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ARTICULATING THE VALUE OF ARCHAEOLOGICAL RESOURCES AFTER DAMAGE

ARCHAEOLOGICAL CRIME AND THE ARCHAEOLOGICAL RESOURCES

PROTECTION ACT

By

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Articulating the Value of Archaeological Resources after Damage

Chairperson: Doug MacDonald, Ph.D.

Archaeological crime is pervasive in the United States and throughout the world. While laws in the United States do not vest national ownership rights in archaeological resources, there are stringent means to enforce federal property rights in cultural resources that exist on federal lands under the Archaeological Resources Protection Act (ARPA) as well as the Embezzlement and Theft, and Malicious Mischief federal statutes. In order to exercise these rights, federal land managers and archaeologists must know how to proceed upon detection of an archaeological violation. Specifically, there must be a thorough understanding of how to prepare an adequate archaeological damage assessment report that addresses the value of the archaeological resources and the consequent loss from the damage to them so that a judge and potential jury sufficiently appreciate the valuable yet irretrievable nature of archaeological resources. An adequately prepared archaeological damage assessment report is paramount to the concept of archaeological value and demonstrating the loss to this value in the court system, and consequently the public. This model, having established its potential effectiveness when properly followed, can and should be used in all archaeological crime cases implicating not only federal, but state, private, and international jurisdictions, and employing any archaeological protection statutes. After a brief history of the case law that defined the parameters of ARPA and its implementing regulations, this paper will discuss details of permitting procedures and preparing an adequate archaeological damage assessment report, including the inconsistencies in damaged site recordation that lead to common mistakes and pitfalls in documentation and report preparation. I also provide an in depth discussion of the concept of archaeological value, how it is established under ARPA, the implementing regulations, and case law. This paper will provide guidance to those who wish to better utilize ARPA and other archaeological protection laws to detect, document, and ultimately prosecute archaeological resource crimes more effectively and deter archaeological crime in the United States and abroad.

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CHAPTER 1: THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT: HISTORY AND NECESSITY

The buying and selling of objects from archaeological contexts contributes to the destruction of the archaeological record...Commercialization of these objects results in their unscientific removal from sites, destroying contextual information. (Cohan 2004:361)

The Archaeological Resources Protection Act (ARPA) was signed into law on October 31st, 1979, by President Jimmy Carter. In the United States Code (USC) of federal laws, ARPA can be found at 16 USC §§ 470aa-mm. 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” (16 USC §§ 470aa-mm). ARPA protects archaeological resources on federal and tribal lands from illegal excavations (looting), vandalism and commercial exploitation. Generally, those who utilize ARPA are federal land managing agencies such as the U. S. Forest Service (USFS), the Bureau of Land Management (BLM), and the National Park Service (NPS), in addition to Native American tribes, law enforcement officers, private consultants, and attorneys.

Archaeological crime plagues America’s public and tribal lands. When an archaeological crime occurs, the public suffers twice. First, the public loses the irreplaceable heritage; second, the public loses funding allocated to heritage preservation in the consequent archaeological crime detection, restoration and prosecution (Huckerby 2006:107). Stolen from its archaeological context and sold to collectors nationally and internationally, “cultural property is a finite, depletable, and nonrenewable resource that requires uniformity of protection throughout the United States” (Gerstenblith 1995:566). As of 1900, “alarming proportions” of archaeological resources were being destroyed by looting activities (Fowler and Malinky, 2006:3). Protecting this country’s archaeological heritage has been a concern since lobbying for and the development of the American Antiquities Act (AAA), which was passed in 1906. The prolific, destructive

plunder of archaeological resources was at the time in pursuit of turn of the 20th century's competing museum collections in the United States and Europe. Despite its enactment, the AAA was not effectively utilized to protect these resources. The USFS and Department of Interior (DOI), the agencies that managed federal lands at the time, were understaffed and uninterested in addressing the looting activities that were taking place on their lands. The lack of agency staffing and interest, in conjunction with the lack of necessary legal mechanisms needed to enforce the AAA, left the volume of archaeological resource destruction on public lands unchanged (Hutt 2010:15; Fowler and Malinky 2006:4).

This trend continued. By 1987, eight years after ARPA was enacted, the General Accounting Office (GAO) reported that federal agencies in the Four Corners region had been “unable to curb the looting and destruction of even the identified resources” (GAO 1987:3). Public and tribal lands continue to suffer from archaeological crime, as is evident in recent Cerberus investigations in the Southwest.

The failing American Antiquities Act (AAA)

Use and enforcement under the AAA had been weak. Between 1906 and 1979, there were a total of 18 convictions nationwide, \$4,000 in fines, and two 90-day jail sentences (Hutt, Jones and McAllister 1992:25, as cited by Fowler and Malinky 2006:9-10). Don Fowler and Barbara Malinky (2006) suggest two predominant reasons for the poor implementation of AAA. First, the American tradition of private property rights is strong and these values become conflated with the public's use of federal lands. This attitude results in a feeling of entitlement where individual Americans feel ownership over items found on open land, regardless of the federal or tribal jurisdiction and the law. Second, the idea that prehistoric archaeological sites, while scientifically interesting, were not part of recognized Euro-American dominant cultures and

therefore removed any sense of personal accountability, ultimately imbuing a lack of interest in protecting someone else's heritage over collecting curious evidence of it (Fowler and Malinky 2006:2).

Judicial complications of AAA

Exacerbating the need for a new law, there were conflicting rulings regarding the constitutionality of AAA in different federal Circuits (Fowler and Malinky 2006:8-9). The Tenth Circuit repeatedly upheld AAA's constitutionality. However, in a 1974 ruling by the Ninth Circuit Court of Appeals¹, the AAA was ruled unconstitutionally vague. In this case, the defendant, Diaz, took several ceremonial masks from a cave on Apache tribal lands in Arizona. The theft was reported to the federal Bureau of Investigation when the masks were offered for sale by Diaz in Phoenix. These masks themselves were approximately five to ten years old, however their purpose and use was part of a cultural heritage that renders the actual age of the mask less important than the long history of use in ceremonial traditions. Diaz was charged with a violation of the AAA and convicted based on testimony that the masks were associated with ancient ceremonies. On appeal, the Ninth Circuit Court overturned this conviction by arguing that if masks that were only five to ten years old could be considered "objects of antiquity" under the statute, then the term was unconstitutionally vague because the reasonable person would not understand what falls under the term "objects of antiquity" from language of the statute (Fowler and Malinky 2006:11). In order for a law to pass constitutional muster, the Due Process Clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution require that criminal laws must be drafted in language that is clear enough for the average person to comprehend (U.S. Const. Amendments V, XIV). The Ninth Circuit decided that the term "objects of antiquity" was

¹ A Federal Court with jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington

unconstitutionally vague language, thereby removing a crucial component of the statute and rendering it useless for prosecuting archaeological crime (United States v. Diaz, 499 F.2d 113 (9th Cir. 1974)).

Several years later, in 1977, due to the effect of the Diaz decision on the AAA in the Ninth Circuit, an assistant U.S. attorney filed charges under the general theft and injury of government property statutes in the egregious Jones, Jones, Gevara archaeological violation case in Arizona. In this case, two brothers, Thayde and Kyle Jones, and a third individual, Robert Gevara, traveled to Arizona from their home in Utah and looted a large prehistoric village site on USFS land (McAllister 1980:24). These men were observed looting the site and they had a large number of artifacts in their possession when they were ultimately apprehended in the site area. In addition to the artifacts, the authorities also seized photographs that had been taken of the perpetrators' illegal excavations. As a result of the Diaz decision, the U.S. attorney's Office in Phoenix chose to charge them with violations of the general theft and injury of government property statutes, 18 USC 641 and 18 USC 1361 respectively (to be discussed further later). Although no statement could be found in federal historic preservation and protection law affirming that archaeological materials on federal land are government property, the decision to use these laws was based on the assumption that these materials became government property by being "abandoned" on federal land. The use of these statutes was not only appropriate but advantageous because, unlike the AAA, violations of these statutes have potential felony penalties (U.S. v. Jones, Jones, Gevara, 607 F.2d 269 (9th Cir. 1979); 18 USC 641; 18 USC 1361).

In 1978, however, the Arizona federal District Court Judge refused to allow the use of these statutes in place of the AAA in the Jones, Jones, Gevara case. This left archaeological sites

on federal and tribal lands unprotected in the vast Ninth Circuit (McAllister 1980:21; U.S. v. Jones, Jones, Gevara, 607 F.2d 269). The federal District Court Judge hearing the Jones, Jones, Gevara case ruled in favor of the defense motion to dismiss the charges for failure to appropriately state a claim under the government property statutes. The defendants should have been charged with violating the AAA, rather than the government property statutes, since the purpose of the AAA is to address these types of crimes. The AAA, however, had been ruled unconstitutionally vague in the Ninth Circuit, and therefore could not be used as a result of the Diaz decision. In the judge's opinion, he stated that Congress intended the AAA to be the sole statute protecting archaeological materials on federal lands. The judge dismissed the charges "without prejudice," which closed the case, but permits the U.S. attorney's Office to appeal his ruling (U.S. v. Jones, Jones, Gevara, 607 F.2d 269).

Lastly, the AAA fines had become insignificant relative to today's annual income and artifact values. According to the U. S. Census of 1906, the average annual income of Americans in that year was \$520. Therefore, the potential \$500 monetary penalty for an AAA conviction was a substantial deterrent to average Americans when the act became law (Hutt 2010:14). However, increasingly high artifact values significantly reduced the sum's deterrent effect, only continuing its diminished effect as artifact dollar values increased over time. For example, a single artifact collection from Arizona in the mid-1970s sold for \$800,000; in that same decade, single pots were sold for thousands of dollars (Hutt 2010:14).

ARPA enacted

As a result of conflicting case law interpreting enforcement of AAA in the 1970s in addition to the lack of financial deterrence, bipartisan support for the bills that would become a new act intended to better protect archaeological resources, H.R. 1825 and S. 490, was sought

and found. After successful “archaeo-politics,” Chair of the House Interior and Insular Affairs committee, Congressman Morris K. Udall (D-AZ), introduced H.R. 1825 into the U.S. House of Representatives on February 1, 1979 (Fowler and Malinky 2006:6,1). Senator Pete Domenici (R-NM) introduced a companion measure, S. 490, into the senate on February 29, 1979. The house passed H.R. 1825, as amended, on October 12, 1979; on October 17th, the senate concurred; President Jimmy Carter signed ARPA into law on October 31, 1979 (Fowler and Malinky 2006:1).

Causes and scope of looting

How significant is the crime of illicit excavation of archaeological resources? One of the earliest recorded incidents of looting took place several thousand years ago, only 15 years after King Tutankhamen’s death, when precious metals and jewels were stolen from his tomb and placed into the early international market of cultural property (Szopa 2004:58). More recently, two hundred twenty-two thousand ancient Chinese tombs were broken into between 1999 and 2004 (McElroy 2004:549). The laws that have developed to protect national and international cultural property have proven ineffective thus far. According to some,

[a]archaeological sites will continue to be looted so long as there are people anywhere in the world willing to pay money for looted antiquities, and so long as there are people living in poverty and under the chaos of war and sectarian conflict who are willing to break the law to uncover and sell them (Cuno 2008:xxxiii).

Fueled by illegal excavations of archaeological resources, the worldwide illicit trade in cultural property is second only to the illicit drug trade as most lucrative and potentially longest running, of black markets (Warring 2005:235). Once the artifact leaves its country of origin, it usually enters the black market via sales through private art dealers (Szopa 2004:62). Nearly “every antiquity that has arrived in America in the past ten to twenty years has broken the laws

of the country from which it came” (Warring 2005:235). The United States “is the largest single buyers’ market for stolen or illegally exported cultural property” (Szopa 2004:55). There are laws that aid in deterring this crime and punishing those who are caught conducting illicit excavations on any land, federal or private, national or international; ARPA is one such law. However, these cases must be investigated and brought to trial, with zealous and effective attorneys arguing persuasively newly established uses of laws such as ARPA in international and private contexts.

Nationally, public awareness and interest in American antiquities reportedly began in the 18th century, when the Ohio Land Company designated a great mound and two pyramids a public square in 1788 in Marietta, Ohio. While reports of looting unscientifically excavated archaeological resources do not necessarily survive, this early act of intended preservation implies many such mounds may have been destroyed in public curiosity. This interest became popular by the 1870s. The Smithsonian Institution included Native American artifacts in its exhibition at the Centennial Exposition of 1876 in Philadelphia. In 1879, both the Archaeological Institute of America as well as the Anthropological Society of Washington, later to evolve into the American Anthropological Association, were established (Gerstenblith 1995:577).

The motivation behind those who loot archaeological resources can vary significantly from person to person, and in fact there are often multiple reasons behind what motivates someone to loot an archaeological site. Many of these reasons are analogous, if not identical to the reasons people become archaeologists and museum specialists. Some feel they are saving the resource from certain loss or destruction; some feel they are entitled to possess the resource, whether it be a heritage connection or otherwise; some feel that the resource does not belong the person or group that possesses it, for political, personal or another reason; others are hungry and

need to feed themselves and or their family (McAllister 1988:56). Whatever the cause, the destruction of archaeological resources occurs and will continue to occur unless an unlikely global shift in priorities takes place.

The ability to legally own archaeological resources enables their continued theft from archaeological sites. This pattern perpetuates despite that the removal of these resources from federal and tribal lands, as well as national and or international trafficking of archaeological resources obtained in contravention of local or state law, is a potential felony (16 USC § 470ee). Laws must be learned and utilized by the communities affected. For an archaeologist who can acquire an ARPA permit and legally excavate archaeological resources, this loss of information by an unpermitted looter can render the value of the artifact entirely obsolete (Cohan 2004:370-371). Paramount to this concern is the theory that archaeological sites should not be excavated unless they will be negatively impacted. The loss of a preserved site, therefore, is considered even more devastating. This suggests that the mechanisms in place are not effectively addressing the problems within archaeological resources preservation. The United States is significantly affected by the destruction of archaeological sites on its own soil, most significantly in the Southwest, Pacific Northwest and Southeast. Additionally, the United States possesses a large market for the sale of antiquities from all over the globe. Such illegally obtained artifacts commonly fuel the illicit trade in antiquities, both nationally and internationally (Cuno 2008:34-35).

There are many reasons behind the extent of archaeological crime, one of which includes that there is far too much land for federal agencies and tribes to realistically monitor. Vast amounts of unmonitored land in conjunction with the various jurisdictions that are simultaneously affected (federal, tribal, state, county, municipal, and private property) leave

open an opportunity for people to illegally excavate and vandalize archaeological sites without detection. While it is difficult to ascertain the root causes of the problem, the themes that contribute include public fascination with the past, desire to collect artifacts, monetary value of artifacts, mixed jurisdictional status of resources, the existence of the right to possess, buy and sell legally obtained artifacts in the United States, and the difficulty of determining origin of an artifact (McAllister 1988:52-53). All of these themes could equally be addressed with appropriate use of the laws, and publication about successful archaeological crime detection and prosecution.

While laws in the United States are not well established and fail to vest national ownership rights in archaeological resources as other artifact-rich nations do, there are stringent means under ARPA to enforce federal property rights in cultural resources that exist on federal and tribal lands, in addition to appropriate adjudication of those resources illegally obtained from private and international lands that are trafficked in the United States (16 USC § 470ee). In order to exercise these rights, tribes, land managers, archaeologists, law enforcement, attorneys must be trained in detection of archaeological crime and know how to proceed upon detection of an archaeological violation.

CHAPTER 2: ARPA PROVISIONS AND THE PROTECTION IT AFFORDS

ARPA distinguished from AAA

ARPA was drafted with the goal of “revis[ing] and strengthen[ing]” the AAA, with the intention of affording federal, state and private archaeological resources more effective legal protection (Fowler and Malinky 2006:11-12). For these reasons, ARPA augments and improves upon the AAA. First, to combat the potential for a challenge of unconstitutional vagueness, ARPA clearly identifies protected archaeological resources so that a person of average intelligence can understand. Specifically, the statute uses the term “archaeological resource” instead of the AAA constitutionally vague term “objects of antiquity.” The definition of archaeological resource was further articulated in detail in the Uniform Regulations (discussed later this chapter), as well as the Society for American Archaeology (SAA) professional standards for determination of archaeological value.

Second, unlike the AAA, ARPA defines the qualifications that individuals, institutions, or organizations must demonstrate in order to apply to a land managing agency for a permit to excavate archaeological resources. Moreover, the statutory language for a permit applicant includes “institutions” and “organizations” in addition to “person,” yet another significant improvement to the AAA (Hutt 2010:16). The AAA definition excludes any mention of ‘organization’ or ‘institution’ as being subject to fines or imprisonment and fails to specify qualifications for those who wish to obtain a permit. Specifically, Section 1 of the AAA specifies that “[A]ny person who shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity” is subject to fines or imprisonment (16 USC §433). Section 3 states “That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity...may be granted...to institutions who are deemed

properly qualified (16 USC §433). ARPA specified these important details, thereby reinforcing appropriate professional archaeological standards and the ability to enforce them.

Third, ARPA establishes felony level criminal penalties, better reflecting the seriousness of the crime. It includes anti-trafficking provisions to better address the modern artifact market and internet sales. ARPA also establishes civil penalties for non-criminal violations, which had historically not been possible, providing a far broader application than AAA. It also includes a vehicle and equipment forfeiture provision, providing a proportionately more severe deterrent to those who orchestrate larger looting operations as well as smaller-scale archaeological criminals. Lastly, ARPA established that for archaeological violations on tribal lands, the Indian tribe involved is the recipient of civil penalties and forfeitures (Fowler and Malinky 2006:14).

Lastly, there is a means of suspension or revocation of a permit in the event a permittee violates one of ARPA's provisions (16 USC § 470cc(f)). While section three of the AAA provided the Secretaries of Interior, Agriculture, and War the authority to permit "institutions which they deem properly qualified," to excavate archaeological resources and collect "objects of antiquity," there was no means of enforcing the professional standards that the permitting process intended to uphold (16 USC §433 (1994)). Under ARPA, the federal land manager can suspend a permit if it was found that the permittee violated one of the three outlined prohibited acts, such as unpermitted excavation, trafficking in archaeological resources obtained in violation of federal law, and interstate or international trafficking in archaeological resources obtained in violation of local or state law (16 USC § 470ee(a), (b), (c)). The federal land manager can revoke a permit if the permittee has been assessed a civil penalty under 16 USC § 470ff, or charged with a criminal conviction under 16 USC § 470ee.

In 1984, ARPA was enhanced with the adoption of its implementing regulations, the ARPA Uniform Regulations (43 CFR 7, 36 CFR 296, 32 CFR 229, and 18 CFR 1312). These implementing regulations have citations in four places within the Code of Federal Regulations (CFR), each location relative to the federal agency for which the regulations apply. The Department of Interior's ARPA Uniform Regulations citation is 43 CFR 7; the Department of Agriculture citation is 36 CFR 296; the Department of Defense citation is 32 CFR 229; and the Tennessee Valley Authority ARPA Uniform Regulations citation is 18 CFR 1312. For efficiency purposes, this paper will cite to the Department of Interior Uniform Regulations citations. ARPA's Uniform Regulations provide federal land managers procedures, standards, and definitions to better protect archaeological resources on public and Indian lands under ARPA. Principally, they expand the definition of an archaeological resource by explicitly defining terms and providing examples of the types of artifacts that are protected by the statute. Most importantly, the Uniform Regulations establish the procedures for assessing civil penalties for determining the monetary values that measure severity of harm under the act. These established values, archaeological value, commercial value, and cost of restoration and repair, are utilized in archaeological damage assessment reports to establish whether the crime can be charged as a felony or misdemeanor, what the offense level will be when the court sentences the defendant, and the civil penalties and or criminal fines and restitution (explained in a later chapter; NPS Technical Brief 20: guidelines for writing Archaeological Damage Assessment).

ARPA was further enhanced when it was amended in 1988. The ARPA Amendment reduced the felony threshold from \$5,000 to \$500. This smaller monetary threshold is fairly easy to meet when calculating archaeological value, or commercial value, and cost of restoration and repair (explained in greater detail in a later chapter), and as a result most ARPA violations are

now charged as felonies. The Amendment also added the “attempt” provision, which applies to many of ARPA’s prohibited acts and provides an additional deterrent to those who are caught preparing for an archaeological crime, who possess the intent to loot, or in the beginning stages of looting, but have not actually conducted an unauthorized excavation that damaged archaeological resources. Depending on the scale of the intended operation, such as when large mechanical equipment and related looting tools are involved, a defendant could be charged with an attempted criminal felony conviction under ARPA, provided the measures of harm reached the \$500 threshold. Lastly, with these amendments, there was an opportunity to change how the statute measures harm, for example, with the hotly debated concept of archaeological value (discussed in greater detail in the next chapter). However, after extensive debate and discussion, lawmakers came to conclude that the damage assessment model was effective and it remained in the law essentially unchanged. Demonstrating the legal validity of the existing provisions and measures of harm under ARPA, this also suggests that these measures of harm and the damage assessment model can and should be utilized with any statute that prohibits damage to archaeological resources on federal, tribal, state, private or international lands.

In 2003, the SAA hosted a conference in Albuquerque, NM, to address archaeological value determination under ARPA. In attendance were federal, state, and private archaeologists (with and without damage assessment experience), attorneys, and criminal investigators. Prior to adoption of the SAA Guidelines and publication of NPS Technical Brief 20, archaeologists struggled with determining a reasonable scope of scientific information retrieval at a damaged archaeological site, thereby leading to unreliable archaeological value determinations because of the different strategies used in calculating and explaining these figures without established guidelines (McAllister 2006:68).

In drafting archaeological damage assessment reports without guidelines, archaeologists tended to have difficulty determining and justifying archaeological value, and doing so with consistency, thereby demonstrating reliability of the report as evidence (McAllister 2006:69). Because of the many different ways an archaeologist's mind can process and deduce information, outlining basic principles in suitable order is crucial to a reliable damage assessment report writing and archaeological value determinations. When those federal, state, and private archaeologists, attorneys, and criminal investigators convened at the SAA conference for determination of archaeological value, it was agreed that by first describing and identifying the damaged archaeological resource involved in the crime, not only will this lay a foundation for the loss of heritage, but it will establish the most appropriate method of scientific information retrieval, the most determinative factor in predicting and assessing costs (McAllister 2006:74).

When archaeologists weigh the scale of archaeological information projected for scientific retrieval, they must do so with the understanding that the seriousness of the offense will turn upon their idea of proportionality. Sentencing guidelines were intended by Congress to facilitate sentences proportionate to the harm caused by the defendant, represented as a monetary figure (McAllister 2006:77-78).

The SAA conference for the determination of archaeological value participants deliberately chose to keep separate the discussion of scale of scientific information retrieval from methods of scientific information retrieval in determining archaeological value. While standards on scale of information retrieval apprise the archaeologist on proportionality of damage, proposing to identify the portion of the archaeological resource actually damaged in the archaeological crime, guidelines suggest the archaeologist consider the same concept of proportionality with regards to archaeological methods projected to be involved in calculating

archaeological value. For example, if no evidence of charcoal, charred organic material, or a hearth, is visible in the damaged archaeological resource, then the archaeological value calculations should not include any carbon dating measures. This would detract from the credibility and reliability of the archaeological value figures and the damage assessment report on the whole. A judge and jury often have a difficult time accepting the costs associated with the archaeological methods without the added concern for trust in the integrity and reliability of an archaeologists' expertise and judgment (McAllister 2006:79)

When using the SAA Guidelines and NPS Technical Brief 20, professional archaeologists should be capable of generating consistent archaeological value determinations for the same damaged archaeological resource (McAllister 2006:73). Archaeological damage assessment report reliability and credibility determine whether an ARPA case will succeed (Prentice 2006:85).

ARPA succeeds the AAA's fatal challenge for vagueness

Like its predecessor the AAA, ARPA was challenged for vagueness. The drafters seriously considered the legal challenges that rendered AAA unconstitutionally void in its definition of "objects of antiquity." Clever attorneys have historically crafted savvy arguments that applied the law favorably for their defendants, however, and a challenge of this nature caused concern. In *U.S. v. Austin*, a defendant was convicted of illegally excavating a Native American archaeological site. Upon appeal, the defendant claimed his conduct was protected by the First Amendment of the United States Constitution. His argument was based on the premise that his conduct was out of academic curiosity, which is protected by academic freedom, "long...viewed as a special concern of the First Amendment," (*U.S. v. Austin*, 902 F.2d 743,744 citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S. Ct. 2733, 57 L. Ed. 2d 750

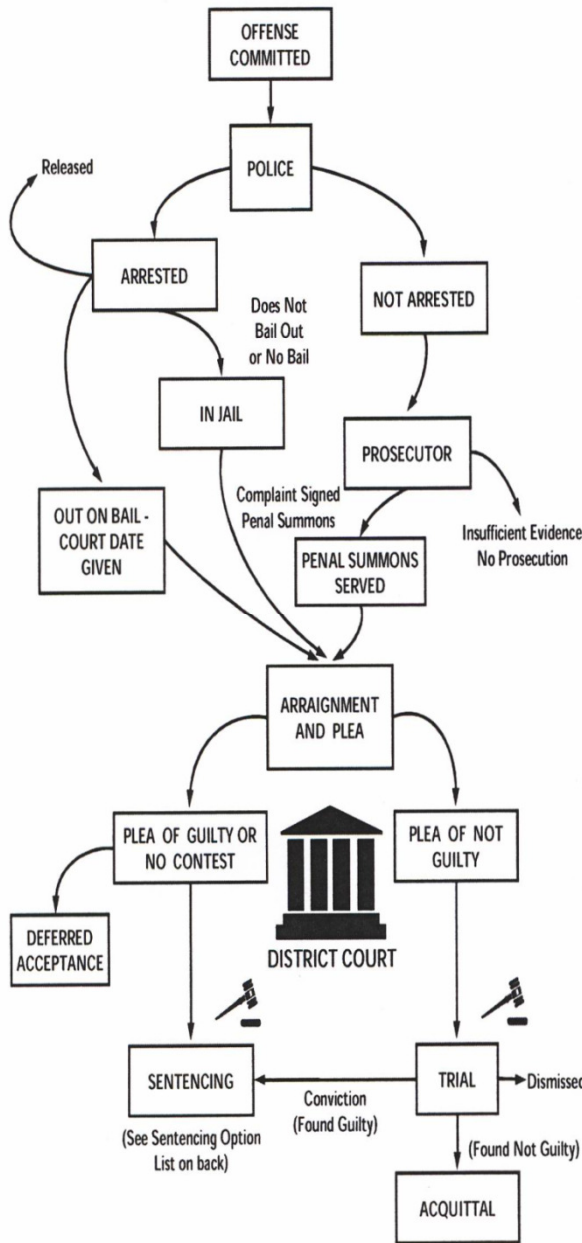
(1978)). The Court rejected this argument in part because Austin neglected to demonstrate how his curiosity was academic, especially since he was not affiliated with an academic institution. The Court further explained that the statute implicates no constitutionally protected conduct and a court should only uphold a challenge for vagueness if the statute is unconstitutionally vague in all of its applications to constitutionally protected conduct (U.S. v. Austin, 902 F.2d 743,744).

Elements of an ARPA Case

In order to convict someone of a basic criminal violation of ARPA (16USC § 470ee(a)), the assistant U.S. attorney must prove several elements. First, that there is an archaeological resource involved, that it was on public or tribal lands, that there was a prohibited act, conducted without an ARPA permit, all done with criminal intent, and that the value and or cost was greater than \$500 for a felony conviction. In the unlikely event the value and or cost was less than \$500, the assistant U.S. attorney can pursue a misdemeanor conviction (Figures 1 and 2).

In order to be convicted of a basic civil violation of ARPA (16USC § 470ff(a)(1)), the assistant U.S. attorney must prove the same elements as a criminal violation, minus the criminal intent (Figure 3). Therefore, that there is an archaeological resource involved, that the resource was on public or tribal lands, that there was a prohibited act, and the act was conducted without an ARPA permit. As with the criminal penalties, ARPA's civil penalty procedures are found in the Uniform Regulations (43 CFR 7.15-7.16). Under the enforcement section of ARPA, 16 USC § 470gg(b) states that civil penalties assessed for violations on tribal land will go to the Indian tribe involved.

Adult Misdemeanor Cases



Definitions

Acquittal — A discharge or release which takes place when the judge or jury, upon trial finds a verdict of not guilty.

Arraignment — A hearing at which the defendant is formally notified of the charges against him and at which time a plea of not guilty, guilty, or no contest is entered. If a not guilty plea is entered, the case is given a trial date.

Bail — An amount of money set by the police or court which must be posted or pledged before an accused may be released from jail, to assure the person's presence in court.

Bench Warrant — A written court order directing the police or the sheriff to arrest a person who has failed to appear at court, failed to follow a court order, or has been indicted by the Grand Jury for a crime.

Contempt — Willful disobedience to or open disrespect for a court or judge.

Defendant — A person arrested and charged with committing a crime.

Deferred Acceptance — Deferred Acceptance of Guilty Plea (DAG) or Deferred Acceptance of No Contest Plea (DANC) - A pretrial procedure under which acceptance of a plea of guilty or no contest may be postponed and the defendant eventually discharged without a judgement of guilty, upon successful completion of terms and conditions set by the court.

Dismissed — The court can dismiss the charges (the person was not actually found to be "not guilty.")

Felony — A serious crime, as opposed to a *misdemeanor*; the distinction is often made in terms of the applicable punishment, felonies being punishable by more than a year in jail.

Grand Jury — A jury of men and women made up of sixteen people who determine if there is probable cause to believe that the defendant committed the crime.

Indict — To formally accuse in writing.

Misdemeanor — A crime with a punishment of no more than one year in jail.

No Contest or "Nolo Contendere" — A Latin phrase meaning "I will not contest it"; a plea which has a similar legal effect as pleading guilty. A defendant may plead nolo contendere only with consent of the court. The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based on the same acts.

Penal Summons — An official complaint with court date set.

Plea — A defendant's answer to a charge filed against him (guilty, not guilty, no contest)

Preliminary Hearing — A proceeding in which the judge determines to whether there is probable cause to believe that the defendant committed the crime.

Probable Cause — A reasonable belief which supports that a defendant did actually commit the crime.

Prosecutor — A lawyer who represents the State in criminal proceedings responsible for bringing the accused to justice.

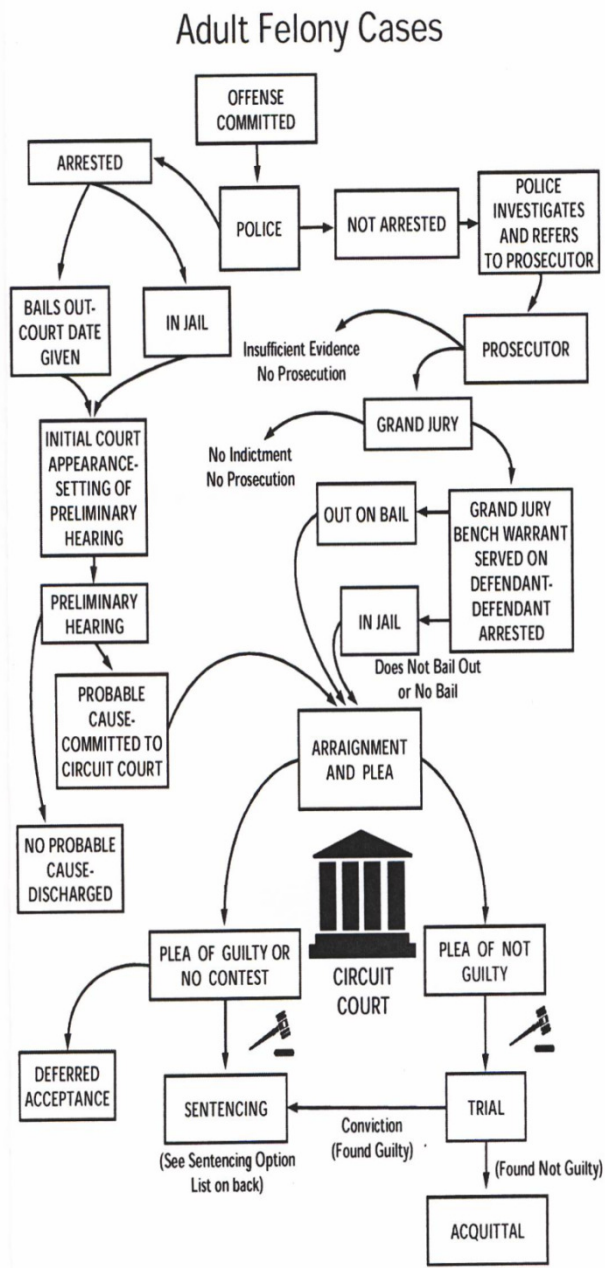
Released — After arrest, the defendant may be released with no charge, or released pending investigation.

Sentencing — After a defendant pleads guilty to a crime, or is found guilty of a crime after a trial, sentencing is the time when the court decides what punishment to give to the defendant.

Trial — A proceeding at which evidence is presented to a judge or jury who then decides whether the defendant committed the crimes charged.

Verdict — The formal decision or finding made by a judge or jury.

Figure 1: Federal Misdemeanor Case Flowchart (State of Hawaii Attorney General 2011)



Definitions

- Acquittal** — A discharge or release which takes place when the judge or jury, upon trial finds a verdict of not guilty.
- Arraignment** — A hearing at which the defendant is formally notified of the charges against him and at which time a plea of not guilty, guilty, or no contest is entered. If a not guilty plea is entered, the case is given a trial date.
- Bail** — An amount of money set by the police or court which must be posted or pledged before an accused may be released from jail, to assure the person's presence in court.
- Bench Warrant** — A written court order directing the police or the sheriff to arrest a person who has failed to appear at court, failed to follow a court order, or has been indicted by the Grand Jury for a crime.
- Contempt** — Willful disobedience to or open disrespect for a court or judge.
- Defendant** — A person arrested and charged with committing a crime.
- Deferred Acceptance** — Deferred Acceptance of Guilty Plea (DAG) or Deferred Acceptance of No Contest Plea (DANC) - A pretrial procedure under which acceptance of a plea of guilty or no contest may be postponed and the defendant eventually discharged without a judgement of guilty, upon successful completion of terms and conditions set by the court.
- Dismissed** — The court can dismiss the charges (the person was not actually found to be "not guilty.")
- Felony** — A serious crime, as opposed to a *misdemeanor*; the distinction is often made in terms of the applicable punishment, felonies being punishable by more than a year in jail.
- Grand Jury** — A jury of men and women made up of sixteen people who determine if there is probable cause to believe that the defendant committed the crime.
- Indict** — To formally accuse in writing.
- Misdemeanor** — A crime with a punishment of no more than one year in jail.
- No Contest or "Nolo Contendere"** — A Latin phrase meaning "I will not contest it"; a plea which has a similar legal effect as pleading guilty. A defendant may plead nolo contendere only with consent of the court. The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based on the same acts.
- Penal Summons** — An official complaint with court date set.
- Plea** — A defendant's answer to a charge filed against him (guilty, not guilty, no contest)
- Preliminary Hearing** — A proceeding in which the judge determines to whether there is probable cause to believe that the defendant committed the crime.
- Probable Cause** — A reasonable belief which supports that a defendant did actually commit the crime.
- Prosecutor** — A lawyer who represents the State in criminal proceedings responsible for bringing the accused to justice.
- Released** — After arrest, the defendant may be released with no charge, or released pending investigation.
- Sentencing** — After a defendant pleads guilty to a crime, or is found guilty of a crime after a trial, sentencing is the time when the court decides what punishment to give to the defendant.
- Trial** — A proceeding at which evidence is presented to a judge or jury who then decides whether the defendant committed the crimes charged.
- Verdict** — The formal decision or finding made by a judge or jury.

Figure 2: Federal Felony Case Flowchart (State of Hawaii Attorney General 2011)

How a Civil Case is Processed

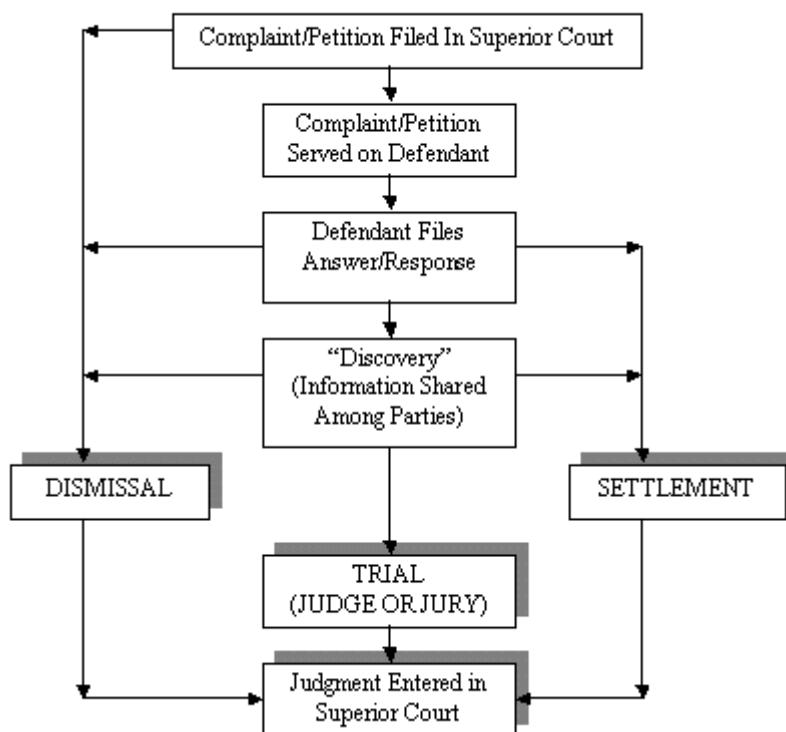


Figure 3: Federal Civil Case Flowchart

Definition of archaeological resources under ARPA

Under ARPA, the term “archaeological resource” is defined as “any material remains of past human life or activities which are of archaeological interest ... [that are] at least 100 years of age” (16 USC § 470bb(1)). The Uniform Regulations provide detailed examples of what falls under the definition. Archaeological interest includes the potential to learn and scientifically retrieve archaeological, historical, and humanistic information and data (Prentice 2006:103).

“Archaeological resource” has several exceptions. As a statutory definition, it does not include some items that may in general terms be considered an archaeological resource, for example, arrowheads found on the surface (16 USC § 470ee(g), ff(a)3). Also not included in the definition are paleontological remains (which are protected by the Paleontological Resources Protection Act (PRPA) (16 USC § 470bb(1)), coins, bullets, and unworked rocks and minerals,

unless these objects are found in a direct physical relationship with an archaeological site or other archaeological resources (16 USC § 470kk(a) and (b); ARPA Uniform Regulations, 36 CFR § 7.3(a)(4)).

Resources not protected by ARPA: Arrowhead Exception, etc.

Many archaeologists learning about ARPA's alleged limitations for the first time find the arrowhead exception infuriating. Under ARPA, "[n]o penalty shall be assessed under this section for the removal of arrowheads located on the surface of the ground" (16 USC § 470ff(a)3; also outlined at 16 USC § 470ee(g)). In that same vein, ARPA civil penalties also are not applicable (ARPA Uniform Regulations 43 CFR 7.16(a)(3)). There are several rumors as to why this is the case, usually involving a famous politician and a penchant for collecting arrowheads. One such claim, substantiated in print, suggested that during the congressional hearings in 1979, the arrowhead exception was a compromise achieved to pacify a "certain congressman from Nevada, who subsequently switched his allegiance to ethnographic baskets" (Fowler and Malinky 2006:16). Regardless of this exception, archaeologically speaking, "arrowhead" is a very specific term for a particular type of artifact that is a subclass of "projectile point." Therefore, the exception has far less a reach than might seem at first glance. If persuasively argued to a judge and jury, spear and dart points should not fall under the arrowhead exception, despite their being collected on the surface, unaffiliated with any archaeological site (McAllister 2008 Archaeological Resource Investigations (ARI) Archaeological Law Enforcement (ALE) Class, Portland, OR).

There are other legal means to prosecute those who steal or destroy the abovementioned exempt archaeological resources. Two examples are government statutes that can be used to protect those archaeological resources that do not fall under the ARPA definition of an

archaeological resource. These statutes, known as Embezzlement and Theft: Public Money, Property or Records, 18 USC § 641 and Malicious Mischief: Government Property or Contracts, 18 USC § 1361, can be used in conjunction with ARPA and will be discussed in greater depth in the next section.

Other Property Statutes to address unprotected resources

In the event the archaeological crime does not fall under ARPA, whether because the elements are not met, or because the artifact falls under one of the exceptions, there are other statutes that can apply to items removed from or vandalized on federal or tribal lands. These general government statutes are Embezzlement and Theft: Public Money, Property or Records, 18 USC § 641, also known as the “theft of government property” statute, and Malicious Mischief: Government Property or Contracts, 18 USC § 1361, also known as the “injury to government property” statute.

The theft of government property statute protects federal government property by prohibiting the injury, damage, or destruction of federal property including its theft from federal land. If the value of the stolen government property is \$1,000 or less, the misdemeanor penalty is one year imprisonment and or a \$100,000 fine. If the value of the property is greater than \$1,000, felony penalty is ten years imprisonment and or a \$250,000 fine. The misdemeanor and felony thresholds and penalties are the same as for theft of government property (18 USC § 641). These government property statutes can be charged in archaeological violations cases in addition to ARPA, or alone when ARPA is inapplicable. However, these statutes apply only to federal government property and not to tribal property.

There are separate statutes that apply to tribal property: Embezzlement and Theft from Indian Tribal Organizations, 18 USC § 1163, and Illegal Trafficking in Native American Human

Remains and Cultural Items, 18 USC § 1170, the latter of which is the criminal section of Native American Graves Protection and Repatriation Act (NAGPRA). In order for an assistant U.S. attorney to prove violations of these statutes, criminal intent must be proven. With regard to Embezzlement and Theft from Indian Tribal Organizations, the misdemeanor and felony thresholds are the same as the government property statutes above, with one exception: the felony penalty imprisonment is only five years for tribal property, as opposed to ten years for government property. The reason for this is remains unclear.

The Illegal Trafficking (NAGPRA enforcement) statute protects Native American human remains obtained without right of possession to those remains, as well as Native American cultural items obtained in violation of NAGPRA. The statute prohibits only trafficking of these items. The misdemeanor penalty for a first offense is one year imprisonment and or a \$100,000 fine. For a subsequent offense, the felony penalty is five years imprisonment and or a \$250,000 fine.

Archaeological resources must be located on public (federal) or tribal lands

For ARPA to apply, the archaeological resource must be located on federal or tribal lands. Without cultural patrimony laws in the United States establishing the government as owner of all archaeological resources, there should be a legal definition that all such resources are the property of the United States; however, this country does its best without one. The common law of finds establishes that objects embedded in the land are the property of the landowner (Gerstenblith 1995:593). However, archaeological resources found on the surface or in defined “treasure troves” may be claimed by the finder, despite the land jurisdiction on which the objects were found. Therefore, case law has established archaeological resources found on federal land as the property of the United States government. This principle was developed in an

unprecedented case regarding an underwater historic resource found on federal land by a private individual (*Klein v Unidentified, Wrecked & Abandoned Sailing Vessel*, 568 F Supp 1562 (1983, SD Fla); criticized in *In re Search & Seizure of Shivers*, 1995 US Dist LEXIS 6482 (1995, ED Tex)). This case was important to ARPA for two reasons. First, the Court found that as a result of the Property Clause of the United States Constitution, items without title found on land within federal jurisdiction are in fact the property of the government. Therefore, the United States was in constructive possession of the submerged, unidentified, wrecked and abandoned sailing vessel that was discovered by the plaintiff embedded in land that was administered and controlled by NPS and owned by United States. Second, Judge Atkins iterated the purpose behind ARPA, in essence strengthening its practice, as “the enactment of ARPA indicates a continuing interest by the government in protecting its archaeological resources from commercial excavation and pillage.” (*Klein v Unidentified, Wrecked & Abandoned Sailing Vessel*, 568 F Supp 1562, 1567-1568; U.S. Const. art. IV, § 3, cl. 2. Line 20).

Conduct ARPA Prohibits

Under 16 USC § 470ee(a), ARPA prohibits acts that include unauthorized excavation, removal, damage, alteration or defacement of archaeological resources. “No person may excavate, remove, damage, or otherwise alter or deface, or attempt ... [to do these acts to] any archaeological resource located on public [federal] lands or tribal lands unless such act is subject to a permit” (16 USC § 470ee(a)).

In *Fein v Peltier* (1996, DC VI) 35 VI 344, 949 F Supp 374, the Court held that the permit requirement under 16 USCS § 470ee(a) applied to a residential construction project where the defendant was required to exhaust all remedies under the statutory permitting process before bringing an action against the government. In this case, the defendant had transferred his interest

in his land to the NPS, retaining for himself an interest on which he claimed he intended to build a home. The defendant filed an injunction against the NPS from disallowing his alleged building excavation. His excavation resulted in the mechanical excavation of a significant archaeological site, which may have been the defendant's intent from the start. The Court held that the land was "public land" within scope of statute and the ground disturbance could be characterized as unlawful, purposeful excavation and removal of archaeological resources (*Fein v. Peltier*, 949 F Supp 374).

Mens rea: Mental States, Criminal Intent and “Knowingly”

In order to comply with Due Process under the U.S. Constitution, to convict someone of a crime, their actions have to match their mental state, that is, their criminal intent to commit those actions. Therefore under ARPA, a criminal conviction means that the actor was aware or practically certain the prohibited conduct under ARPA (i.e. excavation, alteration, defacement, removal) of archaeological resources would result. “Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate” ARPA is subject to a penalty (16 USC § 470ee(d)). In order to prove a “knowingly” state of mind, the assistant U.S. attorney must demonstrate that the defendant was conscious and aware of his or her conduct, that the defendant realizes what he or she is doing, or what is happening around him or her, and that the defendant is not acting because of accident, mistake, or ignorance (*Forsyth and Tarler* 2006:129-130). The “knowingly” requirement has become a hotly litigated issue under ARPA.

In 2000, the Ninth Circuit Court of Appeals held that ARPA is a general intent crime, meaning that the defendant must be generally aware of the facts and circumstances that constitute an ARPA crime (*U.S. v. Lynch*, 233 F.3d 1139, 1140). That ARPA includes “knowingly” instead of “willfully” suggests this statute should not require that the defendant

know that their conduct is against the law (U.S. v. Lynch, 233 F.3d 1139). It is possible for one statute to require different mental states for different elements. That a general intent statute, such as ARPA, can have some elements requiring different mental states was determined by the Court in *Staples v. U.S.* (511 US 600 (1994)). Mental states for the individual elements are determined by considering the items and activities regulated relative to a person's legitimate expectation in engaging in those regulated items and activities (Forsyth and Tarler 2006:130; *Staples v. U.S.*, 511 US 600, 619). The courts apply the *Staples* test to ascertain the level of intent required for conviction when applying the legal elements of the crime to the defendant's conduct.

In situations where the reasonable person "would hardly be surprised to learn...[their conduct] is not an innocent act," the person intending to, attempting to, or conducting an illegal act need not possess knowledge that the conduct in question is illegal (Forsyth and Tarler 2006:130-131). However, for regulations "that criminalize otherwise innocent conduct," where a person may reasonably believe the items or activities were lawful but for the statute, prosecution must demonstrate a defendant's specific intent for the element of the crime in question. Courts construe the specific intent requirement for elements of a crime that have a "long tradition of widespread lawful[ness]" so as to avoid "potentially ... impos[ing] criminal sanctions on a class of persons whose mental state ... makes their actions entirely innocent" (*Staples v. U.S.*, 511 US 600, 610; as quoted in Forsyth and Tarler 2006:130).

Under this *Staples* premise, the *Lynch* decision implies that "excavat[ing], remov[ing], damage[ing], or otherwise alter[ing] or defac[ing] any archaeological resource located on public or Indian lands [without] ... a permit" (ARPA 16 USC 470ee(a)) is "otherwise innocent conduct," or more conservatively, the conduct has a "long tradition of widespread lawful[ness]" (*Staples*, 511 US 600, 610 as quoted in Forsyth and Tarler 2006:130). This is particularly

interesting relative to one particular case of archaeological crime, the Redd case (discussed later in greater depth). U.S. District Judge Clark Waddoups, who departed significantly from the sentencing guidelines when sentencing Jeanne and Jericca Redd under various counts including ARPA, stated that the community of Blanding, Utah, has a long history of collecting artifacts that has been “justified for a number of years” (Loomis, Salt Lake Tribune (SLT) 2011; Tarler 2010:145). While this may be the opinion of Judge Waddoups, this conduct, collecting artifacts in a state where two thirds of the land is public land, is and has been illegal since the AAA was enacted in 1906.

Within the Lynch decision itself, there are potential inconsistencies as to whether the mental state “knowingly” should attach to the archaeological resource element in a prosecution’s ARPA case. The Lynch Court held that in order to determine whether “knowingly” applies to an element of an ARPA crime, the Court must apply the Staples test. Specifically, the Court used the Staples test to decide if the prosecution needed to establish whether the defendant knew the items, in this case human skeletal remains, that the defendant removed without permission from land not owned by the defendant “is usually licit or blameless conduct” (Staples, 511 US 600, 614; Lynch, 233 F.3d 1139 as quoted and discussed by Forsyth and Tarler 2006:133-134).

Remarkably, the Court found that in fact this conduct requires that the prosecution prove the defendant knew the item was an archaeological resource. This applies what many believe is “accurate law to inaccurate facts” (Forsyth and Tarler 2006:133). Specifically, the Staples test is good law, and the test is used to discern whether “knowingly” should apply to an element of law. However, according to the Ninth Circuit, the test was applied to a set of generic facts that differ significantly from those of the Lynch case. The defendant in Lynch saw a partially exposed human skull while exploring a cave when on a hunting trip on FS land in Alaska. When

interviewed by FS agents, the defendant admitted he knew he did something wrong and he knew the skull was old. He admitted that he removed the sediment from around the skull and decided to take the skull home with him to “do some research on it” (U.S. v. Lynch, 233 F.3d 1139, 1140, as cited in Forsyth and Tarler 2006:134). Upon pleading guilty to a felony conviction of ARPA, Lynch reserved the right to appeal the affirmed District Court decision that “knowingly” did not apply to archaeological resource.

The Ninth Circuit Court of Appeals, however, applied the Staples test in a generic manner, devoid of specific facts and consequently achieving an incongruous result. The court considered that the defendant collecting an item resting on the ground surface in the National Forest is innocent conduct that requires “knowingly” to attach to the element of archaeological resource. That the skull was partially exposed on the surface in part persuaded the court to find in favor of the defense attorney in applying the knowingly element to “archaeological resource,” arguing the unfairness of otherwise “innocent conduct” (Forsyth and Tarler 2006:134 quoting U.S. v. Lynch, 233 F.3d 1139, 1144-45).

Therefore, for the assistant U.S. attorney to successfully argue that a defendant engaged in prohibited conduct with an archaeological resource, the defendant must have known the objects he or she were illegally excavating were “archaeological resources” under ARPA (U.S. v. Lynch, 233 F.3d 1139, as cited in Forsyth and Tarler 2006:133-134). This application was incorrect and inappropriate because worded in more factual detail, the defendant could not assume that unearthing human skeletal remains and taking them without permission from land not owned by the defendant cannot be construed as otherwise innocent conduct (Forsyth and Tarler 2006:134; U.S. v. Lynch, 233 F.3d 1139). As held in the 7th Circuit Court of Appeals in U.S. v. Gerber, “there is no right to go upon another person’s land, without permission, to look

for valuable objects on the land and take them if you find them” (999 F.2d 1112, 1115-1116 (7th Cir 1993) as cited in Forsyth and Tarler 2006:134-135). Consequently, applying the Staples test to the more detailed facts would logically render the application of state of mind unnecessary, and therefore the prosecution would need not prove the defendant knew the archaeological resource was an archaeological resource (Forsyth and Tarler 2006:130,134).

The most detrimental result of the Lynch decision is that the “knowingly” state of mind is consistently applied to all “archaeological resources” whether on the surface or not. Some believe this was the mistake of the attorneys who argued the case, while others blame the Court who utilized an erroneous application of law in the Ninth Circuit (Forsyth and Tarler 2006:135).

Further, by attaching “knowingly” to archaeological resource, the court accredits the defendant with the potential expertise to discern archaeological interest in the item involved in the ARPA case. According to some scholars, this is the first time a court allowed a layperson to speak to a topic that has traditionally required expert testimony to establish an element such as archaeological interest. Generally, courts do not impute such detailed, scientific knowledge to the fact finder, hence the use of expert testimony. When scientific evidence is being offered in court, it must pass the Frye test, which was developed in an early polygraph case. This test essentially establishes that the scientific method used by the expert must be the accepted standard in the profession. If an expert is not required for testimony to establish archaeological interest, any layperson could inaccurately provide such testimony (Forsyth and Tarler 2006:138). This precedent could potentially open the door for other archaeological crime cases and dilute the standards within the profession of archaeology as it appears in court of law.

Additionally, depending on how creative the defense attorneys are, one could attempt to apply the “knowingly” state of mind to every element under ARPA, and it is in this vein that

ARPA is still evolving as to which facts and elements of the case the intent applies (Forsyth and Tarler 2006:132).

With the abovementioned established case law in the Ninth Circuit requiring knowledge that the illegal object is in fact an archaeological resource as defined by ARPA, the concern that the courts would continue to construe “knowingly” to apply to other elements under a criminal ARPA conviction was viable. In *U.S. v. Quarrell*, the defense attorney attempted to argue that “knowingly” must apply to the public lands requirement, specifically, that the archaeological crime was knowingly conducted on public lands (*U. S. v Quarrell*, 310 F3d 664 (10th Cir. 2002)). The knowledge requirement of ARPA, 16 USCS §§ 470aa et seq., does not extend to “located on public lands or Indian lands” element of 16 USCS § 470ee(a). The Tenth Circuit held that a defendant need not “knowingly” enter upon public lands when illegally excavating archaeological resources in the 2002 *U.S. v. Quarrell* case (*U.S. v. Quarrell*, 310 F.3d 664). The rationale specified that because it is illegal to excavate without permission from private property, knowledge that the defendant is on public rather than private land is unnecessary (*U.S. v. Quarrell*, 310 F.3d 664, as cited in Forsyth and Tarler 2006:133).

Penalties

Upon a successful case where the prosecution proves all of the above elements of a criminal ARPA case beyond a reasonable doubt, ARPA’s criminal penalties are assessed by determining if the archaeological value or commercial value and cost of restoration and repair is \$500 or less, the misdemeanor penalty is one year imprisonment and or a \$100,000 fine (16 USC §770ee(d)). However, if the archaeological value or commercial value and cost of restoration and repair is greater than \$500, the felony penalty is two years imprisonment and or a \$250,000 fine

(16 USC §770ee(d)). For a second or subsequent ARPA conviction, the felony penalty is five years imprisonment and or a \$250,000 fine, regardless of the value and or cost amounts.

Upon a successful civil case where the prosecution proves all the above elements minus criminal intent, the civil penalties section of ARPA, 16 USC § 470ff, allows the assessment of a civil penalty for a violation of the prohibited acts section of the ARPA Uniform Regulations (43 CFR 7.4(a) and (b)). They prohibit the same acts as ARPA's prohibited acts section, 16 USC § 470ee(a), such as unauthorized excavation, and 16 USC § 470ee(b), such as trafficking in archaeological resources removed illegally from federal or tribal land. The civil penalties section does not allow assessment of civil penalties for violations of 16 USC § 470ee(c), trafficking of resources taken in violation of state or local law. The maximum civil penalty assessed is the archaeological value or commercial value plus the cost of restoration and repair for the first violation, and double this amount for a subsequent violation (16 USC § 470ff(a)).

Except for crimes on tribal lands, penalties paid as a result of ARPA are not routed to the agency or department that paid the expense of the damage assessment and management of a damaged, high risk archaeological resource. Under 31 USC 3302(b), the penalties are generally directed to the U.S. Government treasury (Huckerby 2006:111).

In addition to penalties, restitution is available to recover the cost of restoration and repair under the Mandatory Victim Restitution Act (MVRA) (Huckerby 2006:111). However, as will be discussed in more detail in a later chapter, the deprivation of archaeological value is "too speculative" to recover as "actual loss" under MVRA (U.S. v. Quarrel, 310 F3d 664).

Forfeiture

ARPA's forfeiture provision tends to provide a strong deterrent to archaeological criminals. Under the Enforcement section of ARPA (16 USC § 470gg(b)), all archaeological

resources involved and all vehicles and equipment used in the violation are subject to forfeiture. Items forfeited for violations on tribal lands go to the Indian tribe involved. The loss of personal tools, equipment and vehicles often provides the defendant with greater accountability than the financial penalties as a result of a conviction. Criminologists suggest that the perception of risk is determinative in human behavior. With greater enforcement in conjunction with personal loss of equipment under ARPA's forfeiture provision, the more effective a deterrent such convictions will have on archaeological crime (McAllister 1988: 54-55).

Trafficking Provision

Under 16 USC § 470ee(b), ARPA prohibits any trafficking of archaeological resources excavated or removed illegally from federal or tribal land (16 USC § 470ee(b)). This includes acts such as selling or offering to sell these resources, in person, by phone or on the Internet.

ARPA prohibits interstate or foreign trafficking of archaeological resources obtained in violation of state or local law (16 USC § 470ee(c)). Specifically, this includes offering to sell an artifact in Arizona that was excavated in violation of New Mexico law is itself a violation of ARPA, despite that it may have been removed from non-federal lands. In essence, this means that ARPA has been extended to archaeological violation cases on private property.

The GE Mound case represents the initial successful extension of ARPA onto private property. The anti-trafficking provision, 16 USC §470ee(c), suited the facts and circumstances very well. One of the initial intentions of drafting ARPA was to address protecting antiquities on state as well as private lands. Before the idea to draft completely new legislation, management Consultant, Mark Michel of Santa Fe, NM, prepared a brief and suggested to include private and state land protection in the Department of Interior (DOI) 1977 draft 1906 AAA Amendment (Fowler and Malinky 2006:53-54). A perfectly preserved, 2,000 year old Hopewell mound

measuring 20 feet high and 400 feet in length was located on land owned by General Electric Corporation (GE). Considered one of the fifth largest Hopewell mounds sites in the United States, this site contained thousands of artifacts of all types, including stone tools and weapons of various materials, organic fabric, leather, and woods items, ceremonial and decorative ornaments including ear spools and silver panpipes, uniquely demonstrating the extensive trade networks in which the Hopewell civilizations participated (Mackey 2006:53-54; U.S. v. Gerber, 999 F.2d 1112 (7th Cir. 1993)). Here, the mound site clearly meets the definition of “archaeological resource” under ARPA; the theft of the artifacts by the contract workers clearly violated state and local law when they entered privately owned GE land outside the scope of work, without permission (i.e. trespassing) and took artifacts off GE’s land, and offered to sell the artifacts across state lines. The large-scale, backhoe destruction of the mound in pursuit of artifacts, in conjunction with interstate trafficking, is exactly the kind of archaeological resource destruction the drafters intended to prevent when they enacted ARPA.

In an unprecedented worldwide case, the ARPA provision prohibiting trafficking was used for an international manuscript theft, where pages, illegally cut from medieval manuscripts and removed from the Vatican and other cathedral libraries, were offered for sale in Ohio in violation of state law. One of the counts the defendant was charged with and pled was violation of ARPA (Mackey 2006:48). The manuscript meets the definition of “archaeological resource” under ARPA, as “material remains of past human life or activities that are at least 100 years of age, and which are of archaeological interest” (16 USC §470bb). The Ohio law prohibits trafficking in stolen property and the defendant was offering to sell the stolen manuscript pages in Ohio, thereby fully meeting provision 16 USC §470ee(c) (ARPA 16 USC §470bb, ee(c); Mackey 2006:48).

Effective use of ARPA for trial

The true success of ARPA is in the cooperation between law enforcement, archaeologists, and attorneys to appropriately ascertain the facts, place them in a legal context, argue them persuasively in court so that a judge instructs the jury sufficient for them to find the defendant guilty beyond a reasonable doubt. When a criminal ARPA case is being argued in a court of law, as with any criminal trial, the judge and jury together uphold the Sixth Amendment of the U.S. Constitution, which states

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense (U.S. Constitution, Amendment VI)

Therefore, the successful conviction involves a clever lawyer to identify the relevant rules of law, persuasively argue the facts of the case within those rules of law to the judge and jury, so that when the judge instructs the jury as to the relevant laws, the jury can apply the facts of the case to the identified laws, persuasively introduced by the attorney, and determine that the laws had been broken by the defendant (Forsyth and Tarler 2006:128).

The federal Rules of Evidence (FRE) guide the courts on whether to admit evidence and how it should be accepted in a trial. The basic premise for admitting evidence into a courtroom is that it be relevant and credible. Under FRE 401, relevance is defined as testimony that pertains to the facts at issue in the trial, helping the fact finder to better ascertain the outcome (FRE 401). Credibility is paramount to the weight given to information presented by a witness or expert witness, which is directly related to the competency and skill of the person who is offering the testimony. While the FRE can exclude irrelevant testimony, it is up to the judge and or jury to determine the amount of weight to give the expert witness testimony (Hutt 2006:146).

The FRE Rule 702 states

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case (FRE 702).

When these crimes have been successfully argued by an assistant U.S. attorney and the archaeological criminal is found guilty by a judge and jury, there are Cultural Heritage Sentencing Guidelines that provide instruction on sentencing relative to the severity of the convicted crime. The United States Sentencing Commission (USSC) established sentencing guidelines for all federal crimes. The Cultural Heritage Sentencing Guidelines, effective November 1, 2002, applies to all ARPA, NAGPRA, federal property statutes, and other statutes protecting cultural resources. It allows federal judges to take into account the severity of the offense, in addition to the criminal history of the defendant, when issuing a sentence. If the defendant has been charged with other crimes of a similar nature or is a repeat ARPA offender, this weighs favorably for a more severe sentence in a judge's criminal history evaluation. In addition to being dispositive on whether the threshold for felony and misdemeanor cases has been met, prosecution can use the dollar amounts of all three cost and value determinations together to determine the level of criminal offense for sentencing (Prentice 2006:97). Consequently, more severe sentences are possible when multiple charges under various statutes are being sought.

Unfortunately, the sentencing guidelines are only advisory and not mandatorily followed by the judge. Certain federal Circuits are accustomed to archaeological crime and consider looting a culturally acceptable past time. Recent decisions in such circuits have significantly

departed from the sentencing guidelines and issued minor sentences for defendants who committed grievous archaeological crimes, and had a criminal history of doing so. Statutes such as ARPA, 18 USC § 641, § 1361, § 1163 and § 1170 are very good enforcement tools to prosecute and deter archaeological violations; however, their success in protecting archaeological resources depends upon how well they are used and how persuasively they are argued in court.

CHAPTER 3: POLITICS AND ARPA: AN EXAMPLE IN THE TENTH CIRCUIT

The success of ARPA is largely dictated by politics. Beginning with the who sits in an office, from the president of the U.S. to a federal archaeologist, and makes decisions about federal funding, staffing, cases taken on by the U.S. Attorney's office, and conducting archaeological damage assessments on federal land, politics determines when and how ARPA is utilized. While the existence of federal cultural property statutes indicates a long running priority to protect and conserve our nation's heritage, there are a plethora of other factors that tend to demonstrate conflicting ideas on how and whether to go about doing so.

Our archaeological resource-rich Tenth Circuit² arguably has the most inconsistent history with upholding the nation's cultural resource preservation priorities. The first successful felony archaeological crime conviction under ARPA in Utah was in 1992. Upon David Woolsey and Jimmy Barney's conviction, U.S. Attorney David Jordan made a public statement that these types of crimes were "ravaging archaeological sites on public lands" and he intended to "get tough" and "aggressively prosecute this crime" (Tarler 2010:143). Despite this sentiment, six years later Woolsey was granted a pardon for his archaeological crime by then-President George W. Bush. Woolsey wanted to legally purchase a weapon, a right he lost upon his felony conviction under ARPA. He applied for a pardon on the Internet and was elated upon Bush's favorable response (Tarler 2010:143). It would seem that the branches of government are conflicted in their stance on prioritizing archaeological crime prevention, prosecution, and deterrence.

One year later, a renewed priority to prosecute and deter archaeological crime was set in motion in the Tenth Circuit. What should have been a successful ARPA "slam-dunk" for archaeological crime turned disastrous, demonstrating that archaeological crime continues a slow

² A Federal Court with jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

to climb to proper recognition in some courts. The “Cerberus Action” was a joint investigation between the BLM and the Federal Bureau of Investigation (FBI) that took place in the Four Corners of the American Southwest. The team developed a relationship with a “source” who acted as an undercover agent. This source possessed long-term, reliable connections in the Four Corners artifact collecting community (Daniel Love, BLM Special Agent, personal communication 10-22-2009). On November 30, 2006, the case officially opened, with undercover operations taking place between May 11, 2007 and November 16, 2008. The following discussion of facts is included to demonstrate that despite a positive, cooperative investigation, damage assessment, and relationship among agencies and actors involved, the judicial system may reason its decision based on local culture and politics. The purpose in recognizing this is to emphasize the need for thorough methods and procedures to eliminate any and all opportunities for a judge and or jury to decide against the prosecution in an archaeological crime case. In the end a case may fail despite a cooperative investigation, a thorough damage assessment report, and persuasive prosecution; however, it is more difficult for a judge and or jury to find in favor of a defendant when all facets of an archaeological crime presented at trial are done so in the most effective manner.

The Cerberus Investigation

On June 10, 2009, the search and arrest warrants were executed (Daniel Love, BLM Special Agent, personal communication 10-22-2009). To date, the Cerberus investigation has issued a total of 23 search warrants thus far; fourteen search warrants were issued in Utah, four in New Mexico, three in Colorado, and two in Arizona. Of the 28 individuals indicted, 27 were in Utah, and one in Colorado. While more convictions are pending, two felony convictions

occurred in Utah, along with the seizure of two collections. One arrest was made in New Mexico.

The United States District Court sealed the grand jury proceedings when it indicted 24 of the individuals under ARPA, NAGPRA, and other federal statutes. These indictments were made under several statutes in addition to ARPA, specifically the Trafficking in Native American human remains and cultural items 18 USC 1170, Theft of Government Property 18 USC 641, Theft of tribal Property 18 USC 1163, Depredation Against federal Property 18 USC 1361, Aiding and Abetting 18 USC 2, Interstate Transportation of Stolen Property 18 USC 2314, for a total of 153 counts indicted, with 11 counts convicted. This discussion will focus on information acquired from BLM Special Agent Daniel Love regarding the Redd case, which was the first of the indictments to come to pass.

According to the BLM Special Agent Love, the BLM and FBI developed a basic plan for investigation (personal communication 10-22-2009). This plan included using the source's business to exploit his access, connections, and history in the artifact collecting community. In doing this, the BLM and FBI targeted the excavators, artifact dealers, and the collectors. The investigative team planned to purchase and sell archaeological resources with illegal proveniences. While conducting the purchase and sales, the source planned to have the subjects of the investigations identify illegal excavation sites on BLM maps. Also part of the plan was to create false letters of provenience to incorporate into the charges and solidify criminal intent. The investigative team directed the source to wear audio and video surveillance equipment when visiting with predicated subjects of the investigation. All the transactions were recorded and the investigative team gathered intelligence about the illicit artifact collecting network. The investigative team successfully purchased 256 artifacts from 30 subjects for a total cost of

\$335,685. They also witnessed two active excavation sites, as well as took a total of 300 audio and visual recordings (Daniel Love, BLM Special Agent, personal communication 10-22-2009).

The Cerberus investigative team identified that the illegal network appeared to be a three-tiered organization that incorporated excavators, dealers, and collectors (also super collectors). This network conducts illegal excavations in the Four Corners region, trafficking across multiple states, including Arizona, Colorado, New Mexico, Utah, in addition to many others. The artifact collecting community and its illegal network was a very cautious, close-knit group with many family ties, and concerns with reliable “who-you-know” credibility (Daniel Love, BLM Special Agent, personal communication 10-22-2009).

There were several known concerns and impediments to the potential success of the investigation that caused concern. Of primary concern was the large number of search and arrest warrants, covering multiple locations, and the large number of artifacts covered. There are many procedural and constitutional concerns with any investigation, and cases have been thrown out for errors in the process that seem inevitable in investigations of such substantial size. The four state jurisdictions also pose logistical concerns. Another issue was the specialized training required for booking and handling evidence that includes archaeological remains that range in preservation and curational needs, as well as the introduction of museum artifacts with government provenience. These museum artifacts were used to target the appropriate subjects in the purchase and sale of illegal archaeological remains. The investigative team was also concerned with the wide cross-section of criminals involved in such networks, which nearly inherently brings concern with public corruption allegations. The use of undercover techniques in such a deeply suspicious community of excavators, dealers, and collectors was controversial and received a wide array of support and criticism. Lastly, once the cases are fully adjudicated,

there were concerns about curation and repatriation, especially with such vast amounts of artifacts from so many proveniences (Daniel Love, BLM Special Agent, personal communication 10-22-2009).

The Redd Case

As part of the Cerberus Investigations, the Redd case began with the issuance of search warrants that were served on Dr. James and Jeanne Redd on June 10, 2009. Initially the Redds were indicted on nine counts, one under ARPA and the rest under other federal statutes. In the search conducted at the Redd residence, the investigation team seized journals, computers (including digital photographs), GPS units, and artifacts. One June 11, 2009, Dr. James Redd committed suicide. On July 3, 2009, Mrs. Jericca Redd, daughter of Dr. James and Jeanne Redd, was indicted. On July 7, 2009, Ms. Jeanne and Jericca Redd pled guilty to their charges. Specifically, Jeanne Redd pled guilty to seven felony counts that included three counts of ARPA for trafficking, two counts of theft of government property, and two counts of theft of tribal property. Jericca Redd pled guilty to three felony counts, one count of ARPA for excavation, one count of theft of tribal property, and one count of transporting stolen goods (Daniel Love, BLM Special Agent, personal communication 10-22-2009). Their plea agreement included forfeiting their artifact collections to the investigative team to be appropriately catalogued, curated and repatriated. Scheduled for sentencing on September 16, 2009, by Judge Waddoups, Jeanne Redd faced up to 10 years in prison; Jericca Redd faced up to five years in prison (Church, Moab Times-Independent (MTI) 2009). Judge Waddoups held a sentencing hearing on September 16, 2009, where the assistant U.S. attorney unfortunately recommended the lower level of the sentencing guidelines. Jeanne Redd was sentenced to 18 months prison time, 36 months of probation, and a \$2000 fine. Jericca Redd was sentenced to 24 months of probation and a \$300

fine. On July 7, 2009, the United States Government took possession of the Redd artifacts collection, which consisted of 812 complete artifacts.

The archaeological and legal community anticipated this Cerberus Action investigation to change the manner in which archaeological violation cases were treated, optimistically hoping for greater numbers of detected, prosecuted, and deterred cases. Unfortunately, the informant and two defendants committed suicide. With the deaths, and inherent evidence issues with a deceased informant, the case has lost significant steam. Judge Waddoups departed significantly from the sentencing guidelines, despite Dr. and Jeanne Redd's previous convictions of a state statute protecting Native American graves. As discussed earlier, Judge Waddoups stated that the community of Blanding, Utah, has a long history of collecting artifacts that has been "justified for a number of years" (Loomis, SLT 2011). While this may be the opinion of Judge Waddoups, this conduct, collecting artifacts in a state where two thirds of the land is public land, is and has been illegal since the AAA was enacted in 1906. This indicates a lack of understanding of the severity of this crime by both the judge and jury. Lastly, the most disappointing aspect of this case is the U.S. attorney's recommendation that the judge depart from the sentencing guidelines, which could potentially be a violation of Professional Code of Ethics were the client a human being, and not archaeological resources.

CHAPTER 4: PREVENTATIVE USE OF ARPA: PERMITTING

From review of case law and publications, there appear to be two tactics for protection afforded archaeological resources on federal land under ARPA: preventative (this chapter) and reactionary (next chapter). Permitting requirements preventatively address scientific archaeological integrity and preservation by restricting access to archaeological resources to a qualified, professional community. General ARPA provisions provide procedures and guidelines for convictions that reactively respond to criminal and civil violations of the statute by imposing fines, penalties, and sentences on guilty defendants. With the recent conviction of a professional archaeologist who failed to acquire an ARPA permit (Grammer, Santa Fe New Mexican 2011) and the persistent concerns regarding reliability with damage assessment reports, a timely discussion of both preventative and reactionary provisions, processes and deficiencies under ARPA might be useful.

Permitting under ARPA

In order to conduct an archaeological investigation on public lands, a qualified person or institution may apply to the federal land manager for an ARPA permit to

excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application shall be required, under uniform regulations under this Act [16 USCS §§ 470aa et seq.], to contain such information as the federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work (16 USCS § 470cc)

ARPA's Uniform Regulations delineate permitting requirements and procedures. Due to the administrative process one undergoes to acquire an ARPA permit, it is easy to overlook the import of the permit serving as a legal contract. This contract binds an archaeologist with specified qualifications to produce an outlined standard of archaeological work that will be conducted as an agent of the United States (Hutt 2010:19). The standards under the Uniform

Regulations outline in detail the qualifications that must be met in order to acquire a permit under ARPA

1. A graduate degree in anthropology or archaeology or equivalent training.
2. The demonstrated ability to carry out a project of the type and scope.
3. The demonstrated ability to carry out research to completion.
4. Completion of 16 months of experience in archaeological research, 4 months of which are of the type of work proposed in the permit.
5. At least one year of experience in the historic period of the resources (43 CFR§7.8(a)(1)(i)-(v)(2008))

To apply for a permit, one must provide the name of a person possessing these qualifications along with their address, name of institution that may be affiliated, their education and experience, and the applicant's qualifications based on the above outlined standards (CFR§§7.8(a)(1)(i)-(v)(2008)). Tribes and their members need not apply for an ARPA permit on tribal lands if the tribe has its own established legal system (43 CFR § 7.5(b)(3)).

Once the name of the qualified applicant has been identified in the ARPA permit request, and the permit request is received by the responsible federal agency, the permit must be issued following standards outlined for what must be included on an ARPA permit under the Uniform Regulations. The permit must expressly include several pieces of information about the proposed project for which the permit is being acquired

1. The nature of the work allowed, including the scope, time and duration of the project.
2. The identified responsible individual.
3. The scientific or educational institution serving as the repository.
4. The reporting requirements.
5. Additional terms to secure the work area and safety of the project.
6. Additional terms requested by tribes for work on tribal lands (43 CFR§§7.9(a)(1)-(4) (2008))

Upon satisfying permit application requirements, a permit is approved for year-long intervals, with opportunities for extension upon formal request (43 CFR§§7.9(f)-(g) (2008)).

Under section 7.9(d), once the approved permittee begins the archaeological work, he or she is

presumed to have legally accepted the terms of the contract and therefore becomes bound by it (43 CFR § 7.9(d) (2008)). Further outlined in section 7.9(e) of the Uniform Regulations, if the permit expires before the work is complete under the standards outlined in the permit, the archaeologist continues to be bound by the obligations under the permit. This is a great tool to maintain the integrity of archaeological standards under ARPA, provided the federal land managers abide by their duties to conduct annual reviews and monitor permittee compliance with permitting requirements (43 CFR § 7.9(e)).

Federal land managers are graced with the duty to “ensure the requirements of the permitting regime are followed” (Hutt 2010:19). They are bound by ARPA to suspend a permit if the permittee is found to have violated any of the unauthorized acts that constitute a violation of ARPA; or to revoke a permit if the permittee is convicted of either a civil violation, including the imposition of a fine, or a criminal violation under ARPA (16 U.S.C. § 470cc(f)). This provision seems less utilized than circumstances could dictate. A Heritage Program Manager for the USFS expressed unease over the federal agencies’ concern for being sued if they threaten suspension or revocation of a permit, despite how appropriate the action would be under the permitting requirements (Thomas J. Turck, MA, RPA, Dakota Prairie Grasslands Heritage Program Manager, personal communication 04-11-2011). There are times when contractors are working with oil and gas companies who begin earth disturbing work without the appropriate archaeological monitor or before the preliminary archaeological survey and assessment has been conducted. In this way, permittees are tacitly condoning the oil and gas contractor’s behavior if it is not brought to the federal land manager’s attention. It could be argued that the permittee is taking part in unauthorized conduct outside the scope of a permit under ARPA, which may be

means for suspension. However, the agencies' wish to have positive working relationships with their permittees and mineral leasees, and such action is not likely.

Bolstering these duties to ensure compliance, there is the ARPA provision stating that all activities conducted under the act must be listed annually in a report (16 U.S.C. § 47011) delegated to and prepared by the NPS Departmental Consulting Archeologist (Hutt 2010:20). This provides an opportunity for ARPA permit disposition, monitoring and compliance by having an account of how many ARPA permits are issued, how many are active, and how many federal collections are in existence to better understand the current state of federal cultural resource management.

ARPA Permits and the Law

There is recent interesting case law involving ARPA permitting where attempts were made to carve out constitutional loopholes for recreational enthusiasts to legitimately pursue collecting under the color of law. One such case discussed earlier, *United States v. Austin*, the defendant attempted to allege that his conduct did not require a permit because "curiosity motivated him [to excavate and therefore]...his activity was academic, and that academic freedom therefore protects him. He further emphasized this point by identifying that academic freedom "long has been viewed as a special concern of the First Amendment" (*U.S. v. Austin*, 902 F.2d 743, 745 (9th Cir. Or. 1990); Hutt 2010:21-21). In addition to a conviction under ARPA, the Court stated that the defendant took part in prohibited conduct under ARPA without a permit, disallowing his constitutional claims of legitimate archaeological curiosity. The Ninth Circuit Court's opinion clearly upheld the permit requirements under ARPA.

In a Fifth Circuit Court of Appeals opinion, the court rejected the defendant's assertion that because the treasure trove of coins found on USFS land and was exempt as an

“archaeological resource” under ARPA, he did not require a permit to seek for and excavate it. He additionally suggested that under the common law of finds, the coins were abandoned property that he legitimately found and owned (U.S. v. Shivers, 96 F.3d 120, 121 (5th Cir. Tex. 1996)). The Court held that were Shivers to have sought a permit and succeeded, he could have legally sought for and found the trove of coins, however the coins would still be the property of the federal government under ARPA (U.S. v. Shivers, 96 F.3d 120, 121). The Court also held that under the common law of finds, any items found embedded in soil belong to the owner of the land on which the items were found (U.S. v. Shivers, 96 F.3d 120, 121; Hutt 2010:21).

With these decisions upholding the requirements for permits under ARPA, it begs an inquiry into what rights these permits bestow upon those who possess them and how the courts have affected these rights. Two circuit courts handed down rulings that are in direct conflict with each other regarding the legal basis on which their arguments relied. One Court upheld ARPA permit process and requirements regarding access to human remains in *Exhumation of Meriwether Lewis* (In re *Exhumation of Lewis*, 999 F. Supp. 1066 (M.D. Tenn. 1998)). Another Court decided a similar issue regarding access to human remains, but turned on a different application of law (*Bonnichsen v. U.S.*, 217 F. Supp. 2d 1116, 149 (9th Cir. 2004)).

In the *Exhumation of Lewis*, the human remains of the historic figure Meriwether Lewis were sought to be exhumed from their NPS resting place in Tennessee by a law professor who wished to prove that Lewis may have been murdered. An exhumation order was granted by the state, and the family supported the law professor’s case, which relied upon a nearly defunct state law that saw its last use over 100 years prior (Hutt 2010:23). Despite this, the NPS denied the law professor’s permit for exhumation because he failed to meet the necessary qualifications under ARPA’s Uniform Regulations. This decision clearly upholds the ARPA permitting

requirements that must be considered when determining access to and excavation of human remains, thereby strengthening ARPA's applicability.

The *Bonnichsen* case, however, essentially removed the ARPA permitting process from the legal purview of the case (*Bonnichsen v. U.S.*, 217 F. Supp. 2d 1116, 149; Hutt 2010:25). This case established that certain human skeletal remains, commonly referred to as the Kennewick man, were not sufficiently linked to present day Native American populations to grant custody to a coalition of Native American Tribes so seeking it. In doing so, the Court chose not to discuss and therefore neglected to uphold permitting requirements under ARPA's Uniform Regulations (43 CFR § 7.8(a)(1)(i)-(v), 7.9(a)(1)-(4)); Hutt 2010:25). Rather than rely upon the qualifications laid out under the Uniform Regulations (listed above) for those who are legally permitted to pursue ARPA study, the court chose merely to state that the applicants were "eminent scientists in the field of "First American Studies" who have written hundreds of scientific articles, papers and monographs, and have examined thousands of human skeletal remains" (*Bonnichsen v. U.S.*, 217 F. Supp. 2d 1116, 149). This potentially set a bad precedent for future cases that involve access to human remains on federal lands and that are subject to ARPA permitting procedures and requirements. As a result, there is now case-law that speaks directly to the process for evaluating claims for access to human remains that fall under the definition of "archaeological resource" under ARPA and therefore permitting requirements. These cases can now rely solely on NAGPRA, rather than benefitting from the protection of both ARPA permitting and NAGPRA protections (*Bonnichsen v. U.S.*, 217 F. Supp. 2d 1116, 148-149); NAGPRA, 18 USC 1170). As a result of the *Bonnichsen* case, the Ninth Circuit removed certain breadth of application and enforcement under ARPA permitting requirements, which are

intended to ensure integrity of scientific inquiry affecting archaeological resources and provided a different means of gaining access to archaeological sites on public lands with such safeguards.

There is an unprecedented potential legal argument that could be made on the premise that no ARPA permit is required to collect objects that are exempt from being considered an “archaeological resource” under the statute, such as coins, bullets, and arrowheads (16 U.S.C. § 470kk(b); 43 CFR § 7.5(b)(2)). If these exempt items are found in context with an archaeological site, then an ARPA permit is required to disturb them (16 U.S.C. § 470bb(1)). However, someone intending on collecting isolated occurrences of these exempt items would not require an ARPA permit (16 U.S.C. § 470kk(b); 43 CFR § 7.5(b)(2)). While it has not yet become a legal issue, it would be interesting for someone convicted of an ARPA violation to argue for a lesser charge, such as a civil violation, as a result of the lack of criminal intent.

Regardless of how cases are argued in court, there are alternative means of ensuring procedural requirements under ARPA permits are being upheld. Former Judge and National NAGPRA Program Manager for the NPS, Sherry Hutt suggests that archaeological performance bonds are one possibility to better enforce federal land manager ARPA permitting standards (Hutt 2010:25-26). By providing an opportunity to request performance bonds, the permittee would be required to conduct archaeological investigations according to the specifications within their ARPA permit, which would more effectively achieve timely, ethical results.

Hutt also suggests a way to consider the future of ARPA collections and the current management crisis by way of restricting ARPA permits. Hutt foresees the development of restricted collection practices, in conjunction with current development of federal collections regulations that permit the government to relinquish archaeological collections that no longer have archaeological interest and or are repetitive collections (Hutt 2010:26). Further, consequent

to the collections management crisis together with the difficulty in enforcing diligent and timely resolution of ARPA permittee requirements, NAGPRA compliance cases may increase. Tardy archaeologists who lack ethical commitment to produce scientific reports in a timely fashion and therefore delay compliance with NAGPRA repatriation requests are opening federal agencies up to increased litigation (Hutt 2010:27).

CHAPTER 5: REACTIVE USE OF ARPA: THE ARCHAEOLOGICAL DAMAGE ASSESSMENT REPORT

The key to a successful cultural resource crime conviction, such as once brought under ARPA, is convincing the judge and jury that the defendant knowingly destroyed an valuable resource for which there are standards for valuation under ARPA. When adequately argued in a court of law, U.S. attorneys will convince the judge and jury of the severity of the crime and consequent grievousness of archaeological loss, thereby dictating the defendants' payment to society for the error of his actions and loss of heritage to the public welfare.

One of the most effective instruments for demonstrating the seriousness of the crime in a court of law is the archaeological damage assessment report (Prentice 2006:85). This document advocates for and scientifically evaluates the archaeological resources that were damaged, identifies the type and extent of damage to the resource, articulates the loss in a way that speaks to the judge and or jury, and suggests an economic value that dictates thresholds and guides the judge in determining the penalties, restitution, and jail time relative to the seriousness of the defendants conduct.

Adequately trained archaeologists must follow several guidelines regarding content, organization and style, in drafting an archaeological damage assessment report. Standardizing the report bolsters its reliability and credibility by providing some semblance of consistency with valuing resources that differ so significantly from archaeological site to archaeological site (Prentice 2006:85). Because so many reports inconsistently apply the guidelines, their credibility is at stake in courtroom proceedings and ARPA and other cultural resource statute convictions are failing as a result (McManamon 2007). There are certain areas that are easily identified in rendering a more reliable and therefore effective case. Regarding content and organization, the archaeological damage assessment model consists of a title page, a summary, a table of contents,

an introduction to the archaeological resource and its violation, a description of the site and the archaeological resources, a description of the damage assessment procedures under ARPA or another cultural resource protection statute, a description of the archaeological resources affected, the cost and value determinations under ARPA or another cultural resource protection statute, such as emergency restoration and repair, commercial value, and archaeological value, and the references cited (Prentice 2006:87; NPS Technical Brief 20 2007).

Preparer of Damage Assessment Report

With many years of expertise in archaeological damage assessment, Martin McAllister, M.A., R.P.A, author of NPS Technical Brief 20 and leading expert on archaeological damage assessment, made several observations regarding qualifications and time management necessary for the preparer of the damage assessment report. First, the archaeologist who prepares the report must be qualified to conduct an archaeological damage assessment. Ideally he or she received training specific to archaeological damage assessment preparation; too often agency archaeologists are handed NPS Technical Brief 20 (McAllister 2007) without truly understanding the stringency with which these reports are evaluated or the true weight they have in trial.

The archaeologist must also be capable of developing a reasonable yet exhaustive budget for an archaeological project. Specifically, he or she must be able to assess the cost of scientific information retrieval proportionate to the damaged archaeological resource, including line by line explanations as to the inclusion of necessary costs. The adequacy of this is paramount to the judge and jury finding the costs outlined in the budget as reasonable and necessary, establishing credibility in the expert witness, the archaeologist, and his or her damage assessment report.

Further, these agency archaeologists are seldom afforded adequate time to complete a thorough archaeological damage assessment report. At times, archaeologists are required to tend to their regular professional duties in addition to preparing a damage assessment report in a less than ideal time frame (McAllister personal communication 11-11-2011). An archaeological damage assessment report takes weeks to adequately prepare, and such preparation is necessary for a successful document that will be used in a cultural resource damage trial. Appropriate time spent in preparing, drafting and editing is crucial to a successful trial.

Lastly, the archaeologist who prepares the report must be available and prepared for a trial. Therefore, he or she should be fully educated in the culture history local to the damaged archaeological resource and meet all professional standards within the field of archaeology (Prentice 2006:105). Upon giving testimony at trial, an expert witness' professional reputation is also on trial. The defense attorney will likely try to identify the weaknesses in the archaeologist's method, knowledge, career, and certainly the damage assessment report. Therefore, that the archaeologist is fully educated and credentialed in a reasonable, professional career can be pivotal to a successful cultural resource damage case.

It has been recently proposed that the SAA adopt a new standard requiring peer review of all archaeological damage assessment reports (McAllister et al. 2011:2). Due to the experienced authors' observations of the many failings of archaeological damage assessment reports, the idea behind expert witness assurances developed under the Daubert case became relevant and advantageous for review of damage assessment reports. This would bolster credibility and reliability in courtroom proceedings (McAllister et al. 2011:3). Failings observed by the authors include gross miscalculations in archaeological value dollar amounts, disproportionate assessments of the damaged areas of the site relative to the entire site, in addition to unjustified

dollar values without cause or explanation in the report (McAllister et al. 2011:3-4). Having a peer professional archaeologist with adequate qualifications and experience review an archaeological damage assessment report would remove a great deal of negligent mistakes or misunderstood concepts within the report writing procedures. This would lead to more accurate damage assessment reports, ultimately bolstering the overall credibility of the instruments as evidence in a criminal or civil proceeding in an archaeological crime case (McAllister et al. 2011:5).

Archaeological Damage Assessment Report Basics

To maintain consistency in formalistic details of the damage assessment report, one must start with the beginning and follow an outline (Figure 4). The title page must provide the relevant information about the author and his or her qualifications, the components of the assessment, and any identifying case information, such as date and record number (Prentice 2006:88; Martin McAllister personal communication 11-18-2008). The summary should be able to inform the reader of key elements of the case while not exceeding one typed page. A quick glance at this document should indicate essential details of the archaeological violation (Prentice 2006:88). This enables the attorney to more efficiently peruse the facts and circumstances of the case and better utilize time preparing for trial, rather than understanding the nature of the case (Prentice 2006:86). Elements of the offense charged should be spelled out and consequent costs associated with the archaeological damage should also be articulated. A concise and lucid document speaking directly to all elements of the case, using the language of the statute and applying it to the facts, will thereby avoid the case being dismissed (Prentice 2006:86-87). Other factual details, such as time and place as well as the legal elements of the crime, should be clearly and succinctly identified (Prentice 2006:89). This provides judges, attorneys, jury panelists and

1. Introduction

Describe how you became involved in the case and the details of your participation.

2. Archeological Resource Description

Show that all aspects of ARPA's archeological resource definition are met.

In establishing that the archeological resource has archeological interest, discuss both scientific interest and humanistic interest.

3. Field Damage Assessment Procedures

Describe the field damage assessment procedures carried out.

4. Archeological Resource Damage

Describe the damage to the archeological resources in terms of the acts prohibited by ARPA or other statutes and state the total amount of damage. Photographs and a map or maps should be included as figures to illustrate the extent of damage and profile drawings may also be useful for this purpose in cases involving excavations.

5. Value and Cost Determinations

Identify the value and cost determinations carried out. For example, as was noted above, some cases may involve an archeological value and cost of restoration and repair determination, but not a commercial value determination. A government archeologist may determine the cost of restoration repair, a contract archeologist may determine archeological value and a third archeologist or an appraiser may determine commercial value.

a. Commercial Value

Describe the procedures carried out in determining commercial value (see above) in text that clearly and convincingly explains the method(s) used in making this determination.

b. Archeological Value

Describe the procedures carried out in determining archeological value in text

c. Cost of Restoration and Repair

Describe the procedures carried out in determining the cost of restoration and repair in text that clearly and convincingly explains what each emergency and projected restoration and repair operation is and why it is necessary to carry it out to restore and repair the archeological resource.

6. Conclusions

State the damage assessment report's conclusions. When figures have been developed for any or all of the three value and cost determinations, commercial value, archeological value and cost of restoration and repair, state these figures again in the Conclusions section.

7. Summary

Summarize the damage assessment report and its findings.

Figure 4: Archaeological Damage Assessment Report Outline (McAllister 2007)

others a means to quickly assess whether the case is better suited as a felony or misdemeanor criminal violation, or a civil violation of the cultural resource protection statute. The introduction is where the author must “set the stage” for the entire case, outlining the legal theory under the statute and basic information that will follow in greater detail. Like the summary, this should provide details of the conduct that is in question, how the conduct falls under the scope of the statutory violation, when and how the investigation involved the archaeologists, and any other relevant actors, times, and dates. Most important throughout these early features of the report is using the language of the statute, such as ARPA, when describing the facts of the case. Ideally there should be no question in the judge’s mind, or among the jury panelists, that the elements of ARPA are met by the facts of the case (Prentice 2006:90; NPS Technical Brief 20 2007).

Writing an adequate “Archaeological Resource Description” may be the most pivotal aspect of the persuasiveness of the archaeological damage assessment report (Prentice 2006:91; McManamon 2007). To successfully argue either a criminal or civil violation of ARPA for example, the report must demonstrate three necessary facts about the archaeological resources involved in the crime. The writing must clearly identify that the resources are at least 100 years of age, that they are of archeological interest, and that they were located on either federal lands or transported over state lines in violation of state or local law. The archaeological resource description must also include any research or historical documentation that occurred prior to the damage and preparation of the damage assessment report. In the absence of any prior research, it should be explained clearly and simply how the age and culture of the site are attributed to the archaeological resource, if it is known (McAllister 2007; Prentice 2006:91). According to McAllister, most archaeologists fail to adequately describe the resources in a narrative style that appeals to laypeople, and include scientific detail without necessary explanation. It is best to

persuasively write the description using statutory language integral to defining archaeological resources and archaeological interest (Martin McAllister 2008 ARI Archaeological Damage Assessment (ADA) Class, Elephant Butte, NM). Archaeologists must resist the temptation to describe the damage in the archaeological resource description, or describe the archaeological resource in a more grandiose manner than appropriate. Accuracy is paramount to credibility. There are often defense expert witnesses that will testify that the prosecution's archaeological damage assessment report is unreliable and therefore not credible (McAllister 2008 ARI ADA Class, Elephant Butte, NM).

Like any scientific report, the damage assessment report must clearly outline the damage identification and assessment procedures. The clearer this section is, the more useful the report will be. However, the report should be written so that a person of average intelligence can understand it. Those who will rely upon it will not include archaeologists, but jury members and law enforcement, as well as prosecutors and judges. Any technical language that cannot be avoided should be explained in detail, and the metric system should only be used in conjunction with the English. An overly technical report could destroy an ARPA case at trial by confusing or aggravating the judge and jury. Even worse, the report could be so technical as to miss the humanistic component, especially in the archaeological resource description, and render the attorney ill equipped to convey the value of the illegally damaged or destroyed archaeological resource to the court (Prentice 2006:86; NPS Technical Brief 20). Including tables, maps, and photographs are a persuasive tactic that may help substantiate this section (Prentice 2006:92). It is important that the archaeologist avoid describing the damage in a more severe manner than can be substantiated by the data. The defense may find certain conclusions of the prosecution's damage assessment report inaccurate. However, upon adequate and therefore reliable written

descriptions of the damage identification and assessment procedures, the report may still lead the judge and or jury to a successful conviction as a result.

Another area where archaeologists generally fail in their damage assessment reports is the identification of the archaeological resource involved in the violation. Proportionality in this section is crucial to the entire damage assessment process (McAllister 2008 ARI ADA Class, Elephant Butte, NM). Many sites suffer damage on more than once occasion. If there is damage from earlier criminal or civil conduct, the author must resist the temptation to include it under allegations and calculations for the offense being tried. Despite the merits of the case, indulging the greedy archaeologist's temptation to include damage unsubstantiated by the facts of the case exposes the case to risks, and the reliability of the report may be diminished and could, upon belated objection at trial, nullify a jury, and or the report itself may not pass the "reliability" test of federal Rule of Evidence 702, and it may be thrown out of evidence entirely (Prentice 2006:96).

Some archaeological damage assessment experienced archaeologists find it useful to include supplemental information to aid in conveying to the judge and jury the field of archaeology and what it entails. An example of some such information that have supplemented past damage assessment reports include a glossary of terms, resource specific background publication or documentation on the damaged resource, and any traditional cultural information regarding the value of the damaged resource to the living people (Prentice 2006:105).

Value and Cost Determinations are perceived by many to be the most dispositive to a successful damage assessment report and therefore ARPA conviction (Prentice 2006:96). Despite the difficulty and discomfort of archaeologists assigning dollar values to archaeological resources, it remains the most effective (and only) means of conveying the severity of the crime

so the judge can assess suitable restitution, fines, penalties, misdemeanor or felony sentences. Under the ARPA Uniform Regulations, three different calculations of cost determinations are considered for the ARPA damage assessment: cost of restoration and repair, commercial value, and archaeological value (Uniform Regulations, 43 CFR §§7.1-7.21; NPS Technical Brief 20, 2007). Deciding whether an ARPA violation should be tried as a misdemeanor or felony depends on the calculation of either the cost of restoration and repair in conjunction with commercial value, or cost of restoration and repair in conjunction with archaeological value. The felony threshold is five hundred dollars (Uniform Regulations, 43 CFR §7.14); therefore, because it is relatively easy to reach this financial threshold when conducting an archaeological damage assessment in most cases, prosecution should always try for a felony conviction first, with the option of pleading down to a misdemeanor.

Cost of Restoration and Repair

How the dollar amounts are computed is outlined clearly in the ARPA Uniform Regulations (43 CFR §7.14). Cost of restoration and repair is

...the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include but need not be limited to, the costs of the following: (1) Reconstruction of the archaeological resource; (2) Stabilization of the archaeological resource; (3) Ground contour reconstruction and surface stabilization; (4) Research necessary to carry out reconstruction or stabilization; (5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance; (6) Examination and analysis of the archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved; (7) Reinterment of human remains..., [and] (8) Preparation of reports relating to any of the above activities (Uniform Regulations, 43 CFR §7.14(c)).

This provision includes two components: emergency restoration and repair, such as the dollar amount incurred by the agency in having an archaeologist record the crime scene (ideally with the help of law enforcement) and prepare the damage assessment report; and projected

restoration and repair, which are the projected costs necessary to return the damaged archaeological resource as close to its previous condition as possible (Figures 5 and 6) (McAllister 2007; McAllister 2008 ARI ADA Class, Elephant Butte, NM).

Commercial Value

Commercial value under ARPA is relatively simple:

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

“Fair market value” is established in many different ways. “Fair market value” is defined by Treasury Regulations as

the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts (Treasury Regulation Sec. 20.2031-1(b)).

Examples of fair market value include appraisals by artifact specialists and or dealers, academic records, contract for purchase price, buyers’ guides, prices posted on internet websites, estate and insurance appraisers (Prentice 2006:99). When considering using an appraiser, some believe it is important to acquire more than one appraisal to ascertain reliability of a commercial value and credibility of the expert (Prentice 2006:99-100). Others believe having more than once can detract from credibility in the event of trial; however, requesting confirmation of a commercial value from one appraisal with another appraiser can also serve the same effect for a trial-reliable result (McAllister personal communication 01-12-2012). Commercial value depends as much on dollar value as it does on the ability of the appraiser to justify the method used to ascertain the value (Yeaman 2006:115). Therefore, choosing an appropriate appraiser is critical.

Emergency Restoration and Repair

Operation	Units @ Per Unit Cost	Line Item Cost
1) Examination and analysis of damage to site by Corps Archaeologist (salary)	40 hours @ \$97.17 / hour	\$3,886.80
2) Travel to / from [name withheld] by Corps Archaeologist for examination and analysis of damage to site	4 vehicle days @ \$60.00 / day	\$240.00
3) Examination of information available on site by ADIA Archaeologist McAllister	24 hours @ \$150.00 / hour	\$1,800.00
4) Examination and analysis of damage to site and supervision of 3D laser scanning of damage by ADIA Archaeologist McAllister (salary)	16 hours @ \$150.00 / hour	\$2,400.00
5) Travel to / from [name withheld] by ADIA Archaeologist McAllister for examination and analysis of damage to site and supervision of 3D laser scanning of damage	20 hours @ \$50.00 / hour (travel hours) 600 driving miles @ \$0.50 / mile 3.5 lodging and meal days @ \$116.00 / day	\$1,706.00
6) 3D laser scanning of damage to site by LandAir Surveying (lump sum cost including salary, travel, and data processing)	1 3D laser scan @ \$8,450.00	\$8,450.00
7) Examination and analysis of damage to site for conservation treatment purposes by Conservator Dean (salary)	8 hours @ \$124.75 / hour	\$998.00
8) Travel to / from [name withheld] by Conservator Dean for examination and analysis of damage to site for conservation treatment purposes	10 hours @ \$65.00 / hour (travel hours) 1 ground transportation to / from [name withheld] airport @ \$45.00 1 airfare, [name withheld], round trip @ \$350.00 1 lodging and meal day @ \$116.00 / day 1 rental car and fuel charge @ \$100.00	\$1,261.00
9) Preparation of conservation treatment report by Conservator Dean	8 hours @ \$124.75 / hour	\$998.00
10) Development of value and cost determinations for damage to site by ADIA Archaeologist McAllister	60 hours @ \$150.00 / hour	\$9,000.00
11) Preparation of draft archaeological damage assessment report by ADIA Archaeologist McAllister	60 hours @ \$150.00 / hour	\$9,000.00
12) Preparation of final archaeological damage assessment report by ADIA Archaeologist McAllister	12 hours @ \$150.00 / hour	\$1,800.00

Emergency Restoration and Repair Subtotal: \$43,339.80

Figure 5: Cost of Emergency Restoration and Repair Determination for the [name withheld] Site (McAllister 2011)

Projected Restoration and Repair

Operation, Equipment, and / or Materials	Units @ Per Unit Cost	Line Item Cost
1) Consultation with [name withheld] Tribe by Corps archaeologist on conservation treatment	4 hours @ \$97.17 / hour	\$388.68
2) Consultation with SHPO by Corps archaeologist on conservation treatment	4 hours @ \$97.17 / hour	\$388.68
3) Conservation treatment of damage to site (removal of graffiti defacements by solvent and laser use) directed by Conservator Dean (Specific operations, equipment, and / or and materials documented in Dean report [see Appendix B to this report])	(Specific units and per unit costs documented in Dean report [see Appendix B to this report])	\$211,446.00 (Specific line item costs documented in Dean report [see Appendix B to this report])

Projected Restoration and Repair Subtotal: **\$212,223.36**

Total Cost of Restoration and Repair: **\$255,563.16**

Figure 6: Cost of Projected Restoration and Repair Determination for the [name withheld] Site (McAllister 2011)

Accredited and or certified appraisers are important components of reliable and credible determinations of commercial value. Uniform Standards of Professional Appraisal Practice (USPAP) compliance is one such method of demonstrating reliability in court and withstanding cross examination at trial, a useful tactic in proving the reliability of the expert witness, or lack thereof. Estimates, while helpful in gathering information to ultimately make a determination of value, are casual approximations of value, not appraisals. Actual appraisals include looking at many levels of market context, such as pre-auctions estimates in conjunction with actual price paid from a gallery or auction house (Yeaman 2006:118). Several terms used synonymously by laypeople possess different definitions when in the context of appraisals. “Price” is distinct from “cost” which is distinct from “value.” “Price” is the dollar amount asked in exchange for title and possession of the object. “Cost” is the dollar amount paid in exchange for title and possession of

the object. “Value” is a much more expansive concept that can include both price and cost, however also includes market history, appraisal theory, and economic analysis (Yeaman 2006:116).

There are different types of appraisers and therefore a variety of appraisals that range in quality, adequacy and suitability for individual cases. Generalists in appraisals should be considered with caution. Some appraisal markets are well documented and reliably published, making it more reliable for a generalist or novice appraiser to conduct an appraisal of a popular work of modern art, for example. However, areas such as Native American cultural patrimony are very poorly understood by the appraisal community, and should be assigned to a specialist. A quality to be mindful of that is an indication of an appraiser who follows the ethics and standards within the field, when an appraiser is lacking expertise in the area for which the appraisal is being sought, the appraiser should seek specialized assistance and let the client know in writing (Yeaman 2006:121). As with any expert in a trial, especially one involving archaeological damage, the appraiser should act as a tool for the assistant U.S. attorney, not an advocate for the object of archaeological interest (Yeaman 2006:124). An unreliable appraisal in an archaeological damage assessment report, or one with an agenda, could destroy any case at trial.

Most recently, the Tenth Circuit Court of Appeals held that “auction value” based on prices published in an auction catalogue can be used as a measure of fair market value under ARPA (U.S. v. Max L. Ary, 518 F.3d 775 (10th Cir. 2008; Tarler 2009:188). Regardless of how the commercial value is computed, the archaeologist must recognize that the dollar amount must be articulable, credible, and reliable. Verifying one’s appraisals with an unbiased third-party may reduce any risk that the defense will introduce evidence that diminishes credibility of the prosecution’s commercial value numbers.

Archaeological Value

Perhaps the most misunderstood dollar amount in the entire damage assessment process, archaeological value causes confusion within the archaeological community and therefore can destroy credibility if not adequately articulated and justified so that the average member of a jury panel can relate the costs to reasonable and necessary scientific inquiry. Under the Uniform Regulations, ARPA provides that

Archaeological Value ... shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the cost of retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential (Uniform Regulations, 43 CFR §7.14(a)).

Logically formulated, archaeological value projects the cost to scientifically investigate the damaged portion of the archaeological site to next scientific unit using current scientific methods (Figure 7) (McAllister 2007; Uniform Regulations, 43 CFR §7.14(b)). In assembling the budget, the author must explain each item included in the budget, line item by line item, so that the judge and jury understand where the costs come from and trust that the dollar amount is reasonable, reliable, and credible. Proportionality comes into play once more (Prentice 2006:100). The archaeologist must consider the quantity and types of resources that were directly affected by the damage, again resisting the urge to claim the entire site was damaged as a result of a two by two meter unauthorized excavation (McAllister 2008 ARI ADA Class, Elephant Butte, NM).

While computing costs of an archaeological violation involves unique measurements and elements in each case, there must be a standard for compiling incurred costs and articulating them relative to the damaged archaeological resource. Some argue that “there is no one way of conducting an archaeological damage assessment investigation” (Prentice 2006:102). This author

Archaeological Value Determination

Operation	Units @ Per Unit Cost	Line Item Cost
1) Background research by Corps archaeologist on site and rock image panel	40 hours @ \$97.17 / hour	\$3,886.80
2) Research design preparation by Corps archaeologist	40 hours @ \$97.17 / hour	\$3,886.80
3) Consultation by Corps archaeologist with [name withheld] Tribe regarding research design	16 hours @ \$97.17 / hour	\$1,554.72
4) Travel to / from [name withheld], by Corps archaeologist to consult with the [name withheld] Tribe on research design	8 hours @ \$97.17 / hour 3 vehicle days @ \$60.00 / day 2.5 days per diem @\$116.00 / day	\$1,247.36
5) Pre-field work by Corps archaeologist to arrange for 3D laser scan fieldwork	8 hours @ \$97.17 / hour	\$777.36
6) 3D laser scan of rock image panel by LandAir Surveying (lump sum cost including salary, travel, and data processing)	1 3D laser scan @ \$8,450.00	\$8,450.00
7) Supervision of 3D laser scan by Corps archaeologist	16 hours @ \$97.17 / hour	\$1,554.72
8) Travel to / from [name withheld], and site location by Corps archaeologist to supervise 3D laser scan of rock image panel	8 hours @ \$97.17 / hour 3 vehicle days @ \$60.00 / day 2.5 days per diem @\$116.00 / day	\$1,247.36
9) Analysis and interpretation of 3D laser scan results by Corps archaeologist	80 hours @ \$97.17 / hour	\$7,773.60
10) Consultation with [name withheld] Tribe on results of research by Corps archaeologist	16 hours @ \$97.17 / hour	\$1,554.72
11) Travel to / from [name withheld], by Corps archaeologist to consult with the [name withheld] Tribe on results of research	8 hours @ \$97.17 / hour 3 vehicle days @ \$60.00 / day 2.5 days per diem @\$116.00 / day	\$1,247.36
12) Preparation of scientific report on results of research by Corps archaeologist	80 hours @ 97.17 / hour	\$7,773.60
13) Electronic distribution of scientific report by Corps archaeologist	8 hours @ \$97.17 / hour	\$777.36

Total Archaeological Value:

\$41,731.76

Figure 7: Archaeological Value Determination for the [name withheld] Site (McAllister 2011)

wholly disagrees. While there is no one-size fits all calculation to the value of all archaeological sites, there is sufficient direction and guidance to suggest that there is “one” way to conduct an archaeological damage assessment. NPS Technical Brief 20, 2007 clearly outlines procedures so that an archaeologist can compute the cost and determination numbers in a reasonable and credible manner that a judge and or jury understands, articulate and assemble a damage assessment report. Consistent method and approaches are essential to a successful case preparing for trial (Canaday and Swain 2006:31).

This sentiment stated above leads many archaeologists to believe they can refer to NPS Technical Brief 20, 2007, on their own, loosely follow it and adequately conduct an archaeological damage investigation and assemble a successful damage assessment report. It would be most advantageous for archaeologists, lawyers, and law enforcement alike to thoroughly learn what goes into a credible and reliable archaeological damage assessment investigation and report. This would provide multiple opportunities for a prosecution to recognize an inadequate damage assessment report or investigation before entering the courtroom, saving time, money, and resources for successful archaeological crime prosecutions.

Choosing to use archaeological value rather than commercial value often depends on whether there is a damaged archaeological site, or merely illegally obtained artifacts in a commercial setting (Tarler 2009:180). At times, however, because many who are involved with ARPA and other archaeological resource protection statutes are not thoroughly aware of how best to implement it, some assistant U.S. attorneys occasionally supply commercial value when archaeological value would have been more advantageous or logical.

In *U.S. v. Kenneth Spry*, No. 5:08CR50031-001 (W.D. Ark. Sentence Nov. 24, 2008), the defendant, Spry, pled guilty to one misdemeanor count of violation of ARPA. At the sentencing

hearing, the judge handed down 36 months of probation, a \$500 fine, and \$3,288 in restitution. Spry was observed by USFS law enforcement in the Ozark National Forest with soil on his hands and bulging back pockets. After lawfully searching the defendant and recovering twelve projectile points and one piece of metal, the defendant admitted that he engaged conduct that was prohibited by ARPA and led the officers to the illegally excavated holes that he dug. There was no computation of archaeological value conducted. Cost of restoration and repair was estimated at \$3,288, and commercial value was estimated around \$84 (U.S. v. Kenneth Spry, No. 5:08CR50031-001 (W.D. Ark. Sentence Nov. 24, 2008)). There is no doubt that were an archaeological value computed, the dollar amount would have been greater than \$500, and therefore this crime could have been charged as a felony. Some might feel that collecting twelve projectile points should not lead to a felony conviction. However, if digging holes and collecting archaeological resources justifies a dollar amount within the archaeological damage assessment that raises the charges to meet the felony threshold, there could be no better way to deter such conduct in the future than to advantageously prosecute these crimes.

In rare circumstances, the Judge will make mention of this principle, as occurred in U.S. v. William Paul Rogers (No. 4:07-CR-22-001 (E.D. Tenn. Sentence Mar. 31, 2008)). In this case, the defendant, Rogers, was seen digging at a known, recorded archaeological site. Upon being questioned by the Tennessee Valley Authority Police, Rogers admitted to his conduct and showed the police all the artifacts he had unearthed. All the artifacts, vehicle, and equipment were seized. The defendant conducted an unauthorized excavation in a 120 x 60 foot area, however, neither the archaeological value nor the cost of restoration and repair was calculated. The Judge demonstrated concern that none of these values were known during Rogers' sentencing hearing (US v. William Paul Rogers, No. 4:07-CR-22-001). That the judge was aware

of and concerned by the lack of archaeological value and cost of restoration and repair is an indication that the court system is integrating the formal damage assessment process, an ARPA success. However, that the prosecution did not prepare a formal damage assessment including these crucial components demonstrates a need to publish professional articles, or somehow heighten awareness of successful use of ARPA in the cultural resource community.

Archaeological value versus commercial value (Fair Market Value) was the turning point of *Arizona Silica Sand Co. v. Acting Navajo District Area Director, Bureau of Indian Affairs*, IBIA 94-186-A (October 21, 1996). In an administrative hearing, the Court affirmed the use of commercial value when neither intentional damage to the archaeological resource nor artifact collection occurred, nor was there any indication of “commercial profiteering” (Iraola 2004:251). While it was determined that the method used to quantify commercial value was not “optimum,” it complied with the appropriate standards. The dollar amount totaled \$70,672, sufficient for a felony conviction, and the judge affirmed.

Archaeological value and “actual loss” entitled to restitution

There is difficulty attributing a dollar value to archaeological resources, especially when measuring to calculate “actual loss” to the resource as outlined in Uniform Regulations (43 CFR 7; Iraola 2004:244; *U.S. v. Shumway*, 112 F.3d 1413; Zitter 2011:17; *U.S. v. Quarrell*, 310 F3d 664). The concept of actual loss of the archaeological value of the damaged resource is truly complicated and one of proportionality, as mentioned earlier. It seems impossible to articulate the actual loss of archaeological value in a manner that is legally defensible, and there are standards that exist to aid in appropriately doing so under the Uniform Regulations and ARPA. Often this concept, however, requires further determination and validation in a court of law.

In *U.S. v. Quarrell*, the district court erred by not including archaeological value in determining the amount of restitution for ARPA violations (310 F3d 664). The Court reasoned that under the MVRA, restitution must be based on actual loss. The Court explained that because archaeological value is determined on an archaeological excavation that may never have come to pass, it is a hypothetical value and the defendants cannot therefore be ordered to pay restitution on such “speculation” (*U.S. v. Quarrell*, 310 F3d 664, Zitter 2011:17). While the court is not incorrect that archaeological value is a hypothetical dollar amount representing an expert’s educated estimation of what it would have cost to scientifically excavate the damaged portion of the archaeological resource, had the damage not occurred, it is the only means of attributing value to the loss of the archaeological resource. Further, this educated and practiced method is outlined as the valuation process for archaeological resources in ARPA’s Uniform Regulations, which should render it sufficient for restitution under MVRA. MVRA states

Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense. *18 U.S.C. § 3663A(a)(1)*.

Case law has established that the United States government can represent a victim of an offense.

Subsection (c) provides that

this section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense (A) that is . . . (ii) an offense against property under this title . . . and (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss. *Id. § 3663A(c)(1)*

Therefore, that archaeological crime causes harm to federal lands and the government as a victim is a legally defensible statement. That the MVRA should permit the projection of cost for scientifically retrieving archaeological and historical data as a measure of harm to be compensated by restitution is reasonable. Under a wrongful death case, restitution is a remedy

for the loss of the life of a child at birth by negligence. The measure of harm is determined by projecting the monetary value of the child's life were the child to have not suffered a wrongful death. If a court can reason that this speculation is sufficient as "actual loss" under the MVRA and entitled to restitution, then archaeological value is certainly a harm that the MVRA should foreseeably set right.

It is appropriate that under the Uniform Regulations and case law, archaeological value represents the only "actual loss" conceivable for the loss of value in a damaged or destroyed archaeological resource; restitution should be allowable for archaeological value, as it is the type of loss that the drafters of the MVRA intended to restore.

CHAPTER 6: CONCLUSION: CONSISTENCY, RELIABILITY, AND PERSISTENCY

Archaeological crime has historically been, and continues to be, a significant threat to our Nation's vanishing archaeological resources. Enforcing federal property rights in cultural resources that exist on federal and tribal lands under the ARPA, in addition to Embezzlement and Theft, and Malicious Mischief, and other federal statutes, is the most feasible and effective way to address the crisis. In order to exercise these rights, federal land managers and archaeologists must know how to proceed upon detection of an archaeological violation and competently prepare an archaeological damage assessment report. In so doing, a deliberate selection of the appropriately qualified archaeologist to conduct the assessment, draft the report, and prepare for trial, is paramount to the success of the case.

The damage assessment methodology can and should be utilized with any statute that prohibits damage to archaeological resources or other government or private property. The model that was established under ARPA and the Uniform Regulations has survived judicial scrutiny and has thereby proved itself useful and effective. That the model was not changed in application when it was amended is indicative of its effectiveness. Equally revealing is that the model, including the measures of harm (i.e. archaeological value, commercial value, and cost of restoration and repair) is now codified in the Paleontological Resources Protection Act as well as the California Public Resources Code.

Further, to better encourage consistency and reliability across the field of archeological damage assessments, there should be guidelines on peer review of archaeological damage assessment reports, suggesting mandatory time and budget allotments by private and federal cultural resource managers who conduct assessments of damage to archaeological resources.

Archaeological crimes seem to essentially self-perpetuate. Money allocated to heritage budgets is consumed by conducting archaeological damage assessment, thereby removing funding and resources generally used to preventatively assess and protect high risk resources that are more likely violated and damaged, while resources are compromised by the same type of crime (opinion derived from Huckerby 2006:110). Further, because the penalties paid as a result of an ARPA conviction do not go to the department that bore the expense of the archaeological damage, this is a double loss to heritage program funding. Some suggestions have been made to address this concern, such as initiating a “contingency fund” when budgeting so as to cover costs associated with a damaged archaeological resource without detracting from general heritage projects and broader resources. The agency would have to amend funding, guidelines, and regulations. One could also propose amending ARPA to route payment of penalties to the ARPA cost bearing agency (Huckerby 2006:112). Regardless of hopeful changes for the future laws, increasing awareness of these crimes as well as processes used to address them will lead to better and more effective utilization of ARPA and other statutes for archaeological crime detection, prosecution and prevention. Areas that greatly impact ARPA’s efficacy are permitting procedures, damage assessment and damage assessment reports. With proper recognition and awareness, the success in using ARPA to better deter misuse of the permitting system and unsuccessful litigations can improve, and archaeological resources on public lands could be better protected.

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