-term management.

There are additional kinds of cultural resource that require special considerations. One of these kinds of resource has come to be referred to as 'traditional cultural properties' (TCPs). These are places that have special, strong traditional importance for a particular ethnic, social or cultural group. The significance of this kind of cultural resource is not linked to its archaeological, historical or architectural value, as is the case with other kinds of cultural resources. Some experts have also proposed that traditional behaviours, such as special building skills, crafts, folk arts, etc., should be considered as cultural resources.

CONCLUSION

The United States cultural resource preservation programme recognizes the importance of combining preservation concerns with the requirements of modern development. Policies and procedures result in the management and preservation by public agencies of some highly significant heritage sites, buildings, and places as parks or monuments; however, it also provides incentive for the preservation of many cultural resources through compatible modern uses. Policies and procedures require all federal agencies to take cultural preservation concerns into account in the programmes and projects for which they are responsible. The system involves cooperation among federal, state local and tribal governments and between the public and private sectors. Organizations from each of these levels and sectors have important roles in the United States cultural preservation programme. Finally, the need for accurate information about the locations, characteristics and conditions of cultural heritage sites continues to be recognized as essential information for effective and efficient management. Increasingly, the importance of public education and outreach is recognized as essential to enhance, even to ensure the support of cultural heritage management programmes and the protection of specific resources.

The remains of the past belong to all Americans. The archaeological record is one of the means of recovering things no longer remembered or never written down. The past is not dead; it is in constant use by those of us in the present. We use it to tell stories, to validate actions, to bring to memor

past events and people important to us. One of the best ways in which we come to understand the past is through the scientific investigation of archaeological sites, collections and data. But, in order to seek the counsel of the past through our nation's archaeological sites, we must ensure that they are protected and managed effectively.

Although we cannot predict all the problems of coming generations, one thing is certain: in the future, we shall have fewer archaeological sites. The remains of the past deteriorate naturally, are pushed aside by modern development, and are wrenched from the ground by those who would use them for private gain. Those of us who are concerned about the preservation of archaeological resources must be committed to their long-term protection and management. In the future, changes to our understanding of the past and improvements in how we investigate it will enable us to extract additional information from the archaeological record. It is likely that we will be able to learn more, not less, about the past, but only if the sites, collections and data are preserved for study.

The magnitude of this endeavour is apparent when one considers that only a few of the 280 million or so hectares under the federal government's jurisdiction have been inventoried for archaeological sites. Thousands of federal undertakings throughout the nation affect archaeological sites, and the challenge is further increased by the hundreds of thousands of reports and millions of artefacts and bits of data that must be cared for and curated to ensure that these valuable pieces of the past are not wantonly destroyed.

Effective management integrates the multiple interests in the archaeological record. Sites must be protected even as valuable information about them is made available to the public. Archaeologists and managers must reach out and work with the descendants of those whose cultural history they investigate, protect and manage. Management decisions that affect archaeological resources should be made with awareness that these remains are unique and non-renewable. Decisions that might deny them to future generations must be taken very seriously.

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5 *Conflict between preservation and development in Japan: the challenges for rescue archaeologists*

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OVERVIEW OF THE ISSUES

As we leave the last decade of this century, Japanese archaeologists find themselves in a serious crisis and struggle to find a solution. Over the last twenty years or more, the number of excavations has increased rapidly in Japan; this has occurred in tandem with urbanization and industrialization. During 1996, there were approximately 30,000 proposals for development and construction that would have affected archaeological sites in Japan. These proposals resulted in more than 12,000 archaeological excavations carried out after site assessment. Ninety-five per cent of these excavations were so called 'rescue excavations' undertaken just prior to construction and development. The cost for all the excavation during this year was over 125 billion yen (approximately 550 million British pounds using the December 1997 exchange rates). Rescue excavations, required by governmental administrative systems, are the major focus of archaeological heritage management (AHM) in Japan. As of 1996, there were more than 6,000 archaeologists, often referred to as 'rescue archaeologists', working at these activities in Japan, representing approximately 90 per cent of all Japanese archaeologists, including those working for universities, research centres and museums.

Rescue archaeologists have not only been carrying out technical archaeological work at their sites. They are also in the forefront of public interactions regarding archaeology at all levels. They have negotiated with developers, protected sites, and presented educational programmes about archaeology and interpretations of the past to the general public. Whether or not the archaeological heritage in Japan survives for future generations depends largely on the contributions of these rescue archaeologists to the enhancement of public awareness about the value of archaeological resources, the benefits of an archaeological approach to understanding the past and the necessity to protect archaeological sites.

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19 Reducing the illegal trafficking in antiquities

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INTRODUCTION: FIGHTING BACK

Illegal trafficking in antiquities is an immense and complex problem that destroying the world's archaeological record. The national and worldwide commodification of humanity's archaeological cultural heritage has had devastating consequences for the material record of the human past. The commercial market for illegally obtained antiquities seems to be operating at an unprecedented level and rate. In 1973, Karl Meyer (1973) reported detail on this worldwide, illegal, irreversible destruction. Meyer's book *The Plundered Past*, exposed the links between the art market, traffickers, antiquities, and looting. This terrible triangle trade continues, as described in an increasing series of articles and reports (e.g. Bator 1981; Brinkley-Rogge 1981; King 1991; McAllister 1991; Nickens 1991; Pendergast 1991, 1999; Coe 1993; Gill and Chippindale 1993; Renfrew 1993, 1995; Munson *et al.* 1995; McIntosh 1996; Elia 1997; O'Keefe 1997). Countless archaeological sites have been damaged or completely destroyed to feed national and international illicit markets for illegally, unscientifically excavated or collected artefacts.

Individuals and organizations who want to fight back against the destruction of archaeological sites from looting and trafficking have three means at their disposal. They can demonstrate through their own behaviour, standards and explicit ethical statements that looting and trafficking are the wrong way to treat archaeological resources. They can work to enforce existing laws against these activities more effectively and cooperate with law enforcement authorities in this endeavour. Finally, they can explain to members of the general public the true values for commemoration, education and knowledge that archaeological sites have if properly investigated and preserved.

ETHICS, STANDARDS AND STATEMENTS

Aside from documenting this problem and its effects, organizations in the United States and elsewhere have taken action by highlighting the problem in public forums, pursuing and prosecuting looters and traffickers by legal means, and assisting in the development of international mechanisms to reduce the problem.

National efforts – examples from the Americas

In 1996, after several years of development and discussion within the organization (Lynott and Wylie 1995; Lynott 1997), the Executive Board of the Society for American Archaeology (SAA), the largest professional archaeological organization in the Americas, endorsed a set of 'principles of archaeological ethics' to serve as guidelines for its members and others in determining appropriate behaviours related to archaeological resources and investigations. Principle No. 3 considers the commercialization of archaeological resources which is at the heart of trafficking. The SAA guidance on this matter is rather straightforward:

The commercialization of archaeological objects – their use as commodities to be exploited for personal enjoyment or profit – results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record. Archaeologists should therefore carefully weigh the benefits to scholarship of a project against the costs of potentially enhancing the commercial value of archaeological objects. Wherever possible, they should discourage, and should themselves avoid, activities that enhance the commercial value of archaeological objects, especially objects that are not curated in public institutions, or readily available for scientific study, public interpretation, and display.

(SAA Executive Board 1996: 452)

Another American-based archaeological organization, the Archaeological Institute of America (AIA), recently amended its Code of Ethics, which also includes a statement concerning trafficking in antiquities:

Members of the AIA should . . . refuse to participate in the trade in undocumented antiquities and refrain from activities that enhance the commercial value of such objects. Undocumented antiquities are those which are not documented as belonging to a public or private collection before December 30, 1970, when the AIA Council endorsed the UNESCO Convention on Cultural Property, or which have not been excavated and exported from the country of origin in accordance with the laws of that country.

(Council of the AIA, 29 December 1997)

By highlighting the problem of antiquities trafficking in their official statements, both of these international archaeological organizations illustrate and emphasize the importance of reducing trafficking as a means of slowing down the destruction of sites. As major international organizations representing professional archaeologists and others with a strong interest and concern about archaeology, the SAA and AIA speak with authority on this topic. It is important that such internationally prominent organizations have expressed strong positions opposing the commercialization of archaeological resources that fuel trafficking.

Many prominent museums have developed collections acquisition policies that endorse only the donation or purchase of antiquities that have detailed accurate documentation. The J. Paul Getty Museum in Los Angeles, which includes an accessible, distinguished and popular collection of Greek and Roman antiquities numbering nearly 30,000 objects, provides an important recent example. In 1995, in conjunction with the completion of an expansion mission statement that integrates the museum more fully with the other conservation, education and information institutes of the Getty Trust, the museum announced that it was 'modifying its collecting practice so as to acquire only antiquities with a well-documented provenance' (Getty Museum 1995).

The largest national museum organization in the United States, the American Association of Museums (AAM), also has an ethical code opposing the acceptance of donations or purchase of objects that have been looted from archaeological sites or illegally obtained and exported from their country of origin. In 1991, the AAM Board of Directors adopted a *Code of Ethics, Museums*. Regarding the handling and stewardship of collections, the code directs member museums to ensure that 'acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials' (AAM Board of Directors 1991: 12).

Yet the strict adherence to such lofty statements seems not always to be practised. Recent reporting in *The Boston Globe* describes the likely acceptance of a donation that included looted artefacts from Guatemala, and the exhibition of looted artefacts from Mali by the Boston Museum of Fine Arts (*The Boston Globe* 4 and 6 December 1997, p. 1 and 13 January 1998, p. 1). In another case, one of Harvard University's art museums, the Arthur M. Sackler Museum, is reported to have acquired Greek vase fragments that are likely to have been looted from fifth-century BC archaeological sites in southern Italy, in direct contradiction to a 1971 policy of Harvard not to accept by gift, purchase or bequest objects that may have been looted or illegally obtained (*The Boston Globe* 16 January 1988, p. 1).

A current (April 1999) case illustrates the confused and contradictory positions of museums and museum organizations in the US concerning the protection of archaeological objects and sites. The United States Attorney in New York has prosecuted New York financier and art collector M.H. Steinha-

for illegally importing a gold platter from Italy, dated to the fifth century BC. Steinhardt, according to the government's case against him, falsified custom documents describing the object being imported, which is a federal offence. In addition, the federal judge in the case ruled that because Italian law considers all archaeological items to be the property of the state, the platter is also stolen property and cannot be legally owned by Steinhardt.

The platter clearly has been looted from an archaeological site in Italy. A willing purchaser like Steinhardt, who reportedly paid nearly \$1.2 million dollars for the platter, is the engine driving the looting of objects like this gold platter and the consequent disruption of archaeological deposits and, thus, destruction of information about the past. Yet the American Association of Museums and the Association of Art Museum Directors have supported the appeal by Steinhardt of the judgement against him by the federal court. This apparent contradiction to strong opposition by American museums of the looting of archaeological sites shows the complicated situation in the US and in other 'art importing' countries, where the art market and art collectors, all of whom are potential museum donors, continue to influence the actions of museum directors and museum boards. There apparently continues to exist in at least some US museums, 'the primacy of acquisition in the hierarchy of museum values', illuminated in gripping and penetrating detail twenty-five years ago in *The Plundered Past* (Meyer 1973: 76).

In the Steinhardt case, both the AIA and the SAA also have entered the legal fray surrounding the case. They have filed an *amicus* brief supporting the initial convictions. This action illustrates another way in which archaeological organizations can promote the proper treatment of archaeological resources. They can take a public stand in opposition to those who engage in or support the destruction of archaeological sites, or, in happier circumstances, can provide support for others whose actions enhance archaeological interpretation, preservation, protection and understanding.

International efforts

The international community has also deplored archaeological looting and the illegal trafficking in antiquities that drives so much of it. In 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Clement 1995; Prott 1995). The convention arose as a means of addressing international concern that the high demand in the art market for cultural objects, one major type being archaeological objects, was causing rampant looting of archaeological sites, especially in countries without effective means of protecting their cultural heritage. Effective implementation of the convention has been mixed because most of the 'art market' countries have not adopted it. However, in the United States, one major art market country that has implemented the convention, there have been recent successful cases. Agreements with Peru, Bolivia, Guatemala, Mali, El Salvador and Canada have been reached and implemented. The agreements direct the

United States Custom Service to seize antiquities illegally removed from these countries, or portions of them, if attempts are made to import them into the United States (Hingston 1989; Kouroupas 1995).

The International Council of Museums (ICOM), representing museum organizations and professionals in over 140 countries, has strong sections of its Code of Professional Ethics deploring the illegal trade in antiquities and the looting of archaeological sites (Boylan 1995).

Another international effort, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, has recently begun to receive more attention (Prott 1995, 1997). In 1984, UNESCO requested that UNIDROIT (the International Institute for the Unification of Private Law), a private research organization located in Rome that undertakes legal research and negotiations focusing on international issues, develop international rules that would enhance the effectiveness of the UNESCO convention. Using expert panels and international conferences of government experts, UNIDROIT was able to draft an international convention that has been endorsed and adopted by a number of nations.

The UNIDROIT convention, if effectively adopted, should increase the diligence of purchasers of art and antiquities in requiring sellers to demonstrate their own legal ownership of the object being offered for sale. This reasoning holds that 'if purchasers begin to ask questions, it should be less easy for traffickers to pass on their illegally acquired goods and the illicit traffic should become . . . less attractive to its perpetrators' (Prott 1995: 63). If traffickers are unable to sell looted antiquities, they will not buy them from the peasants, low-end diggers and small-scale middlemen who are responsible for the looting of archaeological sites in pursuit of marketable objects. If the looters are not paid for digging up the objects, they will not spend their time destroying archaeological sites searching for the objects.

ENFORCING LEGAL PROTECTION

Most nations have established legal protection for all or some of the archaeological resources found in their countries. Effective enforcement of these laws is the key to fighting the looting of archaeological sites in the country and the domestic or international trafficking in the objects illegally removed from archaeological sites. Unfortunately, many developing nations find it very difficult to enforce their archaeological protection laws (e.g. Pendergast and Graham 1989; Pendergast 1991, 1994; Schmidt and McIntosh 1996). Even developed nations, such as Italy and the United States, suffer from the looting of their archaeological sites (e.g. Landers 1991).

Looting, trafficking and the art market

The close connection between the trade in antiquities and the destruction of archaeological sites is well documented. In particular, the percentage of

illicitly obtained antiquities that feeds the international art market is shamefully high. An American dealer in ancient coins recently exposed his complicity in the illicit trade when he described 100 Alexander the Great silver drachmas in his possession in an interview he gave to *Vanity Fair*. According to the article he said,

I don't know where they came from, and I don't care. They all go through Turkish guest workers and other smugglers to Switzerland and Germany and from there to New York and London, where we buy them. Now, everyone in the world will deny it, but 80 per cent of the coins sold throughout the world are 'fresh' [i.e. looted]. It's a tremendous percentage. And it's a percentage the public doesn't want to see. Because it'll scare the crap out of them. Who would buy this stuff if they knew the truth?

(Burrough 1994: 84)

Bruce McNall, the millionaire owner of the Los Angeles Kings professional hockey team and a confessed smuggler, made millions of dollars in the illicit antiquities trade. The description of his commercial enterprise in this area, much of it from interviews with McNall himself, highlights the direct connection between illegally removed antiquities, the art galleries and auction house of the West and their respectable patrons (Burrough 1994).

McNall's main company, Numismatic Fine Arts, one of the dominant firms in the ancient coin market, has sold smuggled artefacts for years. McNall admits that his company has routinely broken the export laws of Turkey, Italy and Greece, and other Mediterranean countries. McNall started his antiquities smuggling career at the age of 18 when he began frequenting the antiquities shops of Italy, Turkey, Egypt and Algeria. His personal interest and collecting soon developed into buying and selling for friends and acquaintances, then to commercial dealing. In order to supply the well-heeled clients of his first Beverly Hills Rodeo Drive gallery, he was soon negotiating deals in Switzerland with high-level smugglers he suspected of dealing in guns and drugs as well. At the age of 30, he sold the first \$1 million coin, a silver Greek decadrachm, which he freely admits he bought freshly smuggled out of Sicily.

Taking advantage of the explosively profitable market for antiquities in the late 1970s and the early 1980s, McNall employed a large network of contacts in Europe to procure the finest illicit antiquities. McNall sold these items 'by the truckload' to a wealthy and glittering clientele. He sold Greek and Roman antiquities to Michael Milken, the infamous junk bond trader. He sold Greek and Roman coins to David Geffen, the record company mogul. And he sold more than \$50 million in antiquities to the eccentric Texas oilmen Bunker and Nelson Hunt (Burrough 1994: 82).

Although McNall's name appears frequently in a Turkish file of tips on antiquities smugglers, his companies have never faced legal action by any

government. As McNall himself is well aware, in order to reclaim illicitly removed antiquities, a country like Turkey must demonstrate their origin usually an impossible task given that so many artefacts are looted in midnight digs and quickly spirited away to Switzerland, leaving no record. 'Turkey has no claim, and they never do', McNall says. 'They have to have pictures of pieces *in situ* and you can't do that, so it's not going to happen' (Burrough 1994: 82).

Responding to McNall's statements, Dr Richard Elia, Associate Professor of Archaeology at Boston University, noted:

What is so amazing [about this business] is that something that starts out so illegal, so sleazy, so dirty, ends up so clean, so cultured. It ends up in a Park Avenue showroom, with some Wall Street guy in a three-piece suit oohing and ahing at them. But it starts off with someone smashing into a tomb, looting a cemetery, and damaging a country's cultural heritage. It gets smuggled out by the same people that smuggle guns and drugs. It's a fundamentally corrupt market. Worse there's a code of silence, like the code of silence of the Mafia. The whole system is guaranteed to favour the illicit side of it.

(Burrough 1994: 82).

The commercial dimension is what drives the clandestine excavations and illicit export of antiquities. Looting continues unabated because antiquities sell for upwardly spiralling prices in domestic and international marketplaces. As long ago as 1985, it was estimated that the total value of stolen or smuggled antiquities traded on the international market ran to over \$1 billion annually, a sum second only to narcotics (Nafziger 1985: 835).

Many nations have laws to prohibit the export of their cultural heritage but most of the stolen materials are smuggled abroad where these national laws have no effect. A vast supply of looted antiquities flows abroad from archaeologically rich countries to art-consuming nations (Meyer 1973; Bato 1981; Prott and O'Keefe 1988).

The recent rise in availability of antiquities from East Asia, for example is attributable to increased looting in this part of the world and openly acknowledged by some dealers and collectors. An article in the April 1991 edition of *Arts and Antiques*, a national journal for art collectors in the United States, is quite explicit about the connection between looting and the art market:

For upper-quality, mid-range prices . . . there are quite a few areas in which there are real bargains to be found. . . . Han and T'ang pieces are part of a deluge of goods smuggled out of Asia that also includes Khmer sculpture from Cambodia and bronzes from Thailand. Thanks to corruption, high-speed boats, and world-wide demand, the flow continues unabated in spite of antiquities laws

designed to protect cultural property. More than 40,000 tombs were pillaged in 1989 and 1990 in China alone, according to the country's State Bureau of Cultural Relics. . . . When faced with Chinese funerary art or damaged Indian idols, dealers typically justify their purchase on the grounds that such pieces carry a stigma in their homeland, and that, in the case of the Chinese works, some officials tacitly condone their illegal export.

(Lawrence 1998: 81)

This illegal, uncontrolled disruption of cultural patrimony enables a few to make profits at the expense of the national, and international, heritage of many. The illicit traffic also diminishes the potential appreciation of universal human civilization by destroying the archaeological context at the site or structure from which the looted object is removed. This destruction also severs the connection between the looted object and the information that would be used to infer its chronological and cultural associations. Ultimately, this separation prevents any hope of verifying the authenticity and historical pedigree of the looted objects (e.g. Elia 1993, 1994a; Gill and Chippindale 1993; Chippindale and Gill 1995). It reduces our knowledge of the diversity of our collective past and, at the same time, obscures the parallel processes of change in world cultures. Nations whose citizens receive plundered goods are sullied by the implied disrespect for their neighbours. Nations that are plundered suffer the double ignominy of irreparable loss and delayed or diminished appreciation of the richness of their prehistory and present cultural life (Meyer 1973: xii-xiii).

The connection between illicit trade in antiquities and other illegal activity is well documented. The international structure of the illicit antiquities trade, the illegal trade in rare and endangered species, and the illicit drug trade are remarkably similar. The three are often intertwined, with the same individuals involved in smuggling all three commodities. For example, in 1985, in the case of the *United States v. Timothy Grayson Smith*, the US Customs Service tracked a smuggler's plane entering the United States from Mexico to the Durango, Colorado airport. The cargo included 350 pounds of marijuana with an estimated value of \$50,000, and thousands of dollars in pre-Colombian ceramic figurines and pots from western Mexico. Two men were convicted of smuggling, and the archaeological material was eventually returned to the Mexican government in 1990 under a 1971 treaty that makes the importation of Mexican artefacts into the US illegal. In the state of Alaska in the United States, a recent US Fish and Wildlife Service undercover investigation into the illicit trade in walrus ivory and drugs revealed a strong connection to the antiquities trade as well. Hundreds of pounds of prehistoric ivory and bone artefacts were found in the homes of defendants during the execution of search warrants.

The structures of the domestic and international illicit antiquities markets may vary in the details (e.g. Meyer 1973; Vitelli 1982; King 1991; McAllister

1991; Nickens 1991; Coe 1993; Pendergast 1994; Elia 1997). However, of these markets may be broken down into three components: production distribution and consumption (Coe 1993: 273-7; Elia 1997: 86-8; Lyo 1998). The production portion of the system involves diggers and small dealers on the local level. The sums paid for objects at this level are very low, but still meaningful to the typically low-income local farmers, peasants and workmen who do the illicit digging. At this level, many fakes also enter the market, further diminishing the likelihood that collectors at the high end of the system will be able to establish the authenticity of objects that come through this system. Distribution is made possible by the larger dealer galleries, international auction houses and import firms, and the ultimate consumer in the market, the private collector (Meyer 1973: 33-43, 123-6; Renfrew 1993, 1995; Tubb 1995; Rose 1997; Watson 1997).

However, high-end professional services provided to those who deal in this market should not be overlooked. This arena involves art historians, journal publishers, law firms, private and public museums, and some professional archaeologists and laboratories that authenticate antiquities (e.g. Elia 1995; Lawrence 1998; Lyons 1998). Others without whose actions the illicit trade could not be supported include government officials with import and export responsibilities who allow the trade to flourish under their noses by 'looking the other way', or actively engage in taking bribes to allow trafficking to proceed.

The illicit antiquities market involves many players and a multitude of conflicting values. The question of what is legal and what is not is compounded by the fact that the legal and illegal parts of these markets are so intertwined that without specific information about particular objects and circumstances – information that is seldom widely shared – it is impossible to separate the legal and the illegal. The practice in the art world of keeping precise origins as trade secrets masks the illegal activity, and protects the guilty. Of course this secrecy also casts doubt on the authenticity of all objects that come to the antiquities market.

Piecemeal destruction leads to total loss

Illicit trafficking often destroys the very items sought for sale, by the careless manner in which they are removed from looted sites (e.g. Kirkpatrick 1992; Pendergast 1994). Illicit trafficking also leads to the fragmentation of large architectural objects like Mayan *stelae* or mosaic floors from the Mediterranean and Middle East into segments to facilitate smuggling and bring in more money:

The concept of destruction or mutilation is relatively simple when applied to a Raphael or Monet: nobody would suggest that a painting be cut into pieces in order to make it 'go around' further It is the most distasteful aspect of the current art trade that on this question aesthetics and economics sometimes part company,

and that the physical mutilation of certain types of art is rendered profitable because a respectable and lucrative market can be found for fragments no matter how brutally obtained.

(Bator 1981: 20)

Such piecemeal destruction has been the fate of countless Maya stelae, Egyptian and Assyrian panels, Indian temples and other ancient architectural, scriptural, and decorative elements (e.g. Meyer 1973: 29–33; Russell 1994; Singh 1994). Focus on this destruction in southeastern Asia has made the general news recently (e.g. *Arts and Antiques* 1997; Lawrence 1998). Angkor, in Cambodia, is one of the great architectural and archaeological wonders of the world. Sculptured stone towers and massive stone temples rise from the jungle. Several hundred monuments built of laterite, brick and sandstone, ranging in size from tiny pavilions to vast temples, contain more stone tonnage than the pyramids of Egypt and Mesoamerica. Angkor sculptures are considered the artistic equivalent of any in the world.

Angkor Wat, the largest of the capitals, was built in the first half of the twelfth century. It occupies nearly 2.5 sq. km of cleared jungle, and has been described as the largest complex of religious buildings in the world (Ciochon and James 1994). French scholars have worked at Angkor since the 1800s. The outbreak of war in Cambodia in 1970, however, stopped all professional scholarly work at Angkor; archaeologists did not return until 1986. Currently, Japanese, French, Indian and American teams are working in the archaeological district, and UNESCO has conducted studies and made recommendations for the long-term preservation of the monuments at Angkor.

Unfortunately, even at this very well-known and actively investigated site, ongoing looting is reported. Unsystematic, piecemeal dismantling of the architectural elements of the monument is occurring rapidly (*Art and Antiques* 1997: 20). In the early 1990s, officials working on a World Monuments Fund project reported that thieves were operating in the monument area at Angkor and the surrounding areas. The thieves demolished walls with hand grenades and rocket launchers and took what they wanted. In one instance, they made off with twenty-two objects, including valuable stone sculptures (Ciochon and James 1994: 48–9). Apparently, the provincial police are hampered in apprehending the thieves and their fences by rules that allow the arrest of only those who transport stolen goods, not those who receive and sell them. They are also powerless to act against the Thai military, which is alleged to play an active role in the trafficking. One American archaeologist working for UNESCO says that he has seen art thieves who come to Angkor to take photographs to show their clients in Thailand, and has even overheard Thai dealers discussing which pieces they are supposed to procure for clients (Ciochon and James 1994: 49).

UNESCO has estimated that artworks are being stolen from Angkor at the rate of one per day. To put this into perspective, consider the public outcry if the gargoyles and sacred images of Europe were disappearing at the

rate of one per day. It is safe to assume that a major international effort would be made, regardless of the cost, to save those great cultural treasure. Yet a loss of equal magnitude is taking place in Cambodia, and very few people outside the region are even aware that it is going on. Unless strong measures are taken, the destruction of this priceless cultural heritage in Southeast Asia will soon be out of control (Ciochon and James 1994: 49)

The destruction of context and the loss of authenticity

Compare the rich, detailed drawings that reconstruct the royal Moche tombs excavated scientifically and recorded carefully by Walter Alva and his colleagues (Alva 1990; Kirkpatrick 1992; Alva and Donnan 1993) with simple displays or photos of intricate, but detached, individual gold objects found in leading American museums, said to be from Moche contexts and probably looted from similar burials. The excavated remains have an infinite greater potential for education and information than the disassociated art facts whose authenticity and historical contexts will forever be in doubt.

Dyson (1998) summarizes this issue as it relates to ancient coins and hoards. He notes that some regard the archaeological context of ancient coins and even hoards of coins as unimportant. They say that coins are so common and well known that nothing important remains to be gained from the careful recording and study of the contexts in which they are found. However, Dyson points out that understanding the cultural significance of coins is much more complex. First, he notes that the effectiveness of metal detectors in locating coins within archaeological site areas has led to the destruction of surrounding context when the coins are dug out, disturbing the area around them and destroying information, as well as the context within which the coins themselves rested.

He also notes that the social and economic interpretation of past individual activities and larger social systems hinges on contextual information related to individual objects or groups of objects:

For example, scholars are divided about how complex the ancient Roman economy was. Some follow the late Cambridge historian Moses Finley in arguing for a relatively simple system, while others view it as the most complex in Europe until the Industrial Revolution. Key to resolving this debate is the degree to which money was used in all areas of Roman society, including the countryside. The massive removal of coins from their [archaeological] context by scavengers with metal detectors ... destroys the evidence needed to answer this and other important historical questions

(Dyson 1988: 6)

Gill and Chippindale (1993) conducted a detailed analysis of the consequences of the loss of archaeological contextual information for Cycladic figurines. Using archaeological, art historical and art market data, they

estimated that only 10 per cent of the approximately 1,600 known figurines are from a recorded archaeological context (Gill and Chippindale 1993: 624-5). There are several direct consequences of this very small number of scientifically excavated figurines. One is that the existence of fakes among the corpus of figurines, whilst acknowledged, cannot be precisely known, and for about 90 per cent of the individual figurines archaeological information is unavailable to make an unambiguous judgement. More important is the amount of destruction of the archaeological record of the Cyclades caused by the looting of graves in search of figurines. Gill and Chippindale (1993: 625) calculated that the illegal looting to procure the figurines now lacking archaeological context resulted in the destruction of between 11,000 and 12,000 ancient graves. They point out that the looting seems to have been driven by an increase in the 'aesthetic esteem' for the figurines and subsequent commercial interest in their acquisition that had developed independent of their archaeological value as guides to learning about the past (Gill and Chippindale 1993: 601-8).

A similar appeal to aesthetics followed by commercial exploitation seems also to be driving the increased destruction of archaeological sites in western Africa. The development of interest in so-called 'primitive art', beginning in the late nineteenth century and growing throughout the twentieth century, encouraged art dealers to purchase African tribal art, including antiquities removed from ancient African archaeological sites. By the 1970s, trafficking in artefacts from Mali and other west African nations had become big business. Art dealers in Brussels, Paris and New York, including auction houses such as Sotheby's, were openly dealing in these looted objects. Prices for a piece that would have fetched \$7,000 to \$8,000 in the mid-1970s could command a price in the low hundreds of thousands by the mid-1980s (McIntosh 1993, 1996; Brent 1994; Schmidt and McIntosh 1996). Local farmers in Mali, hired by antiquities dealers to dig the terracotta statues, were given food and caffeine-laden kola nuts to keep them working, with the extra incentive that they might find a piece that would net them a sum equal to ten or twenty times their annual pay as farmers. Meanwhile, European dealers criss-crossed the Malian countryside with bundles of French francs for the purchase of newly found antiquities.

In the beginning, such clandestine digs were poorly organized. As market demand grew, more and more peasants were diverted from traditional farming, thus destabilizing the local economy. Even modest local dealers began forming their own crews, and eventually more than 1,000 peasants soon engaged in looting year-around within a 160 km radius of Mopti, a town at the confluence of the Niger and Bni Rivers (Brent 1994). In some areas of the Middle Niger, the consensus estimate is of a yearly loss of 10 per cent of the archaeological sites (McIntosh 1993, 1996).

The archaeological context of the sites being targeted for looting was poorly reported and not well-understood until scientific excavations at the site of Jenne-jeno got underway in 1977. The investigations at this site provided

the archaeological and historical context and dates for the Malian art and the communities that produced it. Regarding the importance of the archaeological interpretations from their work and the effect of the looting on interpretations of the past, McIntosh and McIntosh have noted:

The illegal . . . exposure and commerce in this art permanently prevents an archaeological appreciation of the dynamism of the African past. The illicit commerce directly perpetuated the view of the past as somehow peripheral to that of other peoples, or even backward.

(McIntosh and McIntosh 1986: 56)

Their research and the work of others has revealed that the floodplain of the Middle Niger was home to societies with rich and varied examples of indigenous food production, the growth of complex societies, urbanism, and the emergence of states and higher political institutions.

In September 1993, the United States enacted an emergency import ban on antiquities from Mali. The action, requested by Mali, implemented the terms of the UNESCO convention. Since then, direct shipments to the United States have ceased, but a more circuitous route through Europe is now being utilized, and looting continues. The pillaging of Mali's past by peasant looters serving local dealers and, ultimately, wealthy European collectors remains uncontrolled. Not since the wholesale rape of Egyptian archaeological treasures in the first half of the nineteenth century has a country been so methodically stripped of its national heritage (Brent 1994: 26).

LOOTING AND TRAFFICKING IN THE UNITED STATES

The United States, although a wealthy, developed country, also must deal with archaeological looters. For example, describing archaeological looting in the United States, Brinkley-Rogers (1981) and Nickens *et al.* (1981) list and describe incidents in Arizona, Colorado, New Mexico and Utah, places where archaeological looting has been recognized as a problem since the late 1800s. The first US law protecting archaeological sites, the Antiquities Act of 1906, resulted from recognition that unsystematic, unscientific, private collection and removal of artefacts was destroying the educational, informational and commemorative values of these sites (Lee 1970; McManamon 1996).

More recently, reports of looting in the US Southwest and elsewhere continue, though with the caveat that the casual looting associated with collecting as a hobby and the thoughtless picking up of artefacts as souvenirs may have diminished due to more public education and outreach by public agencies (General Accounting Office 1987; Subcommittee 1988; King 1999). Although the Four Corners area of the US Southwest has long been a focus of activity and concern, the looting of archaeological sites in the United States occurs throughout the nation. The National Park Service maintains a d.

base of prosecutions of looters (Knoll 1991) which now includes information on about 400 cases, most of them dating from the last two decades. These cases come from all regions of the United States and involve looting at historic as well as prehistoric sites (e.g. see McManamon *et al.* 1993: 60–5).

Statistical views of the extent of the archaeological looting problem in the United States vary, but, there is only one national source of quantitative information. Since 1985, the National Park Service has been working cooperatively with other federal land-managing agencies to collect information about looting on federal land (Keel *et al.* 1989; McManamon *et al.* 1993; Knudson *et al.* 1995; Haas 1997). In the United States, federal agencies are responsible for millions of hectares of land, mainly but not exclusively in the western half of the country. The total area managed by federal agencies is about 300 million ha, or approximately 32 per cent of the land mass of the United States (Haas 1997: 12). Agencies have reported on the extent of archaeological looting, and these statistics are summarized in Table 19.1.

Readers must be warned of three aspects of these summary data to keep in mind when interpreting them. First, it certainly represents only the tip of the iceberg of archaeological looting. The reported incidents are those that were discovered and reported by agency officials; because much of the federal land is remote and not intensively checked annually, we can expect that many looting incidents are undetected. The difficulty of detection of incidents is enhanced because looters are anxious not to be discovered and so hide the results of their activities. The second aspect to be aware of is that not all agency offices have reported comprehensively for every year. Some of the fluctuation in the data are due to this irregularity of reporting. Finally, not all the data are chronologically consistent. For example, the 'prosecutions' and 'felony convictions' categories include cases related to incidents and arrests made in past years. For these sets of categories in the table, there is not a one-to-one relationship among the cases in the different categories.

Despite these faults, the data do indicate some important points about archaeological looting in the United States. First, it clearly is occurring: every year reported shows that, at a minimum, hundreds of looting incidents are reported, with no pattern of diminishment detectable. Agency personnel and law enforcement officials are attempting to fight against these destructive activities, as shown by the steady number of arrests made and citations issued. United States Attorneys and other prosecutors are also pursuing accused looters in courtrooms. The quantitative measures of these categories of action do not display a pattern of increased workload or effectiveness, but rather of steady effort. It is also clear that relatively small percentages of those who loot are apprehended and prosecuted in court.

The pattern in the category for 'felony convictions' provokes a more hopeful response. One can detect an increase in the number of felony convictions from 1992 onward. This may very well reflect improvements to the Archaeological Resources Protection Act (ARPA) made by amendments in 1988 (McManamon 1991). These amendments made the law easier to use

Table 19.1 Looting and related information from federal lands in the United States

Year	Reported incidents	Arrests or citations	Prosecutions	Felony convictions
1985	436	72	48	9
1986	627	43	61	2
1987	657	68	62	6
1988	564	152	53	2
1989	475	69	23	3
1990	664	87	52	1
1991	306	69	35	2
1992	524	92	58	8
1993	770	127	80	13
1994	672	211	65	17
1995	674	86	48	23

Note: Information for table from Keel *et al.* 1989; McManamon *et al.* 1993; Knudson *et al.* 1995; Haas 1997.

by lowering the threshold of damage to a site necessary to prove a felony offence, and by making the 'attempt' to loot also a felony offence. Also contributing to the increased numbers of felony convictions may be a cooperative programme in training and technical assistance developed since then by the National Park Service and the Department of Justice. This programme has enabled United States Attorneys and their staffs, as well as other law enforcement officials, to attend specialized training in using ARPA and other archaeological protection laws, regulations and technical information (e.g. Carnett 1991, 1995; Hutt *et al.* 1992; Hutt 1994) to conduct successful prosecutions.

The looting summarized in Table 19.1 relates only to federal land; however, on other kinds of public land, e.g. land owned by states or local governments or by Indian tribes, and on private land, archaeological looting occurs. In some situations, the problem is worse on these other kinds of land because there is even less active protection and monitoring than is available on some federal land. Many states and some tribes do have specific laws to protect archaeological sites (Carnett 1995), and some state and local laws, such as prohibitions against trespass, can be invoked against looters. When state, tribal or local laws are violated as part of archaeological looting and interstate transport of the looted objects is involved, a violation of ARPA has also occurred, and federal authorities can become involved in investigations and prosecutions.

One recent case in the Midwest United States exemplifies such a situation. In 1988, archaeologists in Indiana became alarmed that a Hope Indian mound site located on private land owned by the General Electric Company was being looted. It was determined that the collection of looted artefacts dated to about 2,000 years ago. The site turned out to be on

the five largest Hopewell sites in North America. Nothing of its size or complexity had been found in Indiana. Local and state law enforcement agencies began an investigation; when it became clear that the interstate trafficking prohibition of ARPA was at issue, the Federal Bureau of Investigation entered the case.

The investigation revealed that a heavy equipment operator had uncovered Hopewell-style artefacts while working on a state highway project that included part of the site area. The construction worker concealed the presence of artefacts, in violation of provisions of the state contract his company had signed. He took the artefacts that he had found to his home in Illinois and contacted a well-known antiquities collector and dealer. The dealer, Art Gerber, promotes one the largest artefact shows in the United States in Owensboro, Kentucky. Gerber paid the worker \$6,000 in cash for artefacts and for information about the location of the site.

Gerber and three associates attacked the site, trespassing on General Electric Company property several times in July and August 1988. They removed artefacts until a security guard caught them and ordered them to leave. Gerber and the others sold some of the looted artefacts at the Owensboro, Kentucky, artefact show in 1988. In transporting the looted artefacts across the state line and trafficking in them, the men violated ARPA, which is a federal offence.

The US Attorney's Office for the Southern District of Indiana learned of this activity and organized a complex intergovernmental investigation and prosecution. In 1992, the men pleaded guilty to violations of ARPA for interstate trafficking in archaeological resources obtained in violation of state trespass and conversion laws. Gerber was sentenced to one year in federal prison, three years of supervised release, ordered to pay a \$5,000 fine, further ordered to pay \$4,750 in lieu of forfeiting vehicles used in committing the crimes, prohibited from engaging in artefact trading for three years except when the proceeds from sales of legally obtained artefacts would be used to pay fines, prohibited from attending artefact shows or exhibitions during that period and ordered to return the stolen artefacts. Gerber appealed his conviction and sentence.

On 22 July 1993, the United States Court of Appeals for the Seventh Circuit affirmed Gerber's conviction (*United States v. Gerber*, 999 F. 2d 1112 (7th Cir. 1993)), and held that ARPA is not limited to objects removed from federal and Indian lands. Instead, the ruling interpreted ARPA as a provision designed to support state and local laws protecting archaeological resources. As such, it resembles other United States statutes that affix federal criminal penalties to state crimes when they are committed in interstate commerce. Gerber then sought United States Supreme Court review of the Appellate Court opinion. The Supreme Court denied his petition on 18 January 1994. Gerber subsequently served his time in a federal jail and is carrying out the other aspects of his sentence. This case provided important support for the prohibition of archaeological looting, by publicizing another legal tool to fight those in the illegal commercial network who cross state and national

boundaries to conceal their activities or to flee from law enforcement authorities. It also demonstrated how national laws in the United States that apply broadly to archaeological protection on federal and tribal lands also assist archaeological protection at the state and local levels.

Loss of United States antiquities to the international illicit market

Although the United States is considered to be one of the premier art consuming nations, few citizens of the US are aware that large quantities of American antiquities are entering the international market and leaving the country for sale abroad. The continuing strength of the international market for Native American antiquities was demonstrated by the \$90,000 sale of single Alaskan prehistoric ivory figurine bought at an auction house in Paris in December 1993. The transfer of American antiquities overseas is a process that began perhaps twenty years ago, and is only more noticeable now because it has been accelerated by international economic shifts in the last ten to fifteen years (Lange 1992, 1993).

ARPA prohibits the export of American archaeological resources that have been illegally removed from federal or Indian lands, or removed from non-federal lands in violation of state or local law. However, this law is not one that the US Customs Service has aggressively enforced, and it has had little or no effect in preventing archaeological resources from leaving the country as illegal traffic.

Under the 1970 UNESCO convention, the signing parties agreed to put export laws into place that would protect their own cultural property, and to form a reciprocal network of protection for all of the signing countries. However, the US has yet to implement such legislation, and recognizes the export restrictions of other countries on only a case-by-case basis (Hingsberg 1989; Kouroupas 1995). The case studies presented throughout this chapter reveal a few glimpses of the sheer size and ubiquitous nature of the illicit network that is destroying the cultural heritage of America and the world for the sake of private profit.

CONCLUSIONS: HOW TO ELIMINATE LOOTING AND ILLEGAL TRAFFICKING

The long-term solution to eliminating the looting of archaeological sites is to make the holding, collecting, selling, donating or accepting of archaeological material that has not been scientifically excavated, removed, described, analysed and reported socially abhorrent (Elia 1994b, 1997: 97; O'Keefe 1996: 61-4; cf. King 1991: 88-91). Achieving this goal will require many, many years, but it is an important goal to recognize and at which to take aim. How can it be realized? There are educational means that must be utilized some broadly and others precisely focused. There are legal means that must be enforced and also used in complement with some of the educational effort

In order to move effectively and efficiently towards our goal, we must understand how and why archaeological looting and antiquities trafficking occur; we must use existing tools to combat the current looting and trafficking; and we must take action now to prevent looting and trafficking in the future.

Understanding the problem

During the past twenty years, archaeologists, curators, law enforcement officials and others concerned with the problem have come to understand the details about how archaeological looting is carried out, how it relates to illegal trafficking and the organization of the illegal traffic itself. In the early 1970s, the scope of this destructive problem was being recognized and described by a few. Coggins (1972) reported on what was happening to ancient Mayan cities in Guatemala, Mexico and other Middle American countries. Meyers (1973) expanded our understanding by illuminating the problem generally and also by reporting on specific instances in the Mediterranean countries, as well as Middle America. Wiseman *et al.* (1974) summarized the key archaeological, curatorial, educational and public policy issues of looting and illegal trafficking at this early stage of understanding the problem.

Since the early 1970s, when these topics achieved a new prominence in concerns about the preservation of the archaeological record, a great many more details have been reported about looting in different parts of the world. In particular, there have been investigations of the problem in the United States, even by the Congress (General Accounting Office 1987; Subcommittee 1988). Other investigations and research reports have been more focused. There are examples of studies of looters, e.g. Seward Trumann's (1987) interviews with artefact collectors and local dealers in Arkansas; Knowles' (1990) and Nickens, *et al.*'s (1981) studies of the same in the United States Southwest; and van Velzen's (1996) description of the world of Tuscan tomb robbers, or *tombaroli*.

Articles describing the destruction caused by looting and its relationship to trafficking, often in general circulation magazines, have appeared with greater frequency. In the United States, news reports describing the looting and related trafficking problem at eastern Civil War battlefields and prehistoric sites in the Midwest and southwestern United States have appeared regularly (e.g. Goodwin 1986; Robbins 1987; Fagan 1988; Harrington 1991; Landers 1991; McAllister 1991; Nickens 1991; Wilkinson 1991; Draper 1993; Neary 1993). Even that staple of American popular culture and supermarket magazine racks, *People*, has featured the topic (Howe and Free 1996), reporting favourably on the federal government's prosecution of a notorious looter, Earl Shumway, in Utah. In the professional literature, there has also been an increase in attention to the topic, by both archaeologists and law enforcement experts. Examples come from around the United States (Wylie and Nagel 1989; Desjeans and Wilson 1990; Ehrenhard 1990; Snedker and Harmon 1990; Williamson and Blackburn 1990; Downer 1992; Higgins 1992; Waldbauer 1992). Of special interest in understanding trafficking are reports

related to legal cases aimed at seeking the return of illegally removed or exported antiquities. When such cases are presented, the normally carefully and deliberately hidden commerce, exchange and transport of antiquities is illuminated (e.g. Elia 1995b; Munson *et al.* 1995; Rose and Acar 1995; Eyster 1996; Rose 1997; Slayman 1998).

The connection between looting, trafficking and collecting has been revealed in the details of reports on incidents and legal cases from countries throughout the world, developed and developing. No country's archaeological heritage is safe from this destruction. Since its publication, the generalities drawn about the antiquities trade in *The Plundered Past* (Meyer 1973) have been confirmed by other examples and the details of looting and trafficking more completely exposed. The truth of many of the quotations in the book has been affirmed repeatedly:

The sale of antiquities is a business unlike the others. In the shard trade, most of the dealer's stock has been acquired, at one point or another, through a violation of law. The matter was stated plainly by John D. Cooney, curator of ancient art at the Cleveland Museum, who in March, 1972, told a reporter that ninety-five per cent of the ancient art material in the United States had been smuggled in. 'Unless you are naive or not too bright', Mr. Cooney went on, 'you'd have to know that much ancient art is stolen.'

(Meyer 1973: 123)

With our expanded understanding of the details, how can those concerned about this problem combat it?

Combating the problem

Looting and trafficking must be attacked using the existing national and international legal framework. Nationally, laws protecting *in situ* archaeological sites must be enforced effectively. This requires that public agencies responsible for such protection have the trained personnel to accomplish the task. In many countries, unfortunately, the financial resources to ensure effective protection are not used for this purpose. Even developed nations, like the United States, do not devote to this effort sufficient funds and staff to be certain that archaeological sites are protected. In the United States, progress is being made with more effective law enforcement. A modest increase in government funding at the Bureau of Land Management and the National Park Service in the early 1990s has continued to be earmarked for archaeological resource protection (McManamon 1991: 266-7). The Department of Justice, through various national programmes and United States Attorney offices in many states, has improved substantially the education of its staff in enforcing archaeological protection laws. Many more prosecutions of looters and traffickers are being made by these federal offices, as indicated by Table 19.1 in an earlier section of this chapter. Domestically, other national governments, as well as governments at regional, state and local levels, must also

make efforts to protect archaeological sites from looting through strong laws effectively enforced.

This need also points out another aspect of combating the problem: archaeologists cannot expect to be effective by working alone. Experts in other fields, such as law enforcement, must be included in efforts. Political and popular support must be cultivated, obtained and held. Unfortunately, there are some problems: poverty, lack of education, and absence of gainful employment opportunities, for example, often make archaeological looting an attractive source of income. These large-scale economic and social conditions are not susceptible to solution by archaeologists alone. Yet it also is not enough for archaeologists to throw up their hands in frustration and feel that they can ignore the matter because they cannot directly improve the situation. Pendergast (1994) has urged action by archaeologists working in impoverished parts of the world to reduce the attractiveness of looting and low-end trafficking. Writing from his perspective as a Mesoamerican archaeologist, Pendergast advocates the involvement of local Maya in archaeological research projects in the region. He suggests

the creation of what might be termed an information loop, in which Maya and archaeologist work together to uncover the past while the archaeologist learns from the excavators, where possible, about the materials extracted from the ground ... [and the excavators] come to understand more about why the work is done, what steps follow excavation, and how much can be learned through analysis of the material recovered. As the fieldwork ends and excavators return to their communities, the loop ultimately extends to a wide range of Mayas without direct involvement in archaeological work ... The failure to establish such a loop is ... [Pendergast asserts], one of the causes of the participation of Maya in the sacking of their ancestral communities.

(Pendergast 1994: 2)

In the Sipan area of the north coast of Peru, archaeologist Luis Alva also found that by incorporating local residents in archaeological investigations of unlooted sites, he was able to obtain their support in reducing further looting by other locals (Kirkpatrick 1992: 137–53; Dempsey 1995).

Internationally, the concern about looting and trafficking has existed for centuries. In recent decades, concerns have increased due to an increase in the amount of activity and the rapid rate of archaeological destruction that this indicates (e.g. Meyer 1973; Wiseman *et al.* 1974: 223; Gill and Chippindale 1993; O'Keefe 1997: 14–16; Lawrence 1998). The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property made an important statement deploring the looting of antiquities and the subsequent trafficking. The lofty principles encompassed by the convention have been spread and been adopted by professional organizations concerned with this problem. However,

most 'art-importing' nations have not implemented the convention (Prott 1995: 59–61). A new international convention has been prepared and accepted by a number of nations. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, if adopted, would increase the diligence with which dealers and collectors would have to check on the provenance of antiquities and other kinds of cultural objects before purchase in order to protect their investment (Prott 1995: 61–5, 1997). The UNIDROIT convention, like the UNESCO convention, addresses the issue of archaeological looting, deplors it, and makes it clear that such activity is illegal and that antiquities obtained in this fashion are considered 'stolen' within the context of the convention. We shall have to wait and see whether art market countries accept the new convention. In the United States, dealers, collectors and some museums and museum organizations are opposed at the present time (Merryman 1996; Vincent 1997).

Many archaeologists, archaeological organizations and others concerned about illegal trafficking have determined to combat the problem by refusing any association with individuals, objects and activities involved in it (Boylan 1995; Coggins 1995; Elia 1995a; Getty Museum 1995; SAA 1996; Lynott 1997). Individual and collective actions such as these can also be used to oppose trafficking, although there is not complete agreement about the effectiveness or appropriateness of such actions. In the past, considerable cooperation between high-end collectors and archaeologists was much more common. Coe (1993) describes a series of Mesoamerican examples from the early and middle part of this century. Differences of opinion exist on this topic; some prominent archaeological scholars, in particular those who focus on texts, form and visual images, argue that this important information can be obtained, even from looted objects. David Stuart, an expert in Mayan glyphs, for example, has noted, 'I work with looted objects routinely ... [such material can be] scientifically useful. If I'm going to look for a glyph say the glyph for 'cave', I'm going to look for as many examples as I can get' (quoted in Dorfman 1998: 32). Yet this perspective and position is not the common one among archaeologists for whom contextual information is almost always essential for accurate and detailed interpretation (e.g. Wiseman *et al.* 1974; Renfrew 1993; Coggins 1995). Even in other disciplines, for example art history, for which the objects of study hold substantial intrinsic information, knowledge of the context of discovery is often essential to establish authenticity (Gill and Chippindale 1993: 629–41).

A final kind of action that can be taken to combat looting and trafficking is to publicize its illegal and destructive nature in as many ways as possible. Highlighting legal cases against those who break laws and are prosecuted and convicted can have substantial positive effects in deterring similar behaviour in others. *Archaeology*, a magazine published in the United States with a circulation of 200,000, *Common Ground*, a publication of the US National Park Service, and the recently initiated *Culture Without Context*, published by the McDonald Institute for Archaeological Research, regularly provide reports

and summaries of particular cases, prosecutions and convictions of those charged with destroying archaeological sites. Although the circulation of only the first of these publications approaches a 'mass market' audience, the latter two can provide the basis for more mainstream news stories if the information is picked up by reporters for newspapers, journals or other media outlets. Among the legal community, the relatively new journal, *International Journal of Cultural Property*, now published by Oxford University Press, is serving a similar purpose, as well as publishing scholarly legal articles on related topics.

Another means of publicizing this issue and making public an archaeological preservation perspective is for organizations to enter actively into legal frays in appropriate cases. The Steinhardt case (Slayman 1998) currently being reviewed by the United States court in New York, and described in an earlier section of this chapter, presents an example of such action. In that case, the Archaeological Institute of America, the Society for American Archaeology, the Society for Historical Archaeology, and the United States Chapter of the International Committee on Sites and Monuments have entered an *amicus* brief in support of the government's case against Mr Steinhardt. This action is a clear statement opposing the collecting of illegally obtained antiquities, trafficking, and the looting that destroyed the original context of the object in question. Being involved in the case enables the organizations involved to state publicly in court, and to any news outlets that pick up and broadcast the story more widely, the view that archaeological sites merit careful, scientific, public treatment, not simple and destructive plunder.

The idea of archaeologists and others opposed to looting and trafficking cooperating with dealers and collectors to create some kind of deal in which legitimate, provenanced antiquities would be made available to the market has been suggested by some (King 1982, 1991; Merryman 1995; Weihe 1995). O'Keefe (1997) reviews the arguments on this idea without reaching a recommendation about whether or not it should be implemented. From an archaeological perspective, Coggins (1995: 76) sees little hope for a 'licit trade' in antiquities. Too many differences in perspective, goals and means stand between the scholarly community and the dealers and collectors with a passion for investing in or personally owning antiquities.

Preventing the problem

Preventing the looting of archaeological sites will require a broad change in attitude about the value of these cultural resources. All the kinds of individuals currently involved in the cycle of looting, trafficking and collection of antiquities must have a change of heart and mind on this subject. From the poor local people residing near the sites who dig into sites searching for loot to sell locally, to the network of dealers who sell the objects up the chain as far as their commercial value will take them, to the high-end collector who prizes the antiquity, there must be a change in perception. The new perception must reflect the goals of modern archaeology which focus on illuminating our understanding of the past and present through careful

investigation and analysis and clear, understandable interpretations. The acquisition of objects is normally part of this process, and a small percentage of the remains recovered are indeed 'wonderful things'. However, such extraordinary objects should be available for all to benefit from the wonder they might inspire.

Realistically, we cannot expect that this change in attitude will occur naturally or simply by pointing it out. The process of creating such a perspective must begin within the formal education that most humans go through as they are raised. The perspective needs to become infused into regular school curricula. It should also be used by individual archaeologists, archaeological organizations, and public agencies of all kinds that support archaeological protection in public presentations and interpretation. O'Keefe (1997: 101) summarizes the perspective and its relative merit in the light of other claims on antiquities:

Although the trade in antiquities is very old, this does not mean that it and those who benefit from it have overriding interests. States need to make clear that the primary value of an antiquity lies in the information it can impart on the history of humanity If the antiquity has an aesthetic, as well as an archaeological value, that is to be welcomed but it is of secondary importance.

In the end, perhaps Karl Meyer, whose book can be said to have substantiated the modern concern about the destruction of archaeological sites from looting and trafficking, should have the last word on this topic. In the final sections of the concluding chapter of *The Plundered Past*, Meyer (1973: 170–211) reviews the 'claims on the past' by various sorts of individuals, and ranks them in ascending order of importance and legitimacy. He identifies, first, nationalists who have used archaeological sites and artefacts to support their political causes. He also recognizes collectors who appreciate artefacts and antiquities for their artistic merit (see also comments about connoisseurship in Gill and Chippindale 1993). He notes curators who, like collectors, are also individuals, but who, given their training and expertise, can appreciate a broader spectrum of values of artefacts. In the end, however, he concludes that archaeological resources are most valuable as remains and information for all humanity:

The nationalist, the collector, and the curator all have made a claim upon the past, and each in his own way has made a contribution. But each looks upon the past as a piece of property. Another approach is possible to see our collective cultural remains as a resource whose title is vested in all humanity. It is a non-renewable resource; once exhausted, it cannot be replaced. And in our lifetime we may see it dwindle meaningless away, not so much because anyone willed it, but because not enough people know that the problem exists In the world's cost accounting,

the past is a small item; it makes a negligible contribution to the Gross National Product; its preservation is scarcely a central concern of the modern state. But one can manifestly contend that if the remains of the past should disappear, our lives will be poorer in ways that a statistician can never measure, we will live in a drabber world, and will have squandered a resource that enlivens, offers a key to our nature, and not least, acts as psychic ballast as we venture into a scary future.

(Meyer 1973: 203-4, 209)

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Lacking the necessary resources, institutions and agencies throughout the country struggle with the problem of properly curating artifacts.

BY NANCY TRAYER

A - This box of artifacts suffered severe water and compression damage. Mold is also apparent.

B - Water damage can be devastating to collections. In this case, leaks in the ceiling caused the deterioration and breakdown of ceiling tiles, which dropped into this open box of artifacts. When this material dried, it adhered to the artifacts and resulted in the growth of mold.

C - Due to being stored in substandard conditions, these artifact documents became a rats' nest.

D - This box and its contents were crushed by having too much weight stacked on top of them.

E - This container and its artifacts have been damaged by insects, rodents, and, as the molted skin of a snake indicates, even a reptile.

F - Storing archaeological documents in inappropriate conditions can result in reports stained by rusted paper clips and warped and brittle paper.

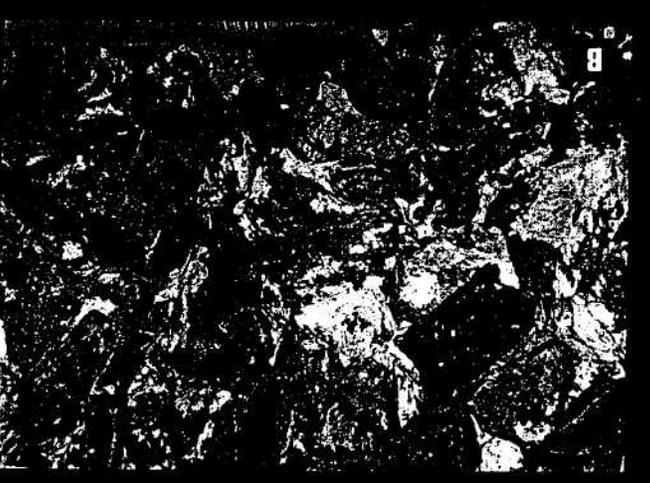
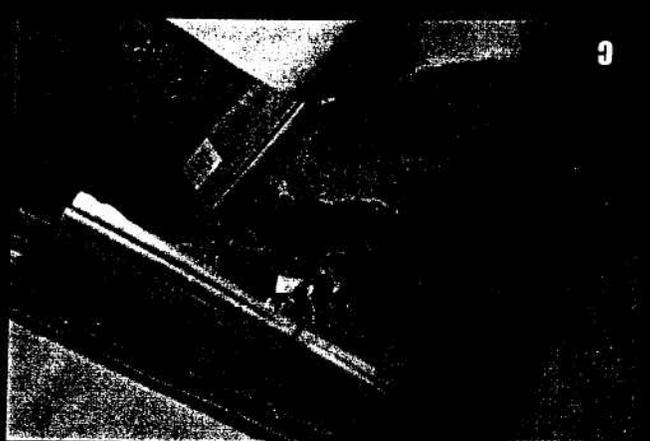
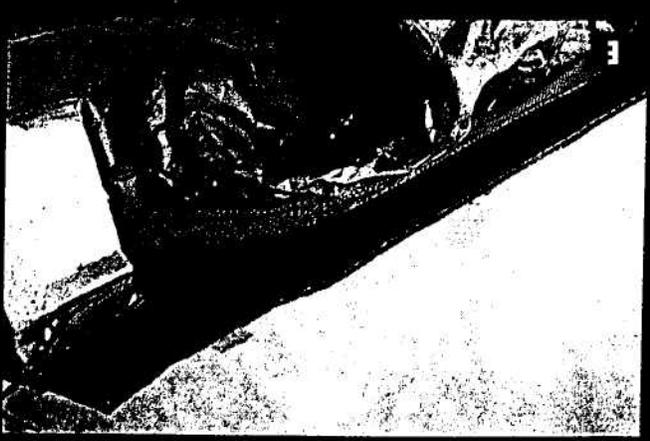
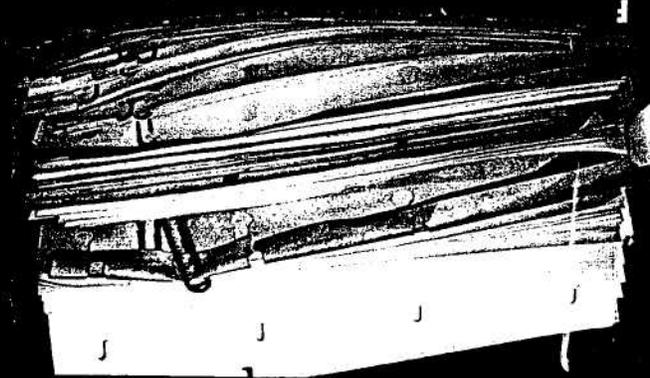
G - Archaeological collections are frequently stored wherever space can be found, such as in this garage.

H - These stone artifacts are haphazardly stored.

In the early 1980s, Bob Sonderman, a staff archaeologist with the National Park Service in Washington, D.C., examined the facilities of three area universities that stored artifacts recovered from federal lands. "In 99.9 percent of the cases, I felt the storage conditions were substandard," he said. Sonderman recalled the most egregious case: "The collections were in a storage room where overhead pipes leaked onto the artifacts that were in paper bags. The provenience information written on the bags in pencil was unreadable. All the metal artifacts were rusted. All the bone had turned to mush."

Sonderman's recollection is one of many examples of the curation problem that has reached crisis proportions. Universities, historical societies, states, and some federal agencies have huge repositories filled with artifacts that are being damaged because there is not enough money to properly house them, curate them, and make them readily accessible to researchers and the public. "What good is a collection when it's little more than a pile of dust?" Sonderman said.

Patience Patterson, an archaeologist in the Fort Worth District for the U.S. Army Corps of Engineers in Texas, said some of the corps's collections were stored "in lunch bags, pizza boxes, and God knows what. Some artifacts were sitting in moth-eaten paper sacks." She noted that, while these conditions, generally speaking, have been improved, some artifacts are still stored in very poor conditions.



Assessing the magnitude of the problem, Terry Childs, an archaeologist for the National Park Service's Archeology and Ethnography Program and chairperson of the Society for American Archaeology's (SAA) Committee on Curation, said, "We're talking millions and millions and millions of objects." In many cases, the documentation for a collection isn't stored with the collection. There are other cases in which institutions don't know where their collections are stored. The problem may be most dire on the state and regional level; a 1998 Army Corps of Engineers study found that only 40 percent of the nation's state historical societies catalogued their artifacts.

THE CAUSES

The crisis has been approximately a century in the making. Prior to the 20th century, most archaeologists were affiliated with museums that housed the artifacts the archaeologists excavated. Then archaeology became professionalized and colleges and universities, many of which had no museums, began to hire archaeologists to teach the science. When these archaeologists, who had little training in collections management, excavated, they often had nowhere to store the resulting artifacts other than their offices or labs.

Some experts have been lobbying for better collections management for about 25 years. And while they concede that conditions have improved across the nation during this time, there are many collections today in dire need of attention from trained staff.

Getting archaeologists to focus on curation has historically been a challenge. Many archaeologists are eager to excavate and do the laboratory work required to complete their research; but they are far less eager to carefully store artifacts in an environmentally controlled repository, where they are safe, secure, and accessible in perpetuity. The Internet has made the job even bigger, as most experts agree that information about every collection should be on-line. Indeed, some curators believe that for every hour spent in the field, an archaeologist should spend four to five hours in the lab.

"Curation is supposedly a back-room, boring thing. People aren't drawn to it. It's not Indiana Jones," said Sonny Trimble, director of archeological curation and collections management for the Army Corps of Engineers. "But to my way of thinking, you can teach anyone to pull something out of the ground. Where the rubber meets the road comes in analysis and in understanding the artifacts, records, and their special needs for long-term care and conservation."

"You get your Ph.D. for digging," Childs stated. Among many archaeologists, curation is considered "women's work." "You put your weak, sun-sensitive woman in the lab to do the clean-up job. The macho man works out in the field."

She also pointed to the widespread practice of storing objects without their field notes. "The problem is especially acute in universities, where you find a professor who sees her work as her own personal property," Childs said. "She thinks, 'Why should I give it over to a museum, when it belongs to me?' Or, she says, 'I'll give it over when I'm done with it when I'm dead.'"

The problem has been compounded by the plethora of federal and state laws regulating excavation work. The Antiquities Act of 1906, which was the first federal law to regulate excavations in this country, said all collections

"shall be made for permanent preservation in public museums" and shall be accessible to the public. After World War II, the American economy boomed and the nation embarked on hundreds of large-scale construction projects. The National Historic Preservation Act of 1966 mandated that when federal money was used for construction projects on federal land, such as building a bridge or a road, attempts should be made to preserve, or at least minimize, the damage to archaeological resources. Consequently, countless excavations preceded countless construction projects, and archae-

ologists amassed staggering numbers of artifacts. They knew for many years they should store these objects, but there were no guidelines to follow.

By the 1970s, the problem became alarming. In 1974, the U.S. Congress approved the Archeological and Historic Preservation Act—the first piece of legislation to call on the U.S. Secretary of the Interior to issue regulations for curation. In 1984, Congress approved regulation 43 CFR Part 7, which provided for the preservation of collections and data. Congress followed up in 1990 with regulation 36 CFR Part 79, which spelled out the standards, procedures, and guidelines for federal curation. The regulation, according to some experts, had several flaws: There was no deadline for compliance, it didn't include a grant process to provide money for curating artifacts, and there was no means of enforcement.

The question of deaccessioning was proposed, but not incorporated in the regulation: In other words, when do institutions have permission to transfer artifacts to another institution? Under current federal law, every artifact must be preserved and accessible. Archaeologists have been taught that every artifact should be collected, as they're all

"Some will say we can't throw out anything because the artifacts are a non-renewable resource. You don't know if a future technology will yield new insight into a piece. But at the same time, we're simply running out of space."

Terry Childs
National Park Service

Doing It Right

In Maryland, thousands of archaeological artifacts were stored in acidic boxes, lying around in attics, closets, basements, even the local U-Store-It. Some objects were scattered all over the state in the homes of the archaeologists who had excavated them.

Realizing that so many priceless objects were buried in the bottom of cardboard boxes, J. Rodney Little, the state historic preservation officer, proposed to the Maryland legislature that it fund one facility that could hold all of the state's archaeological collections.

The state set aside \$8.5 million to build the center at the Jefferson Patterson Park and Museum in St. Leonard, Maryland. "That was relatively inexpensive," said Julia King, director of the Maryland Archaeology Conservation Laboratory, which is located there. "We're not talking break the bank here. After all, down the road there's a high school that cost \$20 million."

The laboratory, which was completed in 1998, is custom designed and climate controlled. The state rented tractor-trailers and moved every archaeological object—5,500 boxes from 2,000 sites—into the building. "We fumigated them, repackaged them, and took everything out of acidic boxes," said King.

All of the objects are packed in archival-quality material. That means, among other things, that if padding foam is required, it be made of virgin, not recycled, polyethylene. Recycled polyethylene often contains chemicals that can affect the artifacts. The collections are stored with their documentation, and the documentation, when necessary, has been copied on acid-free paper which won't degrade.

"We use compactible shelving," said Howard Wellman, the lab's lead conservator. "It basically doubles the capacity of the storage space but it doesn't reduce accessibility."

This year, the museum received a grant from the National Endowment for the Humanities to fund a two-year project that will enable curators to sort through one-fourth of the collection and re-catalog everything. By 2003, it will be accessible on-line. "This way, if you're an archaeologist anywhere in the world, you can access the data," King said. "Having this facility has allowed us to do something we'd earlier only dreamed of: preserve our cultural heritage." —Nancy Traver



Collections manager Ron Orr and volunteer Lisa Seric store artifacts from the Banneker site using archival-grade boxes, bags, and labels.



Conservators use an overhead crane to place a 700-pound waterlogged oak shipyard brace from the Steward Colonial Shipyard site into a treatment tank.

important in understanding past cultural activity.

Experts agree that the delays and controversy over deaccessioning have contributed to the mountain of artifacts in need of curation. "Some will say we can't throw out anything because the artifacts are a non-renewable resource," said Childs. "You don't know if a future technology will yield new insight into a piece. But at the same time, we're simply running out of space."

Sonderman agreed. "How many chicken bones do

you need? How much debitage and fire-cracked rock are you going to keep?" he asked. "Rusty nails, broken window glass—there are huge redundancies in each collection. In a climate where space is equated with money, archaeologists must face the hard reality that we simply can't keep everything. The professional community must take the lead on this issue or we face the possibility of having the decision made for us."

But Darrell Creel, director of the Texas Archeological Research Laboratory in Austin, said, "Let's not be too presumptuous in deciding that something can be thrown out. With rapid changes in technology and new techniques, we can get new information out of artifacts we thought were previously tapped."

Colorado's Crisis

Most of Colorado's museums are no longer accepting collections because they have no space. "We just don't have anyplace to put things," said Mark Mitchell, president of the Colorado Council of Professional Archaeologists.

Only four major museums are still accepting collections, and they're restricting what they'll accept. For example, the University of Denver Museum of Anthropology will take collections found east of the continental divide.

The situation is so severe, Mitchell said, it could halt all archaeological work on public lands in Colorado within two years. Any federal project, such as road construction, that takes place on federal or state land, must be preceded by an archaeological investigation. The investigation can't proceed without a curation agreement with a museum. But what will happen if no museum will enter into an agreement? "Well, that's the \$64,000 question," he said.

Colorado is a rapidly developing state, and growth, as Mitchell noted, generates lots of archaeology. Every object recovered from the state's archaeological sites has been curated and stored in accordance with federal standards.

A committee of the council proposed the construction of a regional curation facility. The group started a dialogue with Colorado's federal congressional delegation in July in hopes of acquiring state and federal funds to address the crisis. But since the events of September 11, money for domestic programs has dwindled, and Mitchell thinks the possibility of obtaining federal financing to build a facility this year is unlikely.

The state's curation crisis has repercussions beyond the field of archaeology. "There's the potential to impede energy development projects and other kinds of public works," he observed.

As bad as Colorado's curation problem is, Mitchell believes it's no worse than that of other states. —Nancy Traver

THE COST

The considerable cost of storing artifacts poses another problem. Thirty-seven states have laws calling for proper collections management, but many of these states don't have the money to support their own regulations. "There's definitely a decrease in the amount of material being collected," Childs stated. Construction companies, who absorb the costs of excavation and curation associated with their projects, may discourage the collection of artifacts. That can skew the archaeological record. It also puts the archaeologists who were subcontracted to do the work in a very difficult situation. "They need to satisfy their client," Sonderman said, "and maintain their ethics."

Experts estimate funding for curation should constitute 25 to 30 percent of the total budget for every excavation project. "That line item must be in the budget," said Sonderman. "If you spend all your money digging up objects and there's no money to take care of what you find, why bother in the first place?"

The Corps of Engineers possesses a huge number of artifacts. Trimble estimated it would cost approximately \$40 million for all the artifacts and records to be properly housed, catalogued, and put on-line. The corps seeks an annual appropriation of \$3 million to \$4 million from Congress, and usually receives about \$1.5 million. Currently, all of this money is used to identify, access, and, as appropriate, return the skeletal remains and other items from grave sites to Native American tribes, as decreed under the Native American Graves Protection and Repatriation Act, passed by Congress in 1990. "The money we receive for curation of collections doesn't begin to address the curation issue at hand," Trimble lamented. In his view, "conditions are getting worse and worse, not better."

Patterson, of the Corps of Engineers' Fort Worth district, said, "Down here in the trenches, I'll tell you, we need all the money we can get to bring things up to standards."

Unfortunately, maintaining archaeological collections "is not sexy, like some cool new exhibit" that will attract visitors who pay admission fees, Childs noted. Consequently, institutions that previously housed collections for free are now charging fees; those that were charging fees



(Left) Archaeologist Robert Sonderman and intern Teresa Moyer conduct an artifact inventory at the National Park Service's National Capital Region Museum Resource Center in Landover, Maryland. These artifacts are stored in non-acidic, museum-quality boxes. (Above) In Sonderman's left hand are two points packed in ethafoam, a material that can be cut to fit the exact shape of the artifact.

are raising them. A 1998 survey undertaken by the National Park Service found that fees vary significantly, ranging from \$60 per cubic foot in Oklahoma up to \$1,080 in Nevada. (See table on page 34.) The survey's authors postulated that the Western states, charge higher fees because of the high proportion of public lands—and more artifacts—in that region and factor in the real cost of curation rather than the rate of competitors.

One of the toughest challenges for any museum director is to find the money for the construction of new repositories. Many facilities have collections that have outgrown their storage space; their only option is to add on. For example, Creel is pursuing money to construct a new building. He has asked both state and federal agencies to pool their resources. The proposed building will cost up to \$20 million. Creel said he feels "lucky to have enjoyed the support we've had so far." His existing facility continues to undergo renovations, at a cost of more than \$1 million, which include new rooms with smoke detectors, fire alarms, fire suppression systems, security systems, environmental controls, high density cabinetry and shelving units, computer systems, and Web sites to make archeologists and the general public more aware of what it curates. Additional renovations and upgrades are planned.

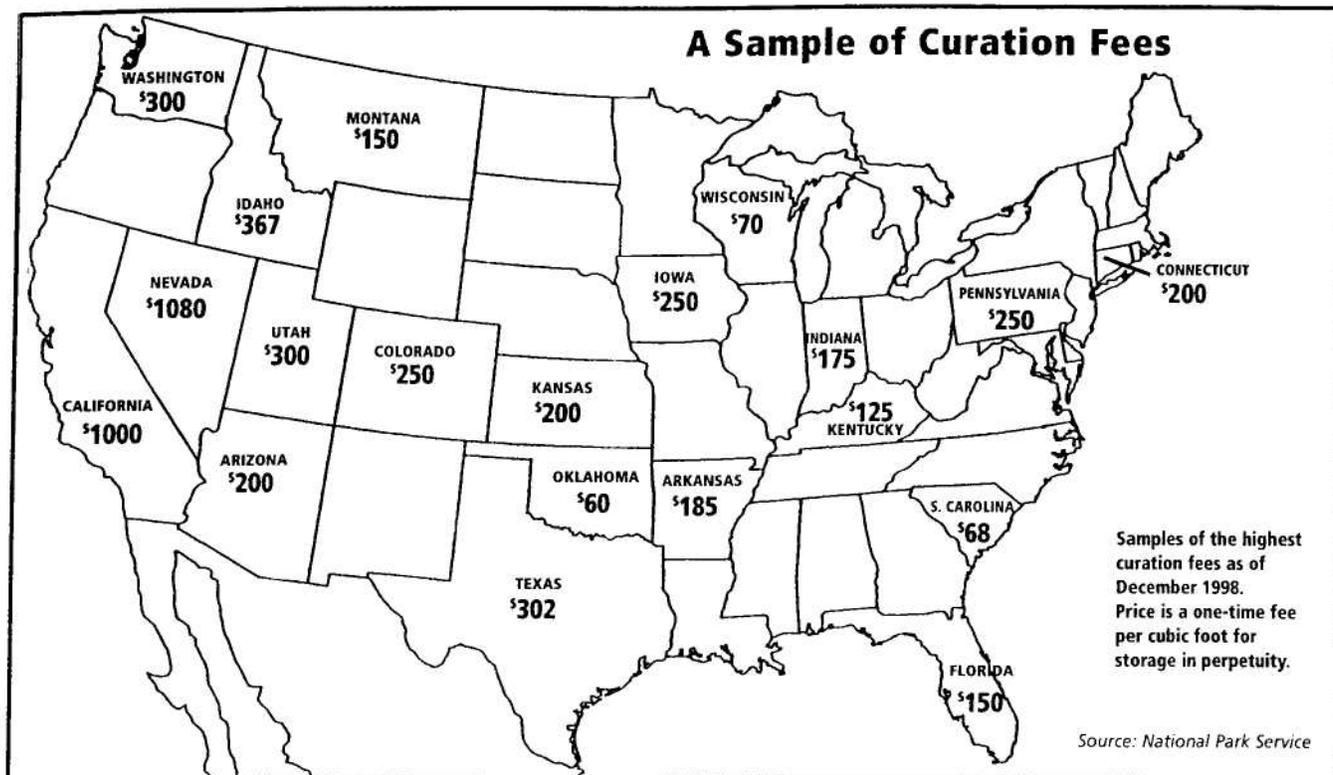
THE SOLUTIONS

A significant sum of money is needed to acquire more space and staff. Construction of new storage facilities will require funding from various sources, including

Federal Storage Standards

Federally owned and administered archaeological collections must meet the following requirements:

- Accession, label, catalog, store, maintain, inventory, and conserve a collection on a long-term basis in accordance with professional museum and archival standards.
- Maintain complete and accurate records of the collections.
- Have adequate equipment and space for storage, study, and conservation.
- Ensure the security of the collections through safety codes, fire systems, intrusion systems, and an emergency management plan.
- Require staff to be qualified professionals.
- Handle, store, clean, conserve, and exhibit collections in a way that is appropriate to the nature of the materials, protects the objects, and preserves data.
- Store forms and records in a protected manner.
- Regularly inspect collections.
- Conduct inventories.
- Provide access to collections.



state legislatures and the U.S. Congress. In order to obtain government funding, the public must be informed of this crisis. The public is now unaware of the problem, Patterson said. "You try to talk to them and they'll look at you and say, 'archi-what?' We haven't done a very good job, so far, of bringing this issue to the fore."

Congress must be convinced that money earmarked for curation won't serve the interests of only a small number of scholars. "I really think these collections can be used by a wide range of people and not just researchers," Trimble stated.

But money alone won't solve a problem of this dimension and complexity. More archaeologists need to be trained in collections management. Very few universities offer classes in curation through their anthropology departments; even fewer offer degrees or on-site training.

"Too often, archaeology professors still teach their students that a real archaeologist goes out and digs stuff up," said Trimble. "Someone who works on a curated collection is often considered a lesser professional."

He and his colleagues are working to change that mentality. Trimble assisted his wife, Nicola Longford, a museum professional, when she taught a course on archaeological curation and collections management at Washington University in St. Louis last spring. It was the first time the course was offered there. "To my surprise, the classroom was filled to the ceiling," he said. "The students know that in today's market they have to be well versed in collections management, even if their professors, who received their degrees in the '60s, '70s, and '80s, are not."

Trimble joked that, if he were "the king of archaeology in North America," he would require every student earning a master's degree to take at several courses in cu-

ration. Most archaeologists now learn to curate on the job, if at all.

Childs believes that, before going into the field, archaeologists need to budget for curation and think about what's going to become of the excavated artifacts once they're done with them. "We were never taught these things," she said.

The SAA's Committee on Curation, which was established in 1999, is preparing more detailed standards to guide archaeologists. The committee started by drafting ethical principles, but the final wording of the guidelines "could take several years," according to Childs.

She believes that deaccessioning may contribute to remedying the problem. "The key is we've got to do it in a very careful manner," she cautioned, adding that a deaccessioning plan must be clearly thought out. "We'd be advocating to not destroy the collections, but to transfer them to other facilities" if possible. Childs wants to present the idea to the SAA's members, and she speculated that deaccessioning guidelines could be promulgated in federal regulations in five years.

Childs is also intent on getting institutions to put information about their collections on the Web. The National Park Service is developing a Web catalogue that has information about the collections found at some of its parks. The catalogue should be on-line by the end of 2001, and more parks will be added in the future.

"We're still in a mess," she said, "but I think we all agree there have been significant steps forward."

Woeful as the situation is, it's far from hopeless.

NANCY TRAVER is a freelance writer whose work has appeared in *Time*, *People*, *the Chicago Tribune*, and other publications.

Bilateral Operations: the Keys to Mutual Protection of Cultural Heritage

by
Richard C. Waldbauer

presented at the
First Binational Conference on the Archaeology of Northeastern Mexico and Southeastern United States
Reynosa, Tamaulipas, Mexico; November 7-10, 2000

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ABSTRACT

Bilateral Operations: the Keys to Mutual Protection of Cultural Heritage

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presented at the First Binational Conference on the Archaeology of Northeastern Mexico and Southeastern United States, held at Reynosa, Tamaulipas, Mexico; November 7-10, 2000

In October, 1997, Mexico and the United States held a conference that initiated a new approach to addressing mutual concerns about international trafficking in cultural property. They recognized that the two nations have significant treaties, conventions, and national laws to protect cultural heritage, but that the comprehensive strategies necessary to use these formidable legal tools to accomplish agreed-upon program objectives were missing. Further, a new memorandum of understanding between Mexico's National Institute for Anthropology and History and the United States National Park Service expressly endorsed efforts to improve protection and conservation of cultural heritage. The new approach emphasized identification and development bilateral operations. The conference was held in San Antonio, TX, to explore ways in which the appropriate governmental agencies and cultural heritage professionals should interact. This presentation summarizes the conference results, describes important activities which have occurred since then, and outlines agencies' interactions. It concludes with lessons-learned about the critical importance of effective interdisciplinary integration of *in situ* conservation, law enforcement, and public awareness for effective international heritage resources management.

INTRODUCTION

In October, 1997, Mexico and the United States held a conference that initiated a new approach to addressing mutual concerns about international trafficking in cultural property. They recognized that the two nations have significant treaties, conventions, and national laws to protect cultural heritage, but that the comprehensive strategies necessary to use these formidable legal tools to accomplish agreed-upon program objectives were missing. Further, a new memorandum of understanding between Mexico's National Institute for Anthropology (INAH) and History and the United States National Park Service (NPS) expressly endorsed efforts to improve protection and conservation of cultural heritage. The new approach emphasized identification and development bilateral operations.

This presentation is organized into three parts, each of which are divided into sections that describe critical issues for bilateral operations. The first part summarizes the Bilateral Conference results and provides the background for both the conference planning as well as the Memorandum of Understanding. The second part describes and analyzes important activities and accomplishments that have taken place since then in sections on training, agencies' interactions, and communications. The final part provides a conclusion about how cooperative activities accomplished for bilateral purposes meet the spirit of Federal law and serve the public interest.

CONFERENCE AND MEMORANDUM OF UNDERSTANDING

Bilateral Conference on Cultural Property Protection: objectives, results

The conference was held in San Antonio, TX, and hosted by the Consulate of Mexico through the support of the Consul General, Mr. Carlos M. Sada Solana. Invited Mexican and United States government officials and professional archeologists met to explore ways in which the appropriate governmental agencies and cultural heritage professionals should interact. To help address issues in the most practical manner, the specific focus of the conference was the borderlands of the Rio Grande River valley. Critical to the agenda were the field sessions at San Antonio Missions National Historical Park and the Institute for Texan Cultures. Then, conference participants learned directly about management of heritage resources, including the real effects of looting and vandalism, the deep meaning of cultural places to communities, and the intensive efforts for professionally-sound curation and conservation.

While the United States and Mexico have met for many years for the purposes of heritage preservation, this was the first conference to bring together the interdisciplinary practitioners of the governmental agencies of both nations who must achieve the objectives of protection. Interactions among the participants was intense. About mid-way through the agenda, the participants came to understand meaning of our different legal cultures and to grapple with ideas on how to find common ground. The final session consisted of development of programmatic recommendations through the deliberations of small working groups.

The conference resulted in a strategy which should guide development of action plans as well as description of the elements needed for effective action plans (Waldbauer and Fernandez Lozano 1998). Among the several elements addressed were program and policy development, technical information exchange, training, and periodic assessments of progress. For the first time, both nations had a comprehensive understanding of issues that are fundamental to wider success in cultural property protection.

INAH/NPS Memorandum of Understanding

The Memorandum of Understanding between the United States National Park Service and Mexico's Council for Culture and the Arts, through the National Institute of Anthropology and History, was signed on June 10, 1998. Its purpose is to facilitate cooperation for the identification, conservation, management, and research in cultural heritage sites. This is to be accomplished by creation of a framework to plan, undertake, and periodically re-evaluate mutually agreeable activities. It applies to, among other things, efforts to protect cultural property. It expressly recognizes the legal responsibilities of both nations, especially with regard to the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.

In a particularly important paragraph, the Memorandum encourages both organizations to facilitate interagency, interdisciplinary cooperation by authorizing them to reach beyond their respective scopes for wider participation in mutual activities. This provides critical support for expanding the meaningful impacts of expected beneficial results. For example, if archeologists collaborate to document looted sites and describe stolen artifacts, both nations expect that law enforcement officials will be incorporated into the project to initiate investigations of potential illicit international trafficking. Further, these efforts should be complemented by interaction with attorneys, who must prosecute any alleged violations. Finally, if the project is to be truly successful, there should be public awareness components, in which the public understands not only what violators did wrong but also why it is critical to enforce cultural heritage protection laws.

The Interagency Archeological Protection Working Group

Shortly after the United States Archaeological Resources Protection Act (ARPA) was amended in 1988 to provide better enforcement capabilities for Federal agencies, an informal group was assembled in Washington, D.C., to learn about the statutory changes as well as discuss potential interagency responses. The group was hosted by the Office of the Departmental Consulting Archeologist, who is delegated directly the Secretary of the Interior's responsibilities for leadership and guidance in interagency, intergovernmental archeological protection. Federal land-managing agency chief law enforcement officers, departmental solicitors, and Department of Justice officials were invited. At the end of the meeting, it was decided that the group should be maintained through the Office of the Departmental Consulting Archeologist, meet

periodically, decide upon mutually beneficial activities, and then cooperate to accomplish them.

This informal interaction became known as the Interagency Archeological Protection Working Group. From the beginning, they have worked to help define policies and programs for archeological protection nationwide. They decided early that a priority was to develop training and technical information. Their efforts began with goals to provide assistance for field investigators. Soon, attorneys were included.

By 1992, all three disciplines necessary for effective archeological heritage protection (archeologists, law enforcement, and attorneys) regularly were being brought together in training sessions, were being exposed to one another's basic technical information, and were participating in one another's program development. The principal results were in more successful casework. It also became clear that many archeological resources violators literally knew no boundaries. They were just as likely to be involved also in natural resources depredations and illegal international networks.

The negotiations between NPS and the INAH for a Memorandum of Understanding were brought to the attention of the Interagency Archeological Protection Working Group in 1995. They immediately recognized the significance of the projected agreement to find more effective ways to combat trafficking in cultural property. They agreed to form a subcommittee to work on technical materials and a conference, which would be held partly to foster practical interaction between Mexico and the United States in anticipation of the finalized agreement. Preliminary discussions with the INAH and other appropriate Mexican agencies were facilitated enthusiastically by the Embassy of Mexico. Formal planning for the Bilateral Conference on Cultural Property Protection was begun at a meeting of the Interagency Archeological Protection Working Group held at the Embassy of Mexico. The Ambassador of Mexico, Mr. Jesus Silva-Herzog, provided full support from the embassy for this work and offered to facilitate further necessary assistance that might be available through Mexican consulates.

During the meeting, it was recognized that both nations have significant bodies of laws, treaties, conventions, and other legal documents that authorize their various federal agencies to act cooperatively for mutually-beneficial purposes. However, it also was recognized that the extent to which the appropriate agencies conducted bilateral operations for cultural property protection was limited. This did not mean that there has not been important, precedent-setting casework. The consular responses to an inquiry by the Embassy of Mexico demonstrated that the United States (especially through the Customs Service) and Mexico regularly cooperate to prosecute cases of illegal trafficking. Understood to be missing, however, were the bilateral operations which would broaden the beneficial impacts of this kind of successful casework. This purpose was incorporated into the stated objectives for the planned Bilateral Conference.

As described above, the Bilateral Conference was held in San Antonio. The conference report identified and described several priorities for action (Waldbauer and Fernandez Lozano 1998). Since then, several of the action priorities have been undertaken. Many of them have been done

with reference to the Memorandum of Understanding. In any case, all of them represent the spirit of the Memorandum to find ways to cooperate in heritage resources management. Some of the results are described in the following text.

ACTIVITIES, AGENCIES, and ACCOMPLISHMENTS

This section is dividing to three parts to address training, agency interactions, and technical information. It focuses upon the impacts of the Bilateral Conference and the Memorandum to provide insight into the directions that cooperation has led.

Training

Just as the Interagency Archeological Protection Working Group had done for the United States, the Memorandum of Understanding and the Bilateral Conference have identified training as one of the highest priorities for cooperation between the two nations. Training should be designed to address various levels of responsibility as well as levels of knowledge or experience. Field archeologists and special investigators need information that is appropriate to conduct casework. Law enforcement and heritage resources managers need information on how to allocate staff, obtain program funding, and integrate protection into an agency's overall mission. Training should consider geographic scope. Regional programs may need to emphasize practical matters in field investigations, for instance, while national programs may concentrate on the managerial duties for archeological protection generally. The following section addresses training in three ways: the importance of designing locally- and regionally-oriented training, training for professionals that covers their specialties as well as interdisciplinary interaction, and the international components of the Law School Initiative of the National Park Service Archeology and Ethnography Program.

Local and regional

One of the first regionally-oriented training projects was the workshop sponsored by the United States Customs Service of the Port of Laredo, TX. Two half-day sessions were held during April 13-14, 1998, that providing introductory information for customs officers. It emphasized the nature of site looting and the illegal international market. It also provided guidance for identifying Mexican cultural materials subject to detention and seizure as customs violations.

Attorneys training in international cultural property protection

The Departments of the Interior and Justice have been cooperating to train government attorneys (Federal, State, and Tribal) in heritage resources law since 1992. The principal venue for training in criminal enforcement has been the three-day course titled, "Overview of Archeological Protection Law." A new component on international cultural property protection was begun in 1997, and government attorneys from both Mexico and Canada participated.

International heritage resources law is now a regular part of these cooperative training courses. Case studies are presented, and creative uses of available legal tools are emphasized to demonstrate the importance of comprehensive, bilateral strategies for cultural property protection.

Initiative on heritage resources law in American schools of law

Another important initiative for the United States was begun by the Office of the Departmental Consulting Archeologist in 1997 based upon an internal study that showed that heritage resources law was not being taught systematically in American schools of law. Therefore, attorneys who entered government service were unlikely to be familiar with the body of law for which they had become responsible. The goals of the new law school initiative were to provide demonstration curricula for teaching heritage resources as a distinguishable body of environmental law, support guest instructors skilled in governmental heritage programs to augment law school faculty, and produce a textbook that examined applicable laws collectively. The textbook, the first of its kind to comprehensively address American heritage resources law, treats international cultural property protection in a variety of ways, especially with regard to enforcement and the marine environment (Hutt, Blanco, and Varmer 1999). Courses at four different law schools have been offered. Presentations about the initiative have been made at several conferences, including those of the student-based organization, the National Association of Environmental Law Societies.

Agency interactions

Agency interactions primarily have been in four areas: projects, casework, communication, and technical information. At the project and casework level, agencies work together for specific purposes such as to conduct conferences on defined topics or to complete investigations and prosecutions for legal violations. Interactions for the purposes of communication and technical information have been programmatic to insure close contact for such things as technical assistance and access to reference materials. The following sections describe each of the four areas of agency interactions.

Projects

International conferences on cultural property protection sometimes have included visits to significant heritage sites as part of the agenda. Most often, however, such visits are conducted primarily to raise participants' awareness through an interpretation of cultural history and as a convenient break in the agenda. They typically are not fully integrated into educational session objectives. One effort to change this involved the field visit to Teotihuacan World Heritage Site that was sponsored by the United States National Park Service during the "Conferencia sobre el Tráfico de Bienes Culturales Robados en América" held in Mexico City during December 1-5, 1999. The conference itself was sponsored by the Oficina Central Nacional, INTERPOL-México and endorsed by INTERPOL headquarters as part of their support for regional meetings

to interdict international trafficking. The principal objective of the field visit was to provide conference participants with a clear demonstration about what is necessary to manage significant heritage resources. The INAH organized and conducted the session as the conclusion to the conference.

One of the important results that followed the conference in Mexico City was an opportunity for United States and Mexican officials to evaluate United States commercial markets with regard to Mexican cultural property. The INTERPOL national central bureaus of both nations cooperated to organize contacts with offices of the Departments of the Interior and Justice in Washington, DC, and New York City for INTERPOL-México staff. Pursuant to the Memorandum, the National Park Service supported staff travel to both cities, particularly to facilitate collation of technical information that would be useful in future international activities. One of the outstanding results was a short guide about Mexican laws and cultural property that is appropriate for training purposes (Barraza Eeckhout 1999).

Casework

Successful casework in cultural property protection is a function of both the development of comprehensive legal strategies that appropriately employ available legal tools as well as accurate information about the nature of the problem. A critical category of such information is data on reported incidents. Preliminary to the Bilateral Conference of 1997, the Embassy of Mexico solicited incident information from all of the consulates in the United States. The response was excellent, and the tabulation showed two important results (Table 1; Dager and Hernandez 1997).

First, most incidents in the past fifteen years have been reported as potential customs violations. Many of the incidents occurred at ports-of-entry, but observations of art markets in major cities also was essential. Thus, while borderlands vigilance certainly is significant, serious violations take place wherever art and antiquities transactions are intense. Second, notifications about the illegal behavior were episodic. Most occurred during two three-year periods from 1989-1991 and 1994-1996. At this point, it cannot be determined whether these results indicate activity cycles in the illegal commercial network or increased law enforcement efforts during those periods. Regardless, it appears that as long as cultural property protection programs are planned effectively with specified objectives, they will yield valuable results. Any risks that may be associated with the allocation of scarce personnel and resources in cooperative efforts by the relevant agencies of both nations likely will be outweighed by the significant contributions to preservation of irreplaceable cultural heritage.

One of the major cases reported to the Embassy of Mexico involved the looting and smuggling of nearly 1,000 pre-Columbian artifacts by Frank Stegmeier, a dealer and former policeman who lived in Washington State (Miles 2000). More than 300 of those objects had been stolen from Mexico, including many from Oaxaca. The rest had been taken from Panama, Peru, and Bolivia. Eventually, Stegmeier was convicted and forfeited his house as well as the artifacts. He was

sentenced to 41 months in prison. This successful outcome was possible because of cooperation among the Department of Justice, Customs Service, and the INAH. These agencies did not conclude their work simply with the court's decision. They continued to cooperate by conducting a major public program to formally return Mexico's artifacts and distribute news articles and press releases. In July, 2000, Ambassador Jesus Reyes Heróles formally received the artifacts on behalf of Mexico in a ceremony at the newly-reopened Seattle Museum of Art. By do so, they helped realize the deterrent effect of excellent casework through public education and awareness.

As important as this case is however, it is essential that future bilateral operations benefit from the recent precedent set by two separate cases involving international trafficking in the cultural property of Turkey and the Hopi Tribe of Arizona. In the case involving Turkey, an American and a Turk were convicted. The American was convicted in United States court for dealing in artifacts illegally. The Turk was convicted in Turkish court for destruction of the archeological sites from which the artifacts came. By cooperating, the United States and Turkey achieved the most important results for cultural heritage protection: they interdicted the illegal commercial network, and they showed that devastation of sites for greedy purposes will not be tolerated. The case involving the Hopi Tribe is in the process of juridical resolution. A critical aspect of it, however, is that the undercover investigation by United States law enforcement agencies included a special investigator from a European nation. This strategic decision was important because it helps to understand both ends of an illegal network: the transactional contexts of the sale as well as the purchase. These are the kinds of cases that can serve as major deterrents when information about them is shared through training, conferences, employee exchanges, and various forms of technical guidance.

Communication

Communication among Mexican and United States agencies is a fundamental feature of both the Memorandum of Understanding and the Bilateral Conference results. The National Park Service and the Office of the Departmental Consulting Archeologist are working to accomplish this in two important ways. The first is to maintain and expand interactions with the Embassy of Mexico. The respective roles of these two organizations call for them to serve as focal points for collating and distributing information as well as to alert appropriate governmental offices about cooperative opportunities, planning developments, and ongoing programs in cultural heritage. For instance, as training courses with international sessions are scheduled, the announcements are forwarded also to the Embassy of Mexico to help insure wide distribution.

Another important avenue of communication is between the Office of the Departmental Consulting Archeologist and the INTERPOL-US National Central Bureau. This contact is essential for law enforcement agency liaison as well as for the purposes of specific casework and transmission of stolen cultural property information. Security is critical for effective law enforcement, and the rights of citizens are protected by statutes which define the uses of investigative information by authorized law enforcement agencies. Whereas, direct interaction

between the INAH and the National Park Service for the purposes of improving heritage resources management, for instance, is appropriate, the contacts for law enforcement purposes must be undertaken by the authorized agencies of both nations. INTERPOL-US serves in that role, and they have been successful particularly with timely and useful contact with their counterparts in INTERPOL-México.

Technical Information

The improved availability and exchange of technical information also are fundamental features of both the Memorandum of Understanding and the Bilateral Conference results. English and Spanish translations of basic documents are essential not only for both nations' agency personnel (more and more of whom are bilingual) who work directly with one another on cases, but also to facilitate program and policy development internally. Training courses and conferences, for instance, benefit from translated documents because these tend to serve doubly as handy reference materials when participants return to their duty stations and must utilize what they've learned.

The Office of the Departmental Consulting Archeologist can provide translations of several of the major documents needed for bilateral operations, including the relevant treaties between the United States and Mexico; Mexico's Federal Law on Archaeological, Artistic, and Historical Monuments; the United States Archaeological Resources Protection Act and its regulations which prohibit trafficking in foreign commerce; and an example of an archeological site damage assessment for legal purposes. Other types of information also are available, including Spanish-language brochures on the National Park Service Applied Ethnography Program and a Spanish version of the introductory ½-hour videotape on archeological protection titled, Assault on Time (FLETC 1991).

One of the most important cooperative efforts undertaken pursuant to the Memorandum was the English translation and electronic publication of Dr. Nelly M. Robles Garcia's landmark work, The Management of Archaeological Resources in Mexico: Oaxaca as a Case Study (Robles Garcia 2000). For the first time, agency officials in both the United States and Mexico can work from a single comprehensive description and analysis of a preservation management program which includes consideration of cultural property protection.

Another advantage of developing a range of documents in English and Spanish is that small packets of information for training or technical assistance may then be prepared which include some important materials that are only available in one language. The difficulty of using such materials is mitigated to an extent because they are not items that must be relied upon solely. Examples of such documents are the Technical Brief titled, "Legal Background of Archeological Resources Protection" (Carnett 1991) and the textbook Heritage Resources Law (Hutt, Blanco, and Varmer 1999)

CONCLUSIONS

The primary goal for cultural preservation in the United States, codified in the stated purposes of Federal laws such as the National Historic Preservation Act and the Archaeological Resources Protection Act, is to conserve heritage resources *in situ* on behalf of present and future generations of citizens. The principle that effective law enforcement is an essential element of *in situ* conservation programs began with the very first Federal law to protect archeological sites, the Antiquities Act of 1906. This recognized immediately that there is little value in calling for preservation if there is not the legal means to intervene on behalf of heritage resources.

Recent legislation always has supported or enhanced the integral relationship among conservation management, law enforcement, and public awareness. The National Historic Preservation Act, for instance, was amended in 1992 to call for research into and reports on feasible alternatives for controlling illegal interstate and international antiquities trafficking (16.U.S.C. 470h-5). Antiquities were defined as archeological, curatorial, and architectural objects and historical documents of all kinds. The reports are to be prepared by the Secretary of the Interior. This section is an important addition to earlier laws because it specifically authorizes the information collection needed to effectively address trafficking in international cultural property.

It was in consideration of these integral relationships in preservation programs and of the need to develop bilateral operations based upon the Memorandum that such a significant project such as the website publication of Dr. Robles' Management of Archaeological Resources in Mexico in English translation was undertaken. In many ways, the value of her research and analyses speak for themselves. However, in the context of the mutually agreed-upon goals stated in the Memorandum, this book goes to the heart of what both nations want to accomplish. If we can continue to progress with these kinds of fruitful cooperation, the prospects for meaningful heritage preservation through effective implementation of the INAH/NPS Memorandum of Understanding are indeed bright.

Table 1: Reported Incidents of Illegal Trafficking of Mexican Cultural Property into the United States, 1985-1997 (Dager and Hernandez 1997).

Entidad	Ciudad	Incidente	Notificacion	Cantidad	Materia/Tipo	Edad	Valor (\$)
Agency	City	Incident	Notification	Number	Material/Type	Age	Value (\$)
Customs	Durango	1985	Sept. 1989	18	Mayan & Mexica		?
FBI & Customs	Richardson, TX	May 1989	May 1989	?	?	?	?
Customs	Austin, TX	Nov. 1989	Mar. 1990?	1	painting	colonial, ca.1763	1-3 million
Consul Gen.	New York	Dec. 1989	Dec. 1989	1	baptism record	1651	?
FBI	Bellville, TX	1989	Dec. 1989	61	ceramics	various	<6000
anonymous tip	Philadelphia, PA	Jan. 1990	Jan. 1990	2	masks	?	?
Customs	McAllen, TX	May 1990	Feb. 1990	1180	various	Clasico y Clasico Tardio	?
Customs	Brownsville, TX	June 1990	?	319	ceramics	Olmecca	2-50
Customs	Atlanta, GA	July 1990	July 1990	?	?	?	?
Customs	Brownsville, TX	1990	Aug. 1990	308	ceramics?	?	?
Customs	?	?	Aug. 1990	65	?	?	?
Customs	Laredo, TX	Feb. 1991	July 1991?	58	artifacts & books (4)	?	325
Customs	San Mateo	?	July 1991	2	figurines	Mayan & Zapotec/Monte Alban	4100
Customs	Dallas/Ft. Worth	1992?	?	3	ceramics	?	?
Customs	El Paso	?	Jan. 1994	25	? (11 -forgery)	?	15,525
Customs	San Francisco	July 1994	July 1994	20	?	?	?
NPS	?	?	Oct. 1994 ?	13	lithics, ceramics	?	?
Customs	El Paso	?	Oct. 1994	1	statue/ forgery	?	0
Customs	Brownsville, TX	Jan. 1995	?	75	ceramics	?	?
Customs	Brownsville, TX	Mar. 1995	1995	14	?	?	?
Customs	Seattle, WA	May 1995	May 1995	300	?	?	?
Customs	Pittsburgh, PA	July 1995?	July 1995	15	wood and ceramic	?	?
DEA	El Paso	Nov. 1995	Feb. 1996	5	ceramics	Mixteca/Post-Classic	30,000
Customs	Santa Teresa, NM	1995	Nov. 1995	4	?	?	?

Customs	New York	Mar. 1996	Mar. 1996	16	Colima, Nayarit, Michoacan		?
Texas Historical Comm.	Falcon Res. TX	Apr. 1996	Apr. 1996	various	various	various	?
Customs	Ojinaga, TX	June 1996	Aug. 1996	13	fossil	paleontological	?
Archivo Gen	California	June 1996	June 1996	1	historic book	1778	?
Consulate/Embassy	Quito, Ecuador	Sept. 1996	Sept. 1996	?	rock figurine	?	1 million
Customs	Texas, Houston	1996	1996	28	ceramic & wood	historic	?
Customs	Los Angeles	1996?	Aug. 1996	?	?	?	?
Customs	Dallas/Ft. Worth	1996	?	501	figurines	?	?
Customs	Dallas/Ft. Worth	1996	1996	3	figurine & ?	?	?
Police	El Paso	?	?	4	?	?	?
F:P/R/P/Incidt2							

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FINDERS

Wisconsin Shipwrecks:

KEEPERS?

by Carlyle H. Whipple & Laura Naus Whipple

When we hear of sunken ships, our first mental images are usually of Spanish galleons and treasure divers like Mel Fisher searching for years to find a site that will yield millions of dollars worth of gold and jewels. Another image is that of the Columbus-American Discovery Group, which in 1989 located, dove on, and recovered part of the cargo being transported in 1857 from Colon, Panama, to New York City aboard the side-wheel steamer S.S. Central American. She sank in a storm 100 miles off the Carolina coast in waters at least a mile and a half deep. The official cargo consignment in 1857 dollars consisted of \$1,595,497.13 in gold bars, dust, and nuggets. The 1989 value exceeded \$1 billion. A third image, and closer to home, is the S.S. Edmund Fitzgerald that sank in Lake Superior on Nov. 10, 1975, coming to rest 200 feet below the surface. Today, undersea technology permits the location and recovery of almost anything lost on the sea floor, providing cost is no object. Search and recovery expeditions can cost up to \$50,000 a day depending upon water depth and the type of equipment used.

Wisconsin, while lacking the high-profile treasure shipwrecks of the ocean, has more than 700 shipwrecks within its territorial waters. Beneath the waters of Lakes Michigan and Superior, the Mississippi River, and the state's inland lakes and rivers can be found an underwater museum of our state's predatory and industry. From the iron tools lost from overboard to the ancient bones of the early seasons of settlement, the exploration of Wisconsin's waters provides many unique glimpses into the state's past. It is no coincidence that the state has shown such an interest in things next to a person and the above Wisconsin lakes and rivers are an essential part of the lives of future Americans and they

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allowed European exploration, expansion, and settlement of this state.

Wisconsin Owns the Shipwrecks Lying Under its Territorial Waters

There are two converging lines of authority for the fact that the State of Wisconsin owns all of the 700 shipwrecks and their related artifacts that lie submerged under its territorial waters. The first line flows from the Northwest Ordinance of 1787 and the Public Trust Doctrine, and the second from the Abandoned Shipwreck Act of 1987. More than 200 years of judicial precedent establishes the rule that these 700 shipwrecks belong to the state under the custody, control, and supervision of the Wisconsin Historical Society (WHS).²

Northwest Ordinance of 1787

At the conclusion of the American Revolution, Great Britain ceded to the United States all lands north of the Ohio River, south of the centerline of each of the Great Lakes, and east of the Mississippi River, known then as the Northwest Territory. Congress enacted the Northwest Ordinance of 1787 (NWO) to administer the lands preparatory to statehood. Title to submerged lands was given to the states that would be formed in the Northwest Territory as each was admitted to the Union.³

"The sovereignty and jurisdiction of (Wisconsin) extend(s) to all places within the boundaries declared in Article II of the Constitution, subject only to such rights of jurisdiction as have been or shall be acquired by the United States over these places."⁴ Article 2, Section 1 of the Wisconsin Constitution was accepted by Congress upon the state's admission to the Union and is in conformity with the original territorial grant of Articles IV and V of the NWO.

Upon its admission to the Union in 1848, Wisconsin became the owner of all

submerged lands within its boundaries, including the bottoms of rivers, inland lakes, and Lakes Michigan and Superior. "Submerged lands" are the bottoms of all navigable waters lying below the ordinary high water mark.⁵ The ordinary high water mark for each of the Great Lakes was last established by the International Great Lakes Datum Commission in 1955 at 601.5 feet above sea level for Lake Superior and 579.8 feet above sea level for Lake Michigan. The Great Lakes are factually and legally inland seas and subject to federal admiralty law and jurisdiction.⁶

Public Trust Doctrine

The Public Trust Doctrine (PTD) establishes that the title to the bottom lands of the Great Lakes is held by each bordering state in an active public trust.⁷ The PTD has been expanded to include the bottom lands of the Mississippi River and its principal tributaries⁸ and all of the state's navigable waters.⁹ The PTD had its genesis in the English common law whereby "both the title and dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and all of the lands below the high-water mark, within the jurisdiction of the crown of England are in the king."¹⁰ It is equally well settled that a grant from the sovereign of coastal lands does not transfer title to the contiguous submerged lands except when "either the language of the grant or long usage clearly indicates that such was the intention."¹¹

Upon the acquisition of territory by the United States from England, dominion over its submerged lands passed to the United States for the benefit of its citizens in trust.¹² All states admitted into the Union subsequent to the American Revolution were on an equal footing with the original 13 states receiving title to the submerged lands within their respective boundaries. This

federal grant specifically included Wisconsin.¹³ These coastal lands are "governed by the laws of the respective states, subject to the rights granted to the United States by its Constitution."¹⁴

Legislative and judicial acts have established that all natural lake beds within Wisconsin are held in an active trust for the benefit of the public, and all navigable waters are public waters for all to use.¹⁵ A trust is active when the trustee has affirmative duties to perform (that is, the State of Wisconsin has the duty to protect submerged cultural resources) with respect to administering the property for the benefit of the designated beneficiary (that is, the general public).¹⁶ The state has a duty to actively protect and preserve its navigable waters for fishing, recreation, and scenic beauty for the general public, and to further this duty, the Legislature may delegate this authority.¹⁷ This duty originated in the NWO.¹⁸ The scope of Wisconsin's PTD is that it be administered by the state to promote the general welfare¹⁹, including recreational purposes and uses²⁰, and includes pleasure boating, sailing, fishing, swimming, hunting, skating, and enjoyment of scenic breadth.²¹ To this listing one obviously can add scuba and sport diving, since the scope of public uses of Wisconsin lakes and their bottom lands is open-ended.²²

Through the Submerged Lands Act of 1953²³, Congress reconfirmed the PTD for Wisconsin and its submerged lands in Lakes Michigan and Superior. It proclaimed that the state owns the bottom lands within its territorial waters and that the state bottom lands are not to be managed in a proprietary fashion, but rather held in trust for the benefit of all citizens of the respective states. The pre-1989 Wisconsin Field Archaeology Act²⁴ titled archaeological artifacts in the state but did not specifically enumerate shipwrecks or their cargoes as a subject matter within the scope of the Act. However, the Act was interpreted to include state ownership of shipwrecks if such wrecks were "clearly of archaeological or historical interest and were found under navigable waters other than

streams within the state's boundaries."²⁵ With the 1989 amendment to the Act, the definition of submerged cultural resources was amended specifically to include shipwrecks and their cargoes, with their title being in the state, and to be administered by the WHS²⁶ as cultural resources for the benefit of the general public.

The Abandoned Shipwreck Act

The second of the converging lines of precedent for Wisconsin owning specifically classified shipwrecks within its territorial waters is the Abandoned Shipwreck Act of 1987 (ASA).²⁷ Congress determined that the states have the responsibility for managing living and nonliving resources in their waters and submerged lands, including certain abandoned shipwrecks that have been deserted and to which the owner has relinquished ownership rights with no retention.²⁸ The ASA recognized the cultural value of abandoned shipwrecks. Because of the recreational and educational opportunities offered to sport divers and other interested groups, reasonable access to such sites should not be denied by the states.²⁹ The ASA defines a "shipwreck" as a vessel or wreck, its cargo, and other contents.³⁰ A goal of the ASA is for states to provide reasonable access by the public to wrecks for sport diving, recreational and educational opportunities, natural resources and habitat protection, and historic preservation of shipwreck sites.³¹ It was enacted to resolve the issue of "salvage" and "finds" under federal admiralty law relative to shipwrecks lying in joint state-federal waters.

Article III, Section 2 of the U.S. Constitution reserves "all cases of admiralty and maritime jurisdiction" for resolution in the federal courts. As admiralty law evolved in the United States, claims to the title of abandoned shipwrecks were asserted in the United States district courts under the law of finds and as salvage claims/awards against the owners of sunken vessels. Conflicting decisions arose within the various federal circuit courts with

respect to the title to abandoned shipwrecks and salvage awards relative to a state's authority to own and manage abandoned property on state submerged lands. This confusion over ownership and management resulted in Congress enacting the ASA. The ASA specifically removed the abandoned shipwreck title issue from the admiralty law of "finds" and "salvage."³²

To effect the objectives of the ASA, Congress first asserted title to all abandoned shipwrecks that were either: 1) embedded in submerged lands (as defined in the Submerged Lands Act of 1953)³³ of a state, or 2) on submerged state lands and either included or eligible for inclusion in the National Register of Historic Places.³⁴ The sole exception to the ASA are all vessels on public lands of the United States (that is, the Apostle Islands National Lakeshore) or on Indian tribal lands.³⁵ The Submerged Lands Act of 1953 includes the submerged lands of the Great Lakes.³⁶ Congress then transferred its title to the states in which the vessels are located.³⁷ Finally, the admiralty laws of salvage and finds, as it applied to such wrecks, was abrogated.³⁸ An admiralty law exception to the ASA are sunken warships, which continue to remain the property of their respective governments or their successor governments unless title to them is affirmatively released.³⁹

The term "abandoned" under the ASA conforms with its meaning under admiralty law⁴⁰, which is that the vessel and/or its cargo are abandoned when title to the vessel and/or cargo has been affirmatively renounced by the owner or when circumstances give rise to an inference of abandonment.⁴¹ "Embedded" is to be "firmly affixed in the submerged lands ... such that the use of tools of excavation is required in order to remove the bottom sediments to gain access to the shipwreck."⁴² Where at least three-quarters of the vessel is clearly visible above the surface of the sea floor, the vessel is not embedded.⁴³ The Sixth Circuit has interpreted the ASA to mean "substantially buried" when the state claimed the vessel was "embedded in state lands."⁴⁴

The ASA is constitutional.⁴⁵ The S.S. Brother Jonathan sunk in California's jurisdictional waters in 1865 carrying \$2 million in gold and a U.S. Army payroll estimated at \$250,000 (all in 1865 dollars). The state made no efforts to salvage it. Deep Sea Research Inc. located the ship in 1991 and filed an action in admiralty in the United States district court, seeking rights to the wreck and its cargo. At trial, it was stipulated that the wreck was located on the state's submerged lands, but the issues of its being embedded therein, eligible for listing in the National Register of Historic Places, and whether it was abandoned were contested. The court found that the state had failed to establish by a preponderance of the evidence that all of the necessary titling events had occurred.

The Ninth Circuit affirmed, reasoning that the ASA requires the state to present evidence that the ASA applies, that is, that the wreck was: 1) abandoned, and 2) either embedded in the state's submerged lands or eligible for listing in the National Register. Further, the state must establish abandonment by clear and convincing evidence.⁴⁶ Once it has been established that the shipwreck belongs to a state and the state has possession of the object (the rem), the Eleventh Amendment then bars in rem suits in admiralty (federal court) against the state. But where the state does not have possession of the object (res), there is no Eleventh Amendment bar to filing suit in admiralty against the state.⁴⁷

The ASA abrogated the admiralty rules of salvage and finds as they apply to shipwrecks subject to the Act. This is a nonsequitur as to the laws of salvage because they "apply when the original owner retains an ownership interest in the ship (that is, not abandoned)."⁴⁸ Where the owner had abandoned the ship, the courts applied the law of finds, vesting title in the finder of a non-Great Lakes shipwreck prior to the ASA.⁵⁰ An exception to the law of finds (finders keepers – losers weepers)⁵¹ is where the abandoned property is embedded in the sea bottom. It then belongs to the owner of the sea bottom.⁵²

The Captain Lawrence was wrecked in 1933 off Poverty Island, Mich., just a few miles north of Rock Island in Door County, Wis. Fairport International Inc. brought an in rem action in 1994 in federal court to perfect title in the vessel located on the rocky bottom in 40 to 60 feet of water on Lake Michigan. The available technology of the 1930s permitted salvaging the wreck. The Sixth Circuit opined that Michigan could prove abandonment by inference, using

the clear preponderance of the evidence standard. This analysis can include express abandonment, depth of wreck, technology available for salvage operations, length of time, steps taken by owner toward recovery, insurance settlement terms, tax return or business records disposition, wreck location, and failure to pursue salvage efforts. There is a rebuttable presumption in admiralty against abandonment. Where the owner comes forward to assert ownership in a

shipwreck, abandonment must be shown by express acts.⁵³ An inference of abandonment is permitted, but only when no owner appears.⁵⁴

Protecting Shipwrecks

Wisconsin has "reserved unto itself the exclusive right and privilege of field archaeology on state sites ... in order to protect and preserve archaeological and scientific information, matter and objects."⁵⁵ Field archaeology is the study of the traces of human culture by means of surveying, digging, sampling, excavating, or removing objects⁵⁶ at an archaeological site.⁵⁷ Submerged cultural resources are archaeological sites or historic property that are located beneath the surface of a lake or stream.⁵⁸ The declared policy of Wisconsin is to encourage a comprehensive program of historic preservation to promote the use and conservation of its cultural heritage for education, inspiration, pleasure, and enrichment of the public.⁵⁹

It is illegal to remove, deface, injure, or destroy any archaeological object from a shipwreck site without state permission⁶⁰; such violations are punishable by a fine of from \$1,000 to \$5,000.⁶¹ Department of Natural Resources (DNR) wardens have the power to obtain search warrants and to arrest in order to enforce these laws.⁶² Property such as vehicles, boats, trailers, diving equipment, and electronic search gear of persons used in illegal wreck diving or damage and/or artifact damage and/or removal can be seized and confiscated at the court's order.⁶³ Additionally, any removal of an archaeological object for commercial gain shall forfeit twice the value of that object.⁶⁴ All of these Wisconsin statutes pertaining to submerged cultural resources should be considered as a package because statutes relating to the same subject matter are to be construed together and harmonized.⁶⁵ When a state agency has a particular competence or expertise on an issue, as in the case of the WHS, the courts will sustain its legal conclusions if they are reasonable.⁶⁶

(continued on page 61)

(from page 22)

Alleged violations of the state laws can be prosecuted by the district attorney or the attorney general.

Shipwrecks in joint federal-state jurisdictional waters (Lakes Michigan and Superior and the Mississippi River) also are protected by federal statutes. Where violations occur on federal waters, the U.S. Attorney also can prosecute.⁶⁷ It is a federal offense to remove by force, steal, or destroy any property belonging to a wrecked vessel lost on the Great Lakes, punishable by a fine of up to \$5,000 and/or up to 10 years imprisonment.⁶⁸

Public Access to Shipwrecks

The WHS is the principal state agency for administering historic preservation activities and programs⁶⁹ relative to their preservation, management, and public use.⁷⁰ It works in tandem with the DNR to manage Wisconsin's submerged cultural resources.⁷¹ Wisconsin's field archaeology law is not intended to burden persons who wish to use public state property for recreational and other lawful purposes.⁷² The WHS Underwater Archaeology Program has worked actively to identify the state's shipwrecks through field research; publication of books and reports; public lectures; buoying wrecks for easy public locating; and publishing wreck site cards for field use, showing wreck location, site plans, and vessel histories. This program works to ensure that the public has recreational use of these sites, while at the same time protecting these sites from looting and vandalism.⁷³

Conclusion

Wisconsin's shipwrecks are submerged cultural resources that belong to all of us. There is no "finders keepers" for shipwrecks in Wisconsin's waters. Legally they are titled in the state through a unique dual legal evolution. One route commences with the British-American Treaty of Paris of 1783 ending the Revolutionary War, whereby title to

the Great Lakes and their sea floors was transferred to the United States. Congress in turn transferred title through the Northwest Ordinance of 1787 to what would become the future states formed from that ceded territory, and enacted the Submerged Lands Act in 1953. For more than a century, the courts have affirmed that state title to the lake beds was held in an active public trust by the respective Great Lakes states, including Wisconsin.

The second titling route was the Abandoned Shipwreck Act of 1987. Here Congress declared the United States to be the owner of all coastal abandoned shipwrecks, including those of the Great Lakes, and then retitled them in the respective littoral states for their care, management, and preservation. The Act was unnecessary for Wisconsin and the Great Lakes states, but it represents a second protectional avenue for those states.

Some irresponsible voices of the sport diving and wreck diving community falsely claim that the laws designed to preserve shipwrecks for all to enjoy will end their diving on shipwrecks.⁷⁴ The law's goal is to preserve the rights for all users and to prevent the shipwrecks from being looted and damaged by the malicious few. The public, and the diving community in particular, must recognize the difference between those who dive on historic ships for knowledge and pleasure and those who dive on them for monetary gain. The press too quickly bestows the title of "underwater archaeologist" on any diver who raises artifacts from the deep. There is a long and honorable tradition of salvage at sea, but it must not be confused with archaeology. Shipwrecks are time capsules of history reflecting daily life as of the day of their sinking. "Wisconsin encourages visitors to enjoy these resources, and to take only pictures and leave only bubbles so that other visitors may also have an enjoyable, educational, and unique diving experience."⁷⁵

Endnotes

¹Gary Kinder, *Ship of Gold in the Deep Blue Sea*

(1998) is the fascinating story of the S.S. Central America salvage operation and its complicated legal battle plan and execution in federal court.

²Wis. Stats. §§ 44.30 and 44.47(5m)(b). (All references are to the 1997-98 Wisconsin Statutes).

³Ordinance of the Northwest Territory (1787), Article V.

⁴Wis. Stat. § 1.01.

⁵*C. Beck Co. v. City of Milwaukee*, 139 Wis. 340, 351, 120 N.W. 293 (1909).

⁶*The Propeller Genesee Chief*, 53 U.S. 443 (1851), *superseded by statute*. *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

⁷*Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387, 435, 437, 452-53 (1892), *aff'd* 154 U.S. 225 (1894); *Angelo v. Railroad Comm'n*, 194 Wis. 543, 217 N.W. 570 (1928); *Munro v. Meilke*, 200 Wis. 107, 227 N.W. 394 (1929); *Colson v. Salzman*, 272 Wis. 397, 75 N.W.2d 421 (1956); *State v. Trudeau*, 139 Wis. 2d 91, 402 N.W.2d 337 (1987); *State v. Town of Linn*, 205 Wis. 2d 426, 556 N.W.2d 394, *rev. denied*, 201 Wis. 2d 287, 560 N.W.2d 275 (1996); *Sterlingworth Condominium Ass'n Inc. v. State Dep't of Natural Resources*, 205 Wis. 2d 710, 556 N.W.2d 201, 791 (Ct. App. 1996); *Pollard v. Hagan*, 44 U.S. 212, 230 (1845); *Doemel v. Jantny*, 180 Wis. 225, 193 N.W. 393 (1923).

⁸*Barney v. Keokuk*, 94 U.S. 324, 333 (1876).

- ⁹*McLennan v. Prentice*, 85 Wis. 427, 444-45, 55 N.W. 764 (1893).
- ¹⁰*Shively v. Bowlby*, 152 U.S. 1, 11 (1894).
- ¹¹*Id.* at 14.
- ¹²*Id.* at 57.
- ¹³*Id.* at 26.
- ¹⁴*Id.* at 58.
- ¹⁵Wis. Stats. §§ 30.10(1) and 281.31(1); Whipple, Carlyle H., 57 Marq. L. Rev. 26, 27 (1973); see also Halsey, John R., *Beneath the Inland Seas: Michigan's Underwater Archaeological Heritage* at 29 (1990).
- ¹⁶*Kinzer v. Bidwell*, 55 Wis. 2d 749, 755, 201 N.W.2d 9 (1972).
- ¹⁷*Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761 (1972).
- ¹⁸*State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 426, 84 N.W. 855 (1901); *Borsellino v. Wis. Dep't of Natural Resources*, 232 Wis. 2d 430, 443, 606 N.W.2d 255 (Ct. App. 1999).
- ¹⁹*State v. Public Serv. Comm'n*, 275 Wis. 112, 119, 81 N.W.2d 71, 74 (1957); *State v. Town of Linn*, 205 Wis. 2d 426, 556 N.W.2d 394, 402 (Ct. App. 1996).
- ²⁰*Muench v. Public Serv. Comm'n*, 261 Wis. 492, 511-12, 53 N.W.2d 514, 522 (1952), opinion adhered to on re hearing, 55 N.W. 40 (Wis. 1952).
- ²¹*State v. Public Serv. Comm'n*, 275 Wis. 112, 117, 81 N.W. 2d 71 (1957).
- ²²*Colson v. Salzman*, 272 Wis. 397, 75 N.W.2d 421, 423 (1956); *Hixon v. Public Serv. Comm'n*, 32 Wis. 2d 608, 146 N.W.2d 577, 582 (1966).
- ²³43 U.S.C. §§ 1301 - 1315 (1995) (all references are to the 1997 United States Code).
- ²⁴Wis. Stat. § 27.012 (1969).
- ²⁵70 Wis. Op. Att'y Gen. 18, 21, 23 (1970).
- ²⁶Wis. Stat. § 44.47(1)(i) - (5m) and (5), respectively.
- ²⁷43 U.S.C. §§ 2101 - 2106. The National Park Service of the U.S. Department of Interior is the administering federal agency with respect to the ASA.
- ²⁸43 U.S.C. § 2101.
- ²⁹43 U.S.C. § 2103(1), (2).
- ³⁰43 U.S.C. § 2102(d).
- ³¹43 U.S.C. § 2103(a).
- ³²43 U.S.C. § 2106(a).
- ³³43 U.S.C. § 1301(a)(1).
- ³⁴16 U.S.C. § 470(a). To be eligible for listing in the National Register of Historic Places, the criteria are established by the Secretary of the Interior and found in 36 C.F.R. Part 63 and 20 *National Register Bulletin*, U.S. Department of the Interior.
- ³⁵43 U.S.C. § 2105(d).
- ³⁶43 U.S.C. § 130 (a)(1). *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird*, 19 F.3d 1136, n.1 (7th Cir. 1994), cert. denied, 513 U.S. 961 (1994).
- ³⁷43 U.S.C. § 2105(c).
- ³⁸43 U.S.C. § 2106(a).
- ³⁹*Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000).
- ⁴⁰*California v. Deep Sea Research Inc.*, 523 U.S. 491 (1998).
- ⁴¹*California*, 102 F.3d 379 (9th Cir. 1996); aff'd in part, vacated in part, 523 U.S. 491 (1998); 63 A.L.R.2d 1369 (19__).
- ⁴²43 U.S.C. § 2102(a).
- ⁴³*Deep Sea Research Inc. v. Brother Jonathan*, 89 F.3d 680 (11th Cir. 1996), aff'd in part, 523 U.S. 491, 149 (1999).
- ⁴⁴*Fairport Int'l Exploration Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 913 F. Supp. 552, 556 (D.C. Mich 1990), 177 F.3d 491 (6th Cir. 1999).
- ⁴⁵*California*, 523 U.S. 491 (1998); *Fairport*, 177 F.3d at 500 (6th Cir. 1999); *Zych*, 19 F.3d at 1140, 1143 (7th Cir. 1994).
- ⁴⁶*Fairport*, 177 F.3d at 499 (6th Cir. 1999).
- ⁴⁷*Madrua v. Superior Court of State of Cal. in and for San Diego County*, 346 U.S. 556, 560 (1954); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Florida Dep't of State v. Treasure Salvors Inc.*, 458 U.S. 670 (1982).
- ⁴⁸43 U.S.C. § 2106(a).
- ⁴⁹*Columbia-America Discovery Group v. Atlantic Mut. Ins.*, 974 F.2d 450, 459 (4 CA 1992), cert. denied, U.S. 113 S. Ct. 1625.
- ⁵⁰*Fairport*, 177 F.3d at 498.
- ⁵¹*Columbus*, 974 F.2d 450 (4th Cir. 1992).
- ⁵²*Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F. 2d 1511, 1514 (11th Cir. 1985).
- ⁵³*Columbus*, 974 F.2d 450 (4th Cir. 1992).
- ⁵⁴*Sea Hunt*, 221 F.3d at 641.
- ⁵⁵Wis. Stat. § 44.47.
- ⁵⁶Wis. Stat. § 44.47 (1)(d).
- ⁵⁷Wis. Stat. § 44.47 (1)(b).
- ⁵⁸Wis. Stat. § 44.47 (1)(i).
- ⁵⁹Wis. Stat. § 44.30.
- ⁶⁰Wis. Stat. § 44.47 (2).
- ⁶¹Wis. Stat. § 44.47 (7)(a)(2).
- ⁶²Wis. Stat. § 29.921(2).
- ⁶³Wis. Stat. § 29.931(2).
- ⁶⁴Wis. Stat. § 44.47(7)(a)(3).
- ⁶⁵*Cornell Univ. v. Rusk County*, 166 Wis. 2d 811, 819, 481 N.W.2d 485, 489 (Ct. App. 1992); *Sterlingworth Condominium Ass'n Inc. v. State Dep't of Natural Resources*, 205 Wis. 2d 710, 556 N.W.2d 791, 796 (Ct. App. 1996).
- ⁶⁶*Nelson Bros. Furniture Corp. v. Wisconsin Dep't of Revenue*, 152 Wis. 2d 746, 753, 449 N.W.2d 328, 330-31 (Ct. App. 1989).
- ⁶⁷18 U.S.C. § 1658(a).
- ⁶⁸18 U.S.C. § 1658(a).
- ⁶⁹Wis. Stats. §§ 44.02(21) and 44.34(4).
- ⁷⁰Wis. Stat. § 44.5(m)(e).
- ⁷¹Wis. Stat. § 44.5(m)(a).
- ⁷²Wis. Stat. § 44.47.
- ⁷³Wisconsin Department of Natural Resources, Bureau of Law Enforcement, PUB-LE-314-98 at 3, 1997, *Boating Program Report*.
- ⁷⁴Peter E. Hess, "Arrested for Shipwreck Diving!," 5 *Advanced Diver Magazine* at 40 (2000).
- ⁷⁵Steve Harrington, *Diver's Guide to Wisconsin*, (quoting David J. Cooper, State Underwater Archaeologist of the Wisconsin Historical Society). 